

2006

Wintergreen Group v. Utah DOT : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

WINTERGREEN GROUP, LC, a Utah
Limited Liability Company,

Plaintiff - Appellant,

v.

UTAH DEPARTMENT OF
TRANSPORTATION,

Defendant - Appellee.

:

:

:

Case No. 20060338-SC

:

:

:

BRIEF OF DEFENDANT - APPELLEE

Appeal from the Memorandum Opinion and Order of the
Third Judicial District Court, Tooele County, State of Utah
the Honorable Randall N. Skanchy, presiding

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FILED
UTAH APPELLATE COURTS
AUG 30 2006

IN THE UTAH SUPREME COURT

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Plaintiff - Appellant,	:	Case No. 20060338-SC
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LIST OF ALL PARTIES

To the best of Defendant's knowledge, all interested parties appear in the caption of this Brief.

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UTAH DEPARTMENT OF TRANSPORTATION,	:	
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BRIEF OF DEFENDANT - APPELLEE

STATEMENT OF JURISDICTION

This matter comes within the original jurisdiction of the Supreme Court of the State of Utah under Utah Code Ann. § 78-2-2(3)(j) (West 2004).

STATEMENT OF THE ISSUES

1. Wintergreen cannot bring a second action arising out of the same transactions that are currently before the trial court in a prior lawsuit. The trial court correctly dismissed this entire action as being in violation of Utah R. Civ. P. 13(a).

STANDARD OF REVIEW: “The grant of a motion to dismiss presents a matter of law, which this court reviews for correctness.” Cook v. City of Moroni, 2005 UT App 40, ¶5, 107 P.3d 713. See also Russell Packard Dev., Inc. v. Carson, 2005 UT 14, ¶3, 108 P.3d 741 (“When reviewing the propriety of a motion to dismiss, we accept the factual

allegations in the complaint as true and interpret those facts and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff as the nonmoving party.”).

ISSUE PRESERVED BELOW: This issue was raised in the Utah Department of Transportation’s motion to dismiss and the memorandum in support thereof. R. 32-33, 67-69, 102-03.

2. An Ex Parte Young action cannot be brought against the State of Utah or its agencies. Such a claim can only be filed against officers or employees of the state. The trial court correctly dismissed plaintiff’s three § 1983 claims based on the Utah Department of Transportation’s Eleventh Amendment immunity.

STANDARD OF REVIEW: Same as for Issue 1.

ISSUE PRESERVED BELOW: This issue was raised in the Utah Department of Transportation’s motion to dismiss and the memorandum in support thereof. R. 32-33, 67, 100-01.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

All such provisions are set forth verbatim in Appendix A to this brief.

STATEMENT OF THE CASE

During March and April of 2004, the Utah Department of Transportation (UDOT) filed three lawsuits seeking to condemn parts of several parcels of land owned by the plaintiff, Wintergreen Group (Wintergreen). R. 21-22. Orders of Immediate Occupancy in favor of UDOT were entered in all three condemnation actions on July 1, 2004. R. 21,

34-63. The condemnation actions have since been consolidated into a single action. R. 178-80.

On March 18, 2005, Wintergreen filed this action. R. 1-24. The only defendant is UDOT. R. 23-24. No state employees or officers were named as defendants. In its complaint, Wintergreen stated six causes of action. The first three causes of action were brought under 42 U.S.C. § 1983 for alleged violations of the takings provision of the Federal constitution. R. 17-20, a copy of the Complaint is attached hereto as Addendum B. The last three causes of action allege violations of the takings provision of the Utah constitution. R. 15-17. All of the claims raised by Wintergreen relate to the properties that are the subjects of the previously filed condemnation actions. UDOT filed a motion to dismiss on May 6, 2005. R. 31-71. The motion asked the trial court to dismiss this action as duplicative of the condemnation proceedings because “[t]he matter should be heard as a single action.” R. 69. The motion also asked that the § 1983 claims be dismissed because UDOT is not a person that can be sued under that statute. R. 67.

On March 6, 2006, the trial court entered its Memorandum Opinion and Order dismissing this action. R. 169-77, a copy of the Memorandum Opinion and Order are attached hereto as Addendum C. The trial court recognized that UDOT was asking that all claims concerning the property in question should be decided in a single action and that § 1983 did not apply to UDOT. R. 175 (“UDOT further claims Wintergreen’s inverse condemnation action should be heard as a single action and that 42 U.S.C. § 1983

does not apply to states or state officials action in their official capacities.”). The court rejected plaintiff’s claim that inverse condemnation claims were not based on the same transaction or occurrence as were the condemnation actions. R. 172-74. The trial court also found that § 1983 was not “applicable” to UDOT. R. 170.

Wintergreen filed its notice of appeal on March 31, 2006. R. 181-83.

STATEMENT OF RELEVANT FACTS

The only facts relevant to the legal issues raised by this appeal are those found in the Statement of the Case.

SUMMARY OF ARGUMENT

Wintergreen seeks to raise inverse condemnation claims in this action. All of its claims relate to the three ongoing condemnation proceedings (since consolidated) concerning certain tracts of land that it owns. These claims must be raised in the condemnation proceeding and not, as here, in a separate action. Utah law requires that all claims concerning the same transaction or occurrence be heard in a single action. Strong public policy supports this rule. To permit damages to be decided for the same conduct by two or more courts or juries would all too often lead to the entry of duplicative awards. It also would raise the danger of inconsistent verdicts and decisions.

The State of Utah and its agencies, such as UDOT, are not “persons” that can be sued under § 1983. Individual state officers can be sued for injunctive and prospective declaratory relief pursuant to Ex Parte Young, 209 U.S. 123 (1908). But the plaintiff has

sued only UDOT. Ex Parte Young does not apply to state agencies, but only to individual employees of the state. Even if UDOT could be sued under § 1983, such a claim would have to be raised either in the condemnation action or in a separate action filed after the completion of the condemnation proceedings.

ARGUMENT

I. WINTERGREEN’S CLAIMS SHOULD HAVE BEEN BROUGHT AS COMPULSORY COUNTERCLAIMS IN THE CONDEMNATION PROCEEDING

Rule 13(a) of the Utah Rules of Civil Procedure, concerning compulsory counterclaims, provides that:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .¹

All of the plaintiff’s claims arise out of the ongoing condemnation proceeding. They are all part of a single transaction or occurrence. The gist of Wintergreen’s action is its claim that its constitutional rights will be violated by the condemnation action. The trial court correctly dismissed this action as being in violation of this rule. “The purpose of rule 13(a) is to ensure that all relevant claims arising out of a given transaction are litigated in the same action.” Raile Family Trust v. Promax Dev. Co., 2001 UT 40, ¶12.

¹ The omitted portions of the rule contain two exceptions that are not relevant to this action.

24 P.3d 980 (contract, slander of title and tort claims should have been raised as compulsory counterclaims in mechanics' lien action). Where a claim should have been presented as a compulsory counterclaim and wasn't, it is forever barred. Todaro v. Gardner, 285 P.2d 839, 842 (Utah 1955).

Campbell also asks that we remand this case to enable him to establish his damages flowing from Kimball's alleged breach of the subject contract. We decline to do so for two reasons. First, Campbell's counterclaim was compulsory under Rule 13(a) of the Utah Rules of Civil Procedure because it arose out of the transaction that is the subject matter of plaintiff's claim. Therefore, his failure to file a counterclaim resulted in a waiver.

Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985) (breach of contract claim waived because it was not raised as a compulsory counterclaim to plaintiff's suit concerning a breach of the same contract).

The same result was reached in Yanaka v. Iomed, Inc., 2005 UT App 239, 116 P.3d 962. Iomed brought an action against a former employee, Yanaka. In that action Iomed alleged that Yanaka had violated two agreements he had entered into while employed with the company. Although he filed some counterclaims in Iomed's action, Yanaka filed his claims of discriminatory employment practices as a separate action. The court of appeals held that the discrimination claims should have been filed as counterclaims to Iomed's lawsuit because they dealt with the same transaction or occurrence: Yanaka's employment with Iomed and the agreements between the parties. Yanaka, 2005 UT App 239 at ¶¶6-8.

Wintergreen's claims arise out of the condemnation process. As such they arise out of the same transaction or occurrence as does the consolidated condemnation proceeding and should have been raised in that action. The trial court correctly dismissed these claims on this basis and its decision should be affirmed on appeal.

Notably, the trial court's decision in this matter does not totally preclude Wintergreen from seeking to raise its claims in the condemnation proceeding. Wintergreen can still seek to raise its claims as omitted counterclaims in the condemnation proceeding. See Utah R. Civ. P. 13(e) (leave of court may be sought to permit an amendment to add a counterclaim that was omitted).

II. WINTERGREEN'S FEDERAL CLAIMS CANNOT BE BROUGHT AGAINST UDOT UNDER § 1983

As a matter of federal law, the State of Utah and its agencies are entitled to absolute sovereign immunity. The Eleventh Amendment to the United States Constitution prohibits federal courts from exercising jurisdiction over suits by private parties against a state. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54-55 (1995). This Eleventh Amendment jurisdictional bar applies regardless of the nature of the relief sought. Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993); Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 100-01 (1984).

Despite the narrowness of its terms, since Hans we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a

State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the “plan of the convention.”

Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991).

Because of the State of Utah's sovereign immunity, no federal claim can be brought against the state unless its immunity has been waived. Sovereign immunity can be waived by Congress in certain circumstances, and by the states themselves.

Congress can waive the states' Eleventh Amendment immunity “by making its intention unmistakably clear in the language of the statute.” Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989). But the only time that Congress can waive Eleventh Amendment immunity is when it is acting pursuant to a valid exercise of power. Green v. Mansour, 474 U.S. 64, 68 (1985). The only congressional power that has been held, to date, to validly authorize Congress to waive the state's Eleventh Amendment immunity is Section 5 of the Fourteenth Amendment. Seminole Tribe of Fla., 517 U.S. at 59-63 (1996); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). If Congress does not have the authority to waive the immunity of the states in federal court, it is without the power to waive their immunity in state courts as well. Alden v. Maine, 527 U.S. 706, 712 (1999). Of most importance to the present action is the fact that 42 U.S.C. § 1983 does not contain a waiver of the immunity of the states. Quern v. Jordan, 440 U.S. 332, 342 (1979).

Nor can a state agency, such as UDOT, be sued under § 1983. In Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989), the Supreme Court expressly held that “neither a State nor its officials acting in their official capacities are ‘persons’ under

§ 1983." This Court, following Will, has also concluded that § 1983 claims cannot be brought against state agencies because they are not "persons" under the statute. Ambus v. Utah State Bd. of Educ., 858 P.2d 1372, 1376-77 (Utah 1993). The Utah Court of Appeals has followed this Court and the United States Supreme Court in holding that Utah and its agencies cannot be sued under § 1983:

Finally, Seare contends that the trial court erred in concluding that the University and its agents were not "persons" who could be sued under 42 U.S.C. § 1983 for civil rights violations. The United States Supreme Court in Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), held that states cannot be sued in their own courts for civil rights violations under section 1983. In Will, the Court held that the state of Michigan and its police department could not be sued in a Michigan state court for civil rights violations. The Court stated that "[i]t is an 'established principle of jurisprudence' that the sovereign cannot be sued in its own courts without its consent. We cannot conclude that § 1983 was intended to disregard the well established immunity of a State from being sued without its consent." Further, the Court held that state officials acting in their official capacity are not "persons" who may be sued under section 1983.

In the instant case, Seare is suing the University of Utah School of Medicine and a number of its employees. Under Utah law, the University and its School of Medicine are state institutions. Additionally, the state has expressly declared that it maintains its immunity from civil rights claims. Thus, the trial court was correct in ruling that the University of Utah School of Medicine cannot be sued under 42 U.S.C. § 1983 and that its employees acting in their official capacity, as is the case here, are not "persons" who can be sued under section 1983.

Seare v. Univ. of Utah, 882 P.2d 673, 679 (Utah App. 1994) (footnote and citations omitted). See also Windward Partners v. Anyoshi, 693 F.2d 928, 928-30 (9th Cir. 1982) (a takings claim could not be brought under § 1983 against the state of Hawaii because of

the Eleventh Amendment and plaintiff's suit against state officers for damages was really a prohibited suit against the state).

Because Congress has not waived the immunity of Utah for a § 1983 claim, no such cause of action can exist unless Utah has waived its own immunity. While the states can waive their Eleventh Amendment immunity, such waivers will not be inferred easily. The United States Supreme Court has said: "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" Florida Dep't of Health v. Florida, 450 U.S. 147, 150 (1981) (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)). A state does not waive its Eleventh Amendment immunity by enacting a statute authorizing suits against the state in its own courts. *Id.* Utah, far from waiving its sovereign immunity, has expressly stated in the Governmental Immunity Act that its immunity is retained for injuries arising out of, connected with, or resulting from a violation of civil rights. Utah Code Ann. § 63-30d-301(5)(b) (West Supp. 2006).

The cases relied upon by Wintergreen in claiming it can sue the state and its agencies do not involve § 1983 claims against the states. Most of them deal with suits against state officials and not the state.² Others are appeals from state supreme courts on

² Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005) (suit against governor and attorney general); Brown v. Legal Foundation of Wash., 538 U.S. 216 (2003) (suit against non-profit organization and officials); Keystone Bituminous Coal Ass'n v. De Benedictis, 480 U.S. 470 (1987) (suit against state officials); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (suit against county and officials).

claims other than those asserted under § 1983.³ The remaining two decisions deal with actions against the United States⁴ and against the City of Chicago.⁵

Nor does Ex Parte Young, 209 U.S. 123 (1908), help the plaintiff. Wintergreen erroneously claims it can sue UDOT under Ex Parte Young. Appellant's Opening Brief at 16-17. But Ex Parte Young involved a suit against a state official for prospective relief only. This exception permits suits against individual state officers in certain circumstances, but not against the states or their agencies. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269 (1997) ("The Tribe's suit, accordingly, is barred by Idaho's Eleventh Amendment immunity unless it falls within the exception this Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities.") (citation omitted). As this Court noted in Ambus, officials can be sued for injunctive relief because such claims are not treated as being against the state. Ambus, 858 P.2d at 1376. In Coeur d'Alene, the court found Idaho to be immune from suit. It then considered whether an Ex Parte Young action could be brought against individual state officers. Coeur d'Alene, 521 U.S. at 269-88.

The same result was reached in Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635 (2002). Petitioners had brought their action against a state

³ Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

⁴ Jacobs v. United States, 290 U.S. 13 (1933).

⁵ Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

commission and its members. The Court decided it did not need to determine if the commission had waived its Eleventh Amendment immunity, because an Ex Parte Young action had been properly brought against the members of the commission and only prospective relief was sought. Verizon, 535 U.S. at 645. (“Whether the Commission waived its immunity is another question we need not decide, because - as the same parties also argue - even absent waiver, Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of Ex parte Young.”).

In a final effort to support its federal claims, Wintergreen claims that it can litigate its federal takings claims in this separate action. Opening Brief of Appellant at 41. To support this claim, plaintiff relies on San Remo Hotel v. City and County of San Francisco, 545 U.S. 323, 125 S.Ct. 2491 (2005). Rather than create a right to file a separate action to litigate a federal takings claim, San Remo only continued the prior understanding that a federal claim could be raised in the same action brought by the state to condemn the private property.

The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so." does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

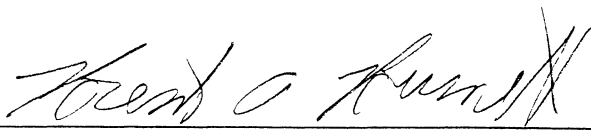
San Remo, 125 S.Ct. At 2506 (citation omitted). The procedure provided by Utah is the condemnation proceeding. The trial court can hear plaintiff's federal takings claims simultaneously to determining the condemnation claims. It continues to be federal law

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Defendant - Appellee, postage prepaid, to each of the following on this the 30th day of August, 2006:

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that a Fifth Amendment takings claim is not ripe until after “just compensation” has been denied in the state proceeding. Williamson County v. Hamilton Bank, 473 U.S. 172, 186, 193 (1985).

CONCLUSION

For the above stated reasons, UDOT asks this Court to affirm the trial court's decision dismissing this action and leaving the plaintiff free to raise any constitutional claims it might have in the consolidated condemnation action.

Respectfully submitted this 30th day of August, 2006.

A handwritten signature in cursive script, reading "Brent A. Burnett", written over a horizontal line.

BRENT A. BURNETT
Assistant Attorney General
Attorney for Defendant - Appellee

ADDENDUM “A”

Article I, Section 22. [Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation.

Rule 13. COUNTERCLAIM AND CROSS-CLAIM.

(a) Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) Permissive counterclaim. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject-matter of the opposing party's claim.

(c) Counterclaim exceeding opposing claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim maturing or acquired after pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(e) Omitted counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(f) Cross-claim against co-party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject-matter either of the original action or of a counterclaim therein or relating to any property that is the subject-matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(g) Additional parties may be brought in. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

(h) Separate judgments. Judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b), even if the claims of the opposing

party have been dismissed or otherwise disposed of.

(i) Cross demands not affected by assignment or death. When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other, except as provided in Subdivision (j) of this rule.

(j) Claims against assignee. Except as otherwise provided by law as to negotiable instruments and assignments of accounts receivable, any claim, counterclaim, or cross-claim which could have been asserted against an assignor at the time of or before notice of such assignment, may be asserted against his assignee, to the extent that such claim, counterclaim, or cross-claim does not exceed recovery upon the claim of the assignee.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ADDENDUM “B”

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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR TOOELE COUNTY, STATE OF UTAH

WINTERGREEN GROUP, LC, a Utah
Limited Liability Company.

Plaintiff,

v.

UTAH DEPARTMENT OF
TRANSPORTATION,

Defendant.

COMPLAINT

Jury Trial Demanded

Case No. 050300341

Judge: Randall N. Shanley

Plaintiff by and through its undersigned counsel of record hereby alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to Utah Code Ann. § 78-3-4(1) because this is a civil

matter not excepted in the Utah Constitution and not prohibited by law.

2. This Court is the proper venue for this action pursuant to Utah Code Ann. § 78-13-1, because this action involves real property in Tooele County, and pursuant to § 78-13-7 because it arises in Tooele County.

PARTIES

3. Plaintiff Wintergreen Group, LC is a Utah limited liability company doing business in Salt Lake County, State of Utah.

4. Defendant State of Utah Department of Transportation (“UDOT”) is the Utah state entity with general responsibility for state transportation systems pursuant to Utah Code Ann. § 72-1-201(1).

BACKGROUND ALLEGATIONS

5. At all times relevant herein, Plaintiff owned several parcels of land in Tooele located on the west and east sides of State Road 36 (SR-36), between 2000 North and 2400 North Streets (hereinafter "Plaintiff's lands"). Such lands consisted of a total of approximately 121.116 acres. (Plaintiff's lands are depicted on a portion of the Tooele Master Transportation Plan Map attached hereto as Exhibit A and incorporated herein by reference.)

6. At all times relevant herein, UDOT has been engaged in a project to widen SR-36 and to conduct ancillary construction and improvements encompassing an area that includes the vicinity of Plaintiff's lands (hereinafter "UDOT SR-36 Project").

7. Prior to the UDOT SR-36 Project, Plaintiff intended to use all its lands, both on the west

and east sides of SR-36, for construction of the North Town Shopping Center as an integrated economic unit.

8. On March 30, 2004, UDOT served Plaintiff with summons and a complaint for condemnation in Case Number 040300459 (hereinafter "the 459 condemnation lawsuit"), in which UDOT sought to condemn fee title to a strip of land of .275 acres belonging to Plaintiff located on the east side SR-36, along 2400 North Street. (A map showing the parcel is attached hereto as Exhibit B and incorporated herein by reference.)

9. On April 15, 2004, UDOT served Plaintiff with summons and a complaint for condemnation in Case Number 040300524 (hereinafter "the 524 condemnation lawsuit"), in which UDOT sought to condemn several parts of a 16.666-acre parcel of land owned by Plaintiff located on the east side of SR-36, bordered by 2000 North on the south, 400 East on the east, and 2200 North on the north (hereinafter "the East Side land"). The 524 condemnation lawsuit sought to condemn fee title to two parcels of the land, together comprising 2.183 acres, one perpetual easement of .111 acres, and three temporary easements amounting to .022 acres. (A map showing the location of Plaintiff's East Side land subject to the 524 condemnation lawsuit is attached hereto as Exhibit C and incorporated herein by reference.)

10. Also on April 15, 2004, UDOT served Plaintiff with summons and a complaint for condemnation in Case Number 040300525 (hereinafter "the 525 condemnation lawsuit"), in which UDOT sought to condemn fee title to a strip of land of 2.147 acres belonging to Plaintiff located on the west side SR-36, along the boundaries of four adjacent parcels of land owned by Plaintiff which

collectively amounted to 104.175 acres (hereinafter "the West Side land"). (A map showing the location of Plaintiff's West Side land subject to the 525 condemnation lawsuit is attached hereto as Exhibit D and incorporated herein by reference.)

11. On July 1, 2004, the trial court entered an Order of Immediate Occupancy in each of the 459, 524 and 525 condemnation lawsuits.

12. As a proximate result of the UDOT SR-36 Project, all of Plaintiff's lands have been reduced to one 14.483-acre parcel on the east side of SR-36--subject to one perpetual easement and three temporary easements--and four adjacent parcels along the west side of SR-36 consisting of 102.028 acres (hereinafter collectively "Plaintiff's remaining lands").

13. As a proximate result of the UDOT SR-36 Project, Plaintiff's lands have been reduced in total size to 116.511 acres, and such remaining lands also are subject to the perpetual easement and three temporary easements resulting from the 524 condemnation lawsuit.

14. As a proximate result of the UDOT SR-36 Project, UDOT permanently blocked off traffic between SR-36 and 2000 North Street, which borders the southern boundary of Plaintiff's remaining East Side land located on the east side of SR-36.

15. As proximate result of the UDOT SR-36 Project, UDOT condemned 2200 North in the 524 condemnation lawsuit, but rendered 2200 North only a right-in, right-out street in relation to SR-36.

16. As a proximate result of UDOT's blocking of 2000 North, in conjunction with UDOT's rendering of 2200 North as a right-in, right-out street in relation to SR-36, Plaintiff's access to

southbound SR-36 from its remaining East Side land is unreasonably restricted to traveling east on 2000 North or 2200 North to 400 East, then north to 2400 North, and then finally south on SR-36.

17. Although UDOT condemned and opened 2200 North as part of the UDOT SR-36 Project, UDOT did not open 2200 North going westward from SR-36 toward the Overlake Subdivision located immediately west of Plaintiff's remaining West Side land, as anticipated by the Tooele Master Transportation Plan.

18. As a proximate result of UDOT's condemnation of part of Plaintiff's lands; UDOT's failure to open 2200 North westbound from SR-36; UDOT's rendering of 2200 North as a right-in, right-out street in relation to SR-36; and UDOT's blocking of 2000 North from traffic in relation to SR-36, all of Plaintiff's remaining lands have been isolated from each other, Plaintiff has been prevented from developing its lands into the North Town Shopping Center as an integrated economic unit, and Plaintiff's remaining lands have been substantially diminished in value.

**FIRST CLAIM FOR RELIEF:
Inverse Condemnation Through Partial Taking
- U.S. Const., Amend 5, 42 U.S.C. § 1983**

19. Plaintiff hereby incorporates by reference the provisions of this complaint set forth above.

20. Defendant UDOT through the UDOT SR-36 Project imposed substantial economic harm on Plaintiff's remaining lands, Plaintiff has demanded compensation for such harm, and UDOT refuses to pay such compensation.

21. Such conduct by UDOT was undertaken under color of state law and was implementing

official custom and policy.

22. Such conduct by UDOT constitutes a partial taking of Plaintiff's property.

23. Such conduct by UDOT was undertaken for the public use of widening SR-36 for the benefit of the public.

24. Such conduct by UDOT violates Plaintiff's clearly established constitutional right to be free from a partial taking of its property without just compensation under the Fifth Amendment of the United States Constitution and 42 U.S.C. Section 1983.

**SECOND CLAIM FOR RELIEF:
Inverse Condemnation Through Categorical Total Taking
- U.S. Const., Amend 5, 42 U.S.C. § 1983**

25. Plaintiff hereby incorporates by reference the provisions of this complaint set forth above.

26. Defendant UDOT through the UDOT SR-36 Project imposed substantial economic harm on Plaintiff's remaining lands, Plaintiff has demanded compensation for such harm, and UDOT refuses to pay such compensation.

27. Such conduct by UDOT was undertaken under color of state law and was implementing official custom and policy.

28. Such conduct by UDOT constitutes a categorical total taking of the reduction in value of Plaintiff's remaining lands resulting from UDOT's conduct.

29. Such conduct by UDOT was undertaken for the public use of widening SR-36 for the benefit of the public.

30 Such conduct by UDOT violates Plaintiff's clearly established constitutional right to be free from a categorical total taking of its property without just compensation under the Fifth Amendment of the United States Constitution and 42 U S C Section 1983.

**THIRD CLAIM FOR RELIEF:
Inverse Condemnation Through Not Substantially
Advancing a Legitimate Governmental Objective
- U.S. Const., Amend 5, 42 U.S.C. § 1983**

31 Plaintiff hereby incorporates by reference the provisions of this complaint set forth above

32 Defendant UDOT through the UDOT SR-36 Project imposed substantial economic harm on Plaintiff's remaining lands, Plaintiff has demanded compensation for such harm, and UDOT refuses to pay such compensation

33 Such conduct by UDOT was undertaken under color of state law and was implementing official custom and policy

34 Such conduct by UDOT was undertaken in pursuit of the legitimate governmental objective of widening SR-36 for the benefit of the public

35 Such conduct by UDOT did not substantially advance such legitimate governmental objective because UDOT engaged in excessive condemnation, failed to open 2200 North westbound from SR-36, rendered 2200 North as a right-in, right-out street in relation to SR-36, and blocked 2000 North from traffic in relation to SR-36

36 As a proximate result of UDOT's conduct all of Plaintiff's remaining lands have been

isolated from each other, Plaintiff has been prevented from developing its lands into the North Town Shopping Center as an integrated economic unit, and Plaintiff's remaining lands have been substantially diminished in value.

37. Such conduct by UDOT violates Plaintiff's clearly established constitutional right to be free from a taking of its property without just compensation under the Fifth Amendment of the United States Constitution and 42 U.S.C. Section 1983.

FOURTH CLAIM FOR RELIEF:
Inverse Condemnation Taking of Property - Destruction or Material Lessening of Value
Utah Constitution Art. I, § 22

38. Plaintiff hereby incorporates by reference the provisions of this complaint set forth above.

39. UDOT's conduct substantially interfered with and destroyed or materially lessened the value of Plaintiff's remaining lands.

40. Such conduct by UDOT violates Plaintiff's constitutional right to be free from a taking of its property without just compensation under Utah Constitution Article I. Section 22.

41. Such conduct by UDOT constitutes a taking without just compensation of Plaintiff's property for the benefit of the public.

FIFTH CLAIM FOR RELIEF:
Inverse Condemnation Taking of Property - Use and Enjoyment Abridged or Destroyed
Utah Constitution Art. I, § 22

42. Plaintiff hereby incorporates by reference the provisions of this complaint set forth above.

43. UDOT's conduct in substantial degree abridged or destroyed Plaintiff's right to use and enjoyment of Plaintiff's remaining lands.

44. Such conduct by UDOT violates Plaintiff's constitutional right to **be free from a taking** of its property without just compensation under Utah Constitution Article I, Section 22.

45. Such conduct by UDOT constitutes a taking without just compensation of Plaintiff's property for the benefit of the public.

SIXTH CLAIM FOR RELIEF:

Inverse Condemnation Through Damaging of Property - Utah Constitution Art. I, § 22

46. Plaintiff hereby incorporates by reference the provisions of this complaint set forth above.

47. UDOT through the physical conduct of failure to open 2200 North westbound from SR-36, rendering of 2200 North as a right-in, right-out street in relation to SR-36, and blocking of 2000 North from traffic in relation to SR-36, destroyed Plaintiff's right to develop its remaining lands into the North Town Shopping Center as an integrated economic unit, which gave Plaintiff's remaining lands additional value.

48. UDOT's conduct caused Plaintiff special damage in excess of that sustained by the public generally because Plaintiff's remaining East Side land was rendered isolated from Plaintiff's remaining West Side land, as well as from the areas surrounding Plaintiff's remaining East Side land, because Plaintiff no longer has access to or from SR-36 on 2000 North, and has no access to southbound SR-36 from 2200 North, but instead must travel a circuitous route eastward on 2000

North or 2200 North, then north on 400 East, then finally south on SR-36.

49. Such damage sustained by Plaintiff is a definite physical injury cognizable to the senses because Plaintiff's remaining lands are isolated from each other as well as from SR-36 to a substantial degree.

50. Such damage sustained by Plaintiff has a perceptible effect on the present market value of Plaintiff's remaining lands because all of such lands have been isolated from each other, Plaintiff has been prevented from developing its lands into the North Town Shopping Center as an integrated economic unit, and Plaintiff's remaining lands have been substantially diminished in value.

51. Such conduct by UDOT violates Plaintiff's constitutional right to be free from a damaging of its property without just compensation under Utah Constitution Article I, Section 22.

52. Such conduct by UDOT constitutes a damaging without just compensation of Plaintiff's property for the public use of widening SR-36 for the benefit of the public.

53. Plaintiff demands jury trial upon all issues so triable, and hereby tenders the jury fee to the Clerk of the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

a) For Plaintiff's inverse condemnation damages, in a sum of not less than four million Dollars (\$4,000,000.00), or such greater or lesser sum as determined at trial;

b) For interest on Plaintiff's inverse condemnation damages from July 1, 2004, the date of the Orders of Immediate Occupancy in the three condemnation lawsuits;

c) For plaintiff's attorney's fees and costs, in the sum of one hundred fifty thousand dollars (\$150,000.00), plus interest to date of payment, or such other greater or lesser sum as the Court may find reasonable and proper;

d) For an injunction:

i) mandating Defendant UDOT to open 2200 North westbound from SR-36; to render 2200 North as a four-way intersection at SR-36, with appropriate traffic signal devices; to remove the obstruction of 2000 North from traffic to and from SR-36 northbound and southbound;

ii) prohibiting Defendant UDOT from construction on the UDOT Project that will prevent implementation of this court's mandatory injunction;

iii) requiring that Plaintiff provide appropriate security pursuant to Rule 65A(c)(1) as determined by the court for purposes of such injunctive relief; and

c) For such other and further relief as the Court deems just and proper.

DATED this 18th day of March, 2005.


NICK J. COLESSIDES
Attorney for Plaintiff

Plaintiff in this action:
Wintergreen Group LC
c/o Butch Johnson
P.O. Box 161
Lehi, UT 84043-0161

ADDENDUM “C”

FILED DISTRICT COURT
Third Judicial District

MAR - 6 2006

TOOELE COUNTY

By _____ *X*
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH

WINTERGREEN GROUP, LC, a
Utah Limited Liability
Company,

Plaintiff,

vs.

UTAH DEPARTMENT OF
TRANSPORTATION,

Defendant.

MEMORANDUM OPINION
AND ORDER

Case No. 050300341

Judge RANDALL N. SKANCHY

The above matter came before the Court for oral argument on Defendant Utah Department of Transportation's (UDOT) Motion to Dismiss. Plaintiff Wintergreen Group LC ("Wintergreen") was represented by Nick J. Colessides and John Martinez, and the Utah Department of Transportation ("UDOT") was represented by Randy S. Hunter.

BACKGROUND

Wintergreen filed this action alleging six total causes of action. The causes of action essentially claim inverse condemnation under the 5th Amendment of the Constitution of the United States of America and 42 U.S.C. § 1983 as well as Article I § 22 of the Utah Constitution.

Wintergreen owns several parcels of land totaling 121.116 acres in Tooele located on the west and east sides of State Road 36 (SR-36) between 2000 North and 2400 North Streets (hereinafter "Wintergreen's

lands"). UDOT is engaged in a project to widen SR-36 and other improvements in the area of Wintergreen's lands. As part of the SR-36 project UDOT initiated condemnation proceedings on three different pieces of Wintergreen's lands in March and April of 2004. Each piece is the subject of its own condemnation lawsuit filed in this Court. On July 1, 2004 this Court entered an Order of Immediate Occupancy in each of the three condemnation lawsuits.

As a result of the UDOT SR-36 project, Wintergreen alleges its properties have been reduced by a total size of 4.605 acres and that such taking has artificially severed the parcels from each other thereby interfering with Wintergreen's development of the property as a whole unit. In addition, Wintergreen alleges UDOT's control of traffic around Wintergreen's lands has further isolated Wintergreen's three parcels from each other, thereby preventing Wintergreen from developing its lands into an integrated project it refers to as the North Town Shopping Center. Hence, Wintergreen claims its remaining lands have been substantially diminished in value and that the only way to address such an impact is by inverse condemnation.

In its Motion to Dismiss, UDOT claims an inverse condemnation action is inappropriate in this case because inverse condemnation is used when a public entity takes private property without formal exercise of eminent domain power, which does not exist here. UDOT had initiated condemnation

proceedings, as previously noted. UDOT further claims Wintergreen's inverse condemnation action should be heard as a single action and that 42 U.S.C. § 1983 does not apply to states or state officials acting in their official capacities. Finally, UDOT claims the inverse condemnation claims are not ripe for adjudication because Wintergreen has failed to exhaust its remedies through the condemnation action.

Wintergreen's opposition to UDOT's Motion argues that the only vehicle to address the resulting harm to Wintergreen's entire property is through inverse condemnation proceedings. Wintergreen further claims UDOT has not properly identified the relevant property at issue in its separate suits, thus making this action necessary. Wintergreen further claims its action is different from UDOT's because UDOT's action is statutory where as Wintergreen's claim is constitutional. Wintergreen also claims the basis for its claims is not § 1983. Instead, § 1983 only provides the remedies for Wintergreen's federal claims, but the 5th Amendment and the doctrine of *Ex Parte Young* are the source of Wintergreen's substantive rights. Finally, Wintergreen claims its cause of action is ripe. Specifically, it alleges the state claims are ripe for adjudication because only available *administrative* remedies need be exhausted.

DISCUSSION

A Rule 12(b)(6) motion to dismiss accepts as true the facts alleged

in the complaint but challenge the party's right to relief based on those facts. *Oakwood Vill. L.L.C. v. Alberstons, Inc.*, 2004 UT 101 ¶8 (2004). The purpose of a motion to dismiss "is to challenge the formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case." *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218, 1220 (Utah 1996). "A dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990).

Wintergreen's first three claims are based on the 5th Amendment of the Constitution of the United States of America and 42 U.S.C. § 1983. The 5th Amendment applies to the states through the 14th Amendment. Wintergreen's fourth, fifth, and sixth claims are based on the Utah Constitution Art. 1, §22. Wintergreen argues this inverse condemnation action brought under the state and federal constitutions is different from the condemnation actions because it encompasses all of Wintergreen's lands and because it is grounded on principles of constitutional right instead of legislative grace. Wintergreen claims that filing a condemnation action under the state statutory scheme does not preclude the filing of a constitutional inverse condemnation action, citing *Colman v. Utah State Land Bd.*, 705 P.2d 622, 634 (Utah 1990) (*Colman*), and

Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) (*Dolan*), to support this proposition. However, Wintergreen's reliance on *Colman* and *Dolan* is misguided.

In *Colman*, the government, through an act of Congress, created a breach in a causeway across the Great Salt Lake to prevent serious flooding. Plaintiff owned a canal that was destroyed because of the breach. The government did not file a condemnation action. Plaintiff filed an inverse condemnation action under the Utah State Constitution seeking just compensation for the damage to his property. The Court held an inverse condemnation action under Article I §22 is not subject to the limitations found in the Governmental Immunity Act. The court did not find that had the government filed a condemnation suit a constitutional violation would still exist allowing the plaintiff to file an inverse condemnation action claiming a constitutional violation. *Dolan* fails for the same reason.

Wintergreen has not cited a single case where an inverse condemnation action was filed after the government agency filed a condemnation action seeking to take the property in exchange for just compensation. Instead, in every case cited by Wintergreen the government enacted some regulation diminishing the value of the private property without ever filing a condemnation action. In these cases, Wintergreen filed an inverse condemnation action to enforce their rights in the face

of already pending condemnation actions.

The Court finds an inverse condemnation action is inappropriate in this case. The Utah Code provides the statutory framework for parties to seek redress for the exercise of eminent domain. Utah Code § 78-34-10 provides broad remedies of recovery for damages, including severance damages to remaining parcels of land affected by the exercise of eminent domain. The proper procedural action to force the government to pay just compensation for damages to the entire property and not just the three individual parcels is to consolidate the three condemnation actions, which the Court orders on its own motion. The Court grants the motion to dismiss all claims based on the arguments of state or federal constitution remedies, as such remedies are provided by statute.

Wintergreen further claims the inverse action is separate from the condemnation suits because it allows for different calculation of damages, namely attorneys' fees, under §1983. The Utah courts have not directly addressed this issue, however, the Court of Appeals of Georgia was faced with a similar claim made under § 1983 in a takings case. The property owners claimed the taking of their property constituted a taking under color of right by the state and deprived them of their rights, privileges and immunities under the Constitution violating 42 U.S.C. § 1983. The Court found a taking which is no more than an ordinary legal action by the Department of Transportation to take property in accordance

with the statutes of the state is not enough to convert the action into a civil rights violation, so as to allow for attorneys' fees, particularly when the property owners have not objected to the propriety of the taking but just to the amount of compensation. *Jackson v. Department of Transp.*, 159 Ga. App. 130, 283 S.E.2d 59 (Ga.App., 1981); See also 3-8 Nichols on Eminent Domain @ 8.01. Furthermore, the *Jackson* Court also noted the long established law that states that attorneys' fees are not a part of condemnation actions. In Utah, attorneys' fees are likewise not provided for in the statute for damages, U.C.A. § 78-34-10.


Wintergreen claims § 1983 provides the remedies for its federal claims and is not the basis of its federal claims. Instead, Wintergreen's federal claims are based on the 5th Amendment and come under the doctrine of *Ex Parte Young*. However, the Court is persuaded by the Georgia Court of Appeals' reasoning in *Jackson*. The Court finds this is an ordinary exercise of the power of eminent domain by UDOT and a claim for attorneys' fees is inappropriate because the law does not provide for such relief in this instance.

Wintergreen claims it is entitled to an injunction stopping UDOT from controlling traffic in such a manner as to limit access to its property. In *Colman v. Utah State Land Bd.*, 795 P.2d at 622 (quoting *Salt Lake City v. Young*, 45 Utah 349, 362, 145 P. 1047, 1051 (1915)), the

Supreme Court of Utah held that "a landowner cannot complain because he is inconvenienced in the use of his property, where such inconvenience arises out of the proper enforcement of the police power to protect the public health, and where such enforcement does not amount to a taking or destruction of his property." The Court finds that Wintergreen has not alleged sufficient facts to show that control of the flow of traffic rises to the level of a taking of property. It may be an inconvenience to drive a few extra blocks around the property when entering it, but it is not a taking. UDOT has the very important task of protecting the public by controlling traffic especially in construction zones. Furthermore, Wintergreen's injunction is reliant on § 1983, which the Court has found is not applicable in this case, and should be dismissed on this basis as well.

The Court GRANTS UDOT's Rule 12(b)(6) motion to dismiss and orders the three condemnation suits, 040300459, 040300524, 040300525, against Wintergreen be consolidated. Mr. Hunter to prepare the Order.

Ordered this day 3rd of March, 2006.



RANDALL N. SKANCHY
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Opinion, to the following, this 3rd day of March, 2006:

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