

1976

# William G. Bruhn v. Associated Students of The University of Utah, Et Al. : Plaintiff-Appellant's Brief

Utah Supreme Court

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MERLIN R. LYBBERT & Henry S. Nygaard; Attorneys for Defendants-Appellee

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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WILLIAM G. BRUHN,

Plaintiff-Appellant,

vs.

ASSOCIATED STUDENTS OF  
THE UNIVERSITY OF UTAH,

Defendants-Appellee.

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PLAINTIFF-APPELLANT

+ + + + +

Appeal from the Dismissal  
in the District Court  
Honorable J. Edgar

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WILLIAM G. BRUHN,	)	
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THE UNIVERSITY OF UTAH,	)	
et al.,	)	
	)	
Defendants-Appellee.	)	

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PLAINTIFF-APPELLANT'S BRIEF

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DISPOSITION IN THE LOWER COURT

On March 30, 1976, the District Court granted the defendants' Motion to Dismiss (R 10-11), as to the defendant, Associated Students of the University of Utah (an unincorporated association), d/b/a The Daily Utah Chronicle.

STATEMENT OF THE CASE

The plaintiff in this action was named in an article which he claims to be defamatory, published by the Daily Utah Chronicle. The Daily Utah Chronicle is a newspaper having

primary circulation on the University of Utah Campus, but also circulation throughout the State of Utah. The plaintiff demanded a retraction from the Daily Utah Chronicle and when the same was not forthcoming initiated a complaint for libel and defamation.

The plaintiff named in his complaint as defendants Andrew Welch, who the plaintiff claimed was the writer of the article and "The Associated Students of the University of Utah (an unincorporated association), d/b/a the Daily Utah Chronicle." The plaintiff claimed the Associated Students of the University of Utah was the publisher of the Chronicle or, at least, legally responsible for the publication.

Shortly after service of the summons and complaint, a motion to dismiss (R 10-11), was filed. The motion to dismiss (R. 10-11), was made by "The University of Utah, characterized by plaintiff as the Associated Students of the University of Utah (an unincorporated association), d/b/a The Daily Utah Chronicle."

The Motion (R. 10-11) was supported by affidavits of Rex Nutting (R. 14-16), who was the editor of the Daily Utah Chronicle and avers the funding of the Daily Utah Chronicle and, also avers the general supervisory function of the "Publications Council" of the University of Utah, indicating that the "Publications Council" is the publisher of the Daily Utah Chronicle, rather than the Associated Students of the University of Utah.

The plaintiff's attorney filed an affidavit (R. 22-23) in response to the effect that (1) he desired more time for discovery to determine the veracity of the averments of Rex Nutting. Further, that Rex Nutting's affidavit (R. 14-16) speaks of the present date, not of the date that the article was written and that as of the date the article was written, "The Associated Students of the University of Utah" may have been publishers. To his affidavit, (R. 22-23), the attorney for plaintiff attached a copy of a letter published by the Daily Utah Chronicle from the president of the University of Utah, David P. Gardner (R. 24), which contained a special report to the Institutional Council from the president of the University of Utah. That report indicated that the identity of the publisher of the Daily Utah Chronicle was unclear to the president of the University of Utah.

Based upon that state of the record, the lower court dismissed the plaintiff's complaint as to The Associated Students of the University of Utah (R. 26-27).

#### ARGUMENT

THE MOVANT HAD NO STANDING TO ATTACK THE COMPLAINT AND SHOULD NOT BE ABLE TO CLOTHE THE ACTUAL DEFENDANT WITH MOVANT'S SOVEREIGN IMMUNITY; A MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED ON THE GROUNDS OF THE LACK OF CAPACITY OR LEGAL EXISTENCE OF THE DEFENDANT IN THAT SUCH ISSUE SHOULD BE DETERMINED AT TRIAL; AND, FURTHER, AT LEAST, PLAINTIFF SHOULD HAVE HAD AN OPPORTUNITY FOR MORE TIME TO DISCOVER THE CAPACITY OR LEGAL EXISTENCE OF THE NAMED DEFENDANT AND THE IDENTITY OF THE PUBLISHER OF THE DAILY UTAH CHRONICLE.

The movant in this case was the University of Utah. The University of Utah was not named as a defendant, but

rather the Associated Students of the University of Utah was so named. The plaintiff does not quarrel with the movant's position that the University of Utah has governmental immunity with respect to libel actions. This is one reason why the University of Utah was not named as a defendant in the instant case. The named defendant is the "Associated Students of the University of Utah (an unincorporated association) . . . ." It is the plaintiff's position that an unincorporated association may be sued. See Rule 17(d) Utah Rules of Civil Procedure. Rule 9(a)(1) of the Utah Rules of Civil Procedure provides:

"It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party."

It is plaintiff's position that there is sufficient facts in the record to show that the "Associated Students of the University of Utah" is a separate entity from the University of Utah. For example, the affidavit of Rex Nutting (R. 14-16) supporting defendant's motion to dismiss (R. 10-11), states that funding for the Daily Utah Chronicle is received not only from the University of Utah, but also from "The Associated Students of the University of Utah". The letter and report published in the Chronicle from the president of the University of Utah (R. 24) notes of different arrangements between the University of Utah Publications Council, and the Associated Students of the University of Utah, as if the two were separate entities.

At least if the separate existence of the Associated Students of the University of Utah is not proved by the state of the record, the plaintiff should have had time for discovery as requested in his affidavit (R. 22-23). See Wright and Miller, Federal Practice and Procedure, §2728, pages 557-558; §2739, pages 719-720; and §2740; Schoenbaum v. First Book, 405 F. 2d 215 (2nd Cir. 1968); Philco Corp. v. Radio Corporation of America, 34 F.R.D. 453 (Penn. D.C. 1964). The plaintiff is well aware that there exists an entity known as the Associated Students of the University of Utah and that it advertises for concerts and other events on radio and as indicated by the affidavit of Rex Nutting (R. 14-16), it maintains a bank account and it is believed to maintain also a charter, constitution, by-laws and officers. This entity is separate and apart from the University of Utah which admittedly has sovereign immunity. It is plaintiff's belief that such entity, Associated Students of the University of Utah was the publisher of the Daily Utah Chronicle.

It is difficult to determine the exact identity of the publisher of the Utah Daily Chronicle. For example, the attachment to the affidavit of plaintiff's attorney, the letter and report from the president of the University of Utah (R. 24) states:

"(2) The existing administrative arrangements for student publications as reflected in policies and procedures of the Publications Council and ASUU (Associated Students of the University of Utah) are ambiguous, uncertain and incomplete in significant particulars:

(a) The identity of the publisher of the Daily Utah Chronicle and other student funded publications is not clear.



If the president of the University of Utah feels that the identity of the publisher is unclear, ambiguous, and uncertain, it is plaintiff's position that the lower court should not have been so positive and that at least plaintiff should have more time for discovery. Ibid.

The Court should not have ordered the dismissal of the Associated Students of the University of Utah (R. 26-27), based upon a motion of the University of Utah. Rule 9(a)(1) Utah Rules of Civil Procedure states the proper procedure where the capacity of a party is non-existent. That rule provides:

"When a party desires to raise an issue as to the legal existence of any party, or the capacity of any party to sue or be sued, or the authority of a party to sue or be sued, in a representative capacity, he shall do so by negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge, and on such issue the party relying on such capacity, authority or legal existence, shall establish the same on the trial."

Again, the granting of a motion to dismiss (R. 10-11) without the opportunity for discovery is not the same as the "trial" which is referred to in Rule 9(a)(1).

#### CONCLUSION

Therefore, it is plaintiff's position that:

The University of Utah should not be able to place its sovereign immunity over the "Associated Students of the University of Utah" and thereby making that unincorporated association immune from libel suits; and

Even assuming the University of Utah were a proper party to raise the issue of the legal existence of the Associated Students of the University of Utah, and assert its own sovereign immunity, such should have been done at trial as provided in Rule 9(a)(1) of the Utah Rules of Civil Procedure and not on a motion to dismiss (R. 10-11) without opportunity for discovery;

In complicated litigation such as the issue in the instant case, as to the identity of the publisher of the Daily Utah Chronicle, a motion to dismiss (R. 10-11) should not have been granted without affording the plaintiff more time for discovery.

It is, therefore, respectfully submitted that the motion to dismiss (R. 10-11) should be reversed and that the defendant the Associated Students of the University of Utah, be given so many days within which to answer plaintiff's complaint and that discovery proceed in accordance with the Utah Rules.

DATED this 16th day of August, 1976.

Respectfully submitted,

Richard J. Leedy