

1985

# Matthew Fenn Hilton v. Mirvin D. Borthick : Brief of Appellant

Utah Supreme Court

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Steven J. Sorenson; Assistant Attorney General; Attorney for Respondents.

Joseph C. Rust; Kesler and Rust; Clarence J. Frost; Richardo Ferrari; Watkiss and Cambell; Robert J. DeBry; Attorney for Appellants.

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UTAH SUPREME COURT

BRIEF

1985 20040

IN THE SUPREME COURT OF THE STATE OF UTAH

MATTHEW FENN HILTON, et al.,

Plaintiffs-  
Appellants,

v.

MIRVIN D. BORTHICK, et. al.,

Defendants-  
Respondents.

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Case No. 20040

PETITION FOR REHEARING

BRIEF FOR APPELLANTS

Appeal From The Third Judicial District Court

of the State of Utah, Salt Lake County, Judge Timothy R. Hanson

JOSEPH C. RUST  
KESLER & RUST  
Attorneys for Appellants  
Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

CLARENCE J. FROST  
Attorney for Appellants  
3536 Market Street, #7  
West Valley City, Utah 84119

RICHARDO FERRARI  
WATKISS & CAMBELL  
Attorney for Appellants  
310 South Main, Suite #1200  
Salt Lake City, Utah 84101

STEVEN J. SORENSON  
ASSISTANT ATTORNEY GENERAL  
Attorney for Respondents  
237 State Capital  
Salt Lake City, Utah 84114

ROBERT J. DeBRY  
Attorney for Appellants  
965 East 4800 South, Suite #2  
Salt Lake City, Utah 84117

IN THE SUPREME COURT OF THE STATE OF UTAH

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MATTHEW FENN HILTON, et al.,	:	
	:	
Plaintiffs-	:	
Appellants,	:	Case No. 20040
	:	
v.	:	
	:	PETITION FOR REHEARING
MIRVIN D. BORTHICK, et. al.,	:	
	:	
Defendants-	:	
Respondents.	:	

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BRIEF FOR APPELLANTS

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JOSEPH C. RUST  
KESLER & RUST  
Attorneys for Appellants  
Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

CLARENCE J. FROST  
Attorney for Appellants  
3536 Market Street, #7  
West Valley City, Utah 84119

RICHARDO FERRARI  
WATKISS & CAMBELL  
Attorney for Appellants  
310 South Main, Suite #1200  
Salt Lake City, Utah 84101

STEVEN J. SORENSON  
ASSISTANT ATTORNEY GENERAL  
Attorney for Respondents  
237 State Capital  
Salt Lake City, Utah 84114

ROBERT J. DeBRY  
Attorney for Appellants  
965 East 4800 South, Suite #2  
Salt Lake City, Utah 84117

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Appellants respectfully petition the court for a rehearing of that portion of the case which pertains to appellants' claim against respondents for the monies placed on deposit and otherwise invested in Grove Finance once the cease and desist order had been issued by the respondents. This matter was not specifically addressed by the opinion issued in this case and appears to be a matter which is outside the scope of the case of Gillman v. Department of Financial Institutions, 120 Utah Adv. Rep. 3 (1989), cited by the court. This petition is submitted in good faith and not for delay.

## ARGUMENT

### POINT I

#### THE ACT OF ENFORCING A CEASE AND DESIST ORDER IS DIFFERENT THAN SUSPENDING OR REVOKING A LICENSE

In the instant case, this court has now ruled that governmental immunity protects the respondents from suit because the conduct complained of by appellants related to a failure to suspend or revoke Grove Finance's license. While that may be true of a majority of appellants' claims, a certain number of the appellants had, as an additional cause of action against respondents, a claim that during the period from the time the cease and

desist order was issued by respondents on April 8, 1980 until the bankruptcy of Grove Finance in August of 1980 (or at least until the takeover of Grove Finance by respondents in late July), respondents allowed Grove Finance to take money on deposit and otherwise engage in activities in specific contravention of the cease and desist order. (See Appellants' Brief at page 25 and appellant Hilton's amended complaint, Third Cause of Action.) Admittedly not all of the appellants can allege this cause of action and the amount so received by Grove Finance which would be claimed as damages in this case is a very small portion of the monies claimed in the total lawsuit. Nevertheless, this specific claim deserves to be addressed because it represents a separate cause of action. It appears that this court, in making its ruling, overlooked this small but important claim.

There is a major difference between a governmental agency on the one hand making a decision whether and to what extent to suspend or revoke a financial institution's license and on the other hand to enforce its own order. Once the decision was made by respondents that Grove Finance was improperly and illegally taking funds on deposit, it entered a cease and desist order. For reasons of its own, it did not make the cease and desist order public. The only way, therefore, that the public (for whose benefit the cease and desist order was issued) would be protected

would be for respondents to undertake such actions as to make certain that the cease and desist order was enforced. It is the allegation of appellants that respondents did not do that. Rather, even with the cease and desist order in place, officials of Grove Finance took monies on deposit from some of the appellants and continued to violate the cease and desist order until on July 18, 1980 (over three months later) when respondents took possession of Grove Finance. During this period of more than three months, some appellants placed additional monies or new monies on deposit with Grove Finance.

To enforce the cease and desist order did not require a determination of suspending or revoking a license. Rather it could have been accomplished in a myriad of ways. Among other things, respondents could have placed personnel in Grove Finance's offices to personally prevent any more monies from being placed with Grove Finance in exchange for a Grove Finance obligation. Respondents could have also posted a notice on the premises informing the public that, until further notice, Grove Finance was not permitted to take monies on deposit or otherwise receive monies in exchange for obligations of Grove Finance. Respondents could also have imposed a series of fines every time a violation was detected. In other words, once the cease and desist order was issued, it did not require respondents to shut down Grove Finance but rather it

required respondents to enforce the order. As it was, respondents imposed the cease and desist order and then completely failed to enforce the order. At the same time the public was not informed as to the existence of the cease and desist order and therefore during the three month period certain of the appellants continued to make deposits and otherwise provide money to Grove Finance in exchange for obligations of Grove. Since appellants claim that respondents were negligent in this regard, they should be permitted to go to trial on the issue.

## POINT II

### ENFORCEMENT OF THE CEASE AND DESIST ORDER WAS MINISTERIAL

The definition of ministerial versus discretionary governmental functions is well briefed in appellants' briefs. Suffice it to say, once the cease and desist order was in place, i.e., once the discretionary decision had been made to issue a cease and desist order, thereafter the enforcement of the cease and desist order was ministerial. The instructions were clear - Grove Finance was ordered not to undertake activities which would bring monies or other assets into Grove Finance in exchange for Grove obligations. That was an order without discretion and respondents had the duty to enforce it. They did not and so should be held liable for the damages incurred by appellants as a direct result.



Therefore, there has been a waiver of governmental immunity for the respondents' negligent conduct as to that aspect of the case.

The claim of appellants in this regard is virtually identical to the facts in the case of Little v. Utah State Division of Family Services, 667 P.2d 49 (1983). In that case this court determined that the Division of Family Services had the discretionary right to determine whether a particular individual was a candidate for a foster care program. However, once they determined that the child was such a candidate, then this court held that the governmental agency had a ministerial duty to make certain that the child was properly cared for. The failure to properly care for the child resulting in the child's death became the basis for the lawsuit and this court held that immunity had been waived.

Assuming that the decision to place Jennifer in a foster home was a discretionary one, once that decision was made and the placement occurred, the question was no longer whether the child was to receive foster care but whether due care was exercised under a duty assumed. Where a breach of that duty can be shown, the government is held to the same standard as private individuals and cannot cloak itself with the mantle of discretion.

Id. at 51.

In like vein, respondents could use their discretion to determine whether a cease and desist order should be imposed, but once having so exercised that discretion, they had a duty to enforce the order.

Their negligent conduct in failing to do so gives rise to a waiver of immunity.

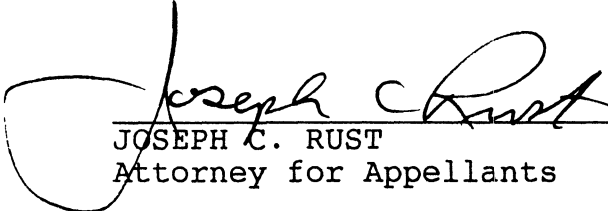
#### SUMMARY

Even under the authority of Gillman, supra governmental immunity does not shield the respondents under those circumstances where the remedy is other than revoking or suspending the license and a ministerial act is involved. It is submitted that this court has overlooked the specific claim of appellants with regard to respondents' failure to enforce its cease and desist order. Therefore, this case should be remanded to the District Court with instructions to permit trial on the issue of respondents' negligence in failing to enforce the cease and desist order.

DATED this 30 day of November, 1989.

Respectfully submitted,

KESLER & RUST

  
JOSEPH C. RUST  
Attorney for Appellants

j:pethearing.hil.

CERTIFICATE OF MAILING

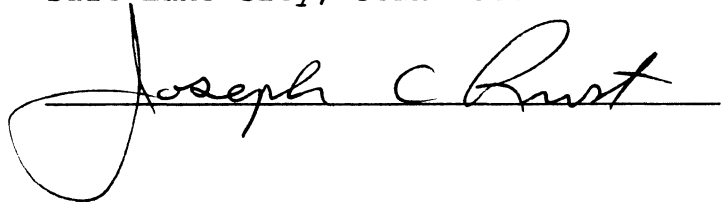
I hereby certify that I caused to be mailed a true and correct copy of the foregoing PETITION FOR REHEARING this 30 day of November, 1989 to:

STEVEN J. SORENSON  
ASSISTANT ATTORNEY GENERAL  
Attorney for Respondents  
237 State Capital  
Salt Lake City, Utah 84114

CLARENCE J. FROST  
Attorney for Appellants  
3536 Market Street, #7  
West Valley City, Utah 84119

RICHARDO FERRARI  
WATKISS & CAMBELL  
Attorney for Appellants  
310 South Main, Suite #1200  
Salt Lake City, Utah 84101

ROBERT J. DeBRY  
Attorney for Appellants  
965 East 4800 South, Suite #2  
Salt Lake City, Utah 84117

A handwritten signature in cursive script, reading "Joseph C. Rust", is written over a horizontal line.