

1985

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

Utah Supreme Court

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IN THE SUPREME OF THE STATE OF UTAH

1985 20040

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

APPELLANT'S BRIEF

Appeal From The Third Judicial District Court
of the State of Utah

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Clerk, Supreme Court, Utah

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APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action brought by investors in Grove Finance Company against the State of Utah and the Department of Financial Institutions to recover the amount of the investment lost when Grove Finance became insolvent in 1980.

DISPOSITION IN THE LOWER COURT

The Honorable Timothy R. Hanson of the Third District Court, granted defendants' Motion for Summary Judgment on the basis of governmental immunity.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the order granting summary judgment and a remand to the district court allowing the case to proceed to trial.

STATEMENT OF FACTS

Grove Finance Company was incorporated in 1960 as a small loan business pursuant to Section 7-10-1, et seq., Utah Code Ann. (repealed 1969). (R. at 837, 771.) From 1960 until

1969 Grove Finance Company operated as a small loan business.

When the Small Loan Act was repealed in 1969, Grove Finance Company opted to become a supervised lender pursuant to Section 70B-3-501, et seq., Utah Code Ann. (R. at 838, 772.)

In 1969, W. Smoot Brimhall, who was at that time the Commissioner of the Department of Financial Institutions, made a determination that Grove Finance Company as a supervised lender was not subject to the Department's jurisdiction under Sections 7-1-7 and 7-1-8, Utah Code Ann. (1953). (R. at 379-380, 839, 772.) The Department of Financial Institutions, pursuant to Section 70B-3-506, Utah Code Ann., established a procedure whereby it made annual examinations of the loan records of Grove Finance Company. (R. at 839, 773.)

From the early 1970's until its closure in 1980, Grove Finance Company held itself out to the general public as accepting monies on deposit and in fact did accept monies on deposit. (R. at 839, 864-865, Deposition of Howard Sherwood, pg 14.)

From the early 1970's until its closure in 1980, Grove Finance Company through its agents and in the mass media advertised that deposits made in Grove Finance Company were insured up to \$10,000. (R. at 839, 835, Deposition of Howard Sherwood, pg 23.)

Between 1969 and 1980, the Department of Financial Institutions received a number of telephone calls from individuals claiming to be depositors of Grove Finance

Company. They stated that they had either a savings certificate or a passbook issued by Grove Finance Company. (R. at 925.)

During this same period of time, the Department of Financial Institutions received telephone calls from individuals inquiring as to whether the debentures sold by Grove Finance Company were insured. The Department of Financial Institutions was also told that agents of Grove Finance Company had represented to the public that the monies deposited in the Company were insured up to \$10,000. (R. at 835, Deposition of Howard Sherwood, pg 23.)

None of the inspections of Grove Finance Company performed by the Department of Financial Institutions uncovered evidence that Grove Finance Company was accepting monies on deposit. (R. at 839, 390.)

Between 1969 and 1980, Hal S. Haycock, one of the officers of Grove Finance Company, commingled the assets of Grove Finance Company with his personal assets. (R. at 840.)

On March 13, 1980, in response to a complaint received by the Department of Financial Institutions from the Bank of American Fork, the Department of Financial Institutions sent Gary R. Cox and Code Shaw to examine Grove Finance Company. (R. at 375.) Mr. Cox and Mr. Shaw found that the records of Grove Finance Company were in a state of shambles and that the information submitted by Grove Finance Company on its reports to the Department of Financial Institutions could not be

verified or confirmed by the books and records of Grove Finance Company. Mr. Cox stated in his report to the Department of Financial Institutions:

The many inconsistencies noted between the financial statements received from this company which tend to confuse and mislead along with lack of bookkeeping and control exhibited by Grove Finance Company are a major concern. Based on the bookkeeping methods being employed by this institution, a clear, well-defined accounting trail that could be followed does not exist . . .

(R. at 898.)

As a direct result of the examination by Messrs. Cox and Shaw on April 8, 1980, the Department of Financial Institutions issued a cease and desist order to Grove Finance Company requiring that it cease and desist from any further sales of debentures or any further activity which would result in money or other assets being transferred into Grove Finance Company in exchange for an obligation of Grove Finance Company. (R. at 385, 900A.)

At approximately the same time that it issued the cease and desist order, the State of Utah hired the CPA firm of H. Sherwood & Company to audit the books and records of Grove Finance Company. (R. at 382, Deposition of Howard Sherwood, pg 7.)

On or about July 18, 1980, the Department of Financial Institutions petitioned the Fourth Judicial District Court of Utah County to allow the Department of Financial Institutions to take possession of Grove Finance Company. On that same day an order granting possession of Grove Finance Company was

signed by Judge Ballif and the Department of Financial Institutions closed Grove Finance Company. (R. at 841.)

On or about August 22, 1980, Grove Finance Company filed a Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the District of Utah. (R. at 841.)

PROCEDURAL HISTORY

This action originally commenced as three separate complaints, each brought by a group of investors in the defunct Grove Finance Company. Two of the three actions were consolidated on October 27, 1982. (R. at 410-412.) The third action was consolidated therein on June 22, 1983. (R. at 765-766.)

The defendants brought a motion to dismiss on January 5, 1983. (R. at 594-595.) The motion was argued before Judge Timothy R. Hanson on March 4, 1983 and was denied on May 18, 1983. (R. at 753-754.)

The defendants brought a motion for summary judgment on July 21, 1983. (R. at 783-784.) The plaintiff brought a motion for summary judgment on July 28, 1983. (R. at 833-834.) These motions were argued before Judge Timothy R. Hanson on November 3 and 8, 1983.

Judge Hanson issued a memorandum decision denying plaintiffs' motion and granting defendants' motion on April 26, 1984. (R. at 962-966.) An order awarding judgment for the defendants was entered on May 22, 1984. (R. at 968-969.)

A notice of appeal was filed with the district court on June 20, 1984. (R. at 761-762.)

ARGUMENT

POINT I

THE DEPARTMENT OF FINANCIAL INSTITUTIONS
HAD A STATUTORY DUTY TO INSPECT GROVE FINANCE COMPANY

The basic position of the appellants in this action is that the Department of Financial Institutions had a statutory duty to make certain inspections of Grove Finance Company and that the losses sustained by the appellants in this action are due to the failure of the State of Utah to make the required inspections.

A. Duty to Inspect Under Title 7. In 1981 the Utah State Legislature repealed most of the sections of Title 7 and replaced them with the Financial Institutions Act of 1981. The cause of action in this case arose prior to this change in state law and all citations to sections in Title 7 are to the former law as it existed at the time when the cause of action arose.

Grove Finance Company at all times from 1969 to its closure in July 1980 was a corporation doing a banking business under Utah law. Section 7-3-3 which defines a banking business states as follows:

Any corporation holding itself out to the public as receiving money on deposit, whether evidenced by a certificate, promissory note or otherwise, shall be considered as doing a banking business and shall be subject to the provisions of this chapter as to such business.

If this case is allowed to proceed to trial, appellants will establish, among other things, that the

Department of Financial Institutions was on notice that Grove Finance Company was indeed accepting money as if on deposit long before the Department issued the April 1980 cease and desist order. Knowledge of this activity would have brought Grove Finance Company within the purview of Title 7 under U.C.A. §7-3-3.

According to Section 7-1-7 of the Utah Code Ann., all financial institutions required to obtain a license under Utah law were to be subject to examination by the Bank Commissioner and examiners. Section 7-1-7 stated as follows:

All banks, all loan and trust companies, all building and loan associations, all industrial loan companies, all credit unions, all small loan businesses required to obtain a license under any provision of law, and all bank service corporations shall be under the supervision of the banking department and shall be subject to examination by the Bank Commissioner and examiners.

Grove Finance Company was in the business of making small loans and, although Chapter 10 of Title 7 dealing with small loan companies was repealed in 1969, the language of Section 7-1-7, Utah Code Ann., was not changed until 1981. It should also be noted that Grove Finance Company even as a supervised lender was required to obtain a license from the Department of Financial Institutions and was therefore a small loan business required to obtain a license under "any provision of law."

The Commissioner of the Department of Financial Institutions had a statutory duty to annually visit and examine

those financial institutions under his jurisdiction. Section 7-1-8, Utah Code Ann., provides as follows:

The bank commissioner, or an examiner, shall visit and examine every bank, savings bank, every loan and trust corporation, every building and loan association, every industrial loan company, every small loan business, and every cooperative bank, and at least once a year. At every such examination careful inquiry shall be made as to the condition and resources of each institution examined, the mode of conducting and managing its affairs, the official actions of its directors and officers, the investment and disposition of its funds, the security afforded to its members, if any, and to those by whom its engagements are held, whether or not it is violating any provisions of law relating to corporations or to the business of the institution examined, whether or not it is complying with its articles of incorporation and bylaws, and as to such other matters as the commissioner may prescribe.

The Commissioner of the Department of Financial Institutions has, therefore, a very clear duty under Title 7 to inspect those financial institutions which fall under his jurisdiction.

B. Duty To Inspect Under Title 70B. While the respondents in this case have continually denied that they have any duties to inspect Grove Finance Company pursuant to Title 7 of the Utah Code Ann., the respondents have admitted, however, that Grove Finance Company is under their jurisdiction pursuant to Title 70B of the Utah code and that the respondents have a statutory duty to examine the loans, business and records of Grove Finance Company pursuant to Section 70B-3-506 of the Utah Code. (R. at 387-388.)

Section 70B-3-505 imposes a duty upon every licensee to "maintain records in conformity with generally accepted accounting principles and practices and in a manner that will enable the administrator to determine whether the licensee is complying with the provisions of this act." Grove Finance Company was therefore required by Title 70B to keep its records in conformity with generally accepted accounting principles and practices.

Section 70B-3-506, Utah Code Ann., requires:

That administrator shall examine periodically at intervals he deems appropriate the loans, business and records of every licensee.

The Department of Financial Institutions pursuant to Section 70B-3-506 established a policy of examining each supervised lender subject to its jurisdiction once a year.

If this case is allowed to proceed to trial, appellants will establish, among other things, that the inspections of Grove Finance Company conducted by the Department of Financial Institutions were inadequate in their scope to comply with the requirements of Section 70B-3-506, Utah Code Ann.

In reviewing the motions for summary judgment, the district court apparently found that the applicable duties under Titles 7 and 70B were discretionary rather than mandatory or ministerial under Section 63-30-10(1)(a), Utah Code Ann. (1953). (R. at 138-139.) Hence, the court found no waiver of immunity and judgment was entered for the defendants on the

basis of governmental immunity. As will be more fully discussed herein, the duties of inspection were in fact mandatory or ministerial and the failure of the State in this regard cannot be waived. Thus the district court erred in its findings on duty to inspect.

POINT II

GOVERNMENTAL IMMUNITY DOES NOT SHIELD THE RESPONDENTS FROM SUIT BECAUSE GOVERNMENTAL IMMUNITY HAS BEEN WAIVED FOR THIS TYPE OF NEGLIGENCE ACTION

The appellants allege and believe they can establish at trial that the respondents had statutory duties under both Title 7 and Title 70B of the Utah Code to supervise the financial integrity of Grove Finance Company and that the respondents negligently failed to perform said duties. The issue before this Court, however, is whether the respondents are immune from suit by virtue of the Utah Governmental Immunity Act.

Section 63-30-3 of the Utah Code states in pertinent part:

Except as may be otherwise provided in this Act, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function

The appellants do not dispute that the regulation of financial institutions in the State of Utah is a governmental function under the standard set forth in Standiford v. Salt Lake City Corporation, 605 P.2d 1230 (Utah 1980), which defines a governmental function as an activity of such a unique nature

that it can only be performed by a governmental agency. This Court in Madsen v. Borthick, 658 P.2d 627 (Utah 1983), specifically held that the "supervision of financial institutions is an activity of such a unique nature that it can only be performed by a governmental agency."

Therefore, the claim of the appellants is that immunity for the negligent conduct alleged in the case at bar has been waived by Section 63-30-10 of the Utah Code. This section states in pertinent part as follows:

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment
. . . .

This section of the Governmental Immunity Act clearly waives governmental immunity for all governmental entities based on a claim of negligence; provided, however, that the negligence does not fall into one of the eleven enumerated exceptions to this waiver of immunity.

The district court in its memorandum decision held:

The nature of defendant Borthick's actions or claimed failure to act even if such were proven, are discretionary, and do not fall into a class of activities where governmental immunity has been waived.

(R. at 139.)

This ruling is in error and should be reversed by this court.

A. Respondent's Conduct Did Not Fall Within The Definition Of Discretionary Functions.

Section 63-30-10(1), Utah Code Ann. (1953), states that a government entity is immune if the injury:

(1) Arises out of the discretion or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused

In Frank v. State, 613 P.2d 517 (Utah 1980), the Utah Supreme Court stated that the purpose of the discretionary ministerial function distinction is the protection of governmental entities from suits for acts and decisions at the policymaking level. In this regard, the Court stated:

This Court has followed the lead of cases interpreting the Federal Torts Claim Act by distinguishing between those decisions occurring at a broad policymaking level and those taking place at the implementing operational level. In Carroll v. State Road Commuission, this Court recognized that almost all acts require some degree of discretion, and observed that the exception to the waiver set forth in the Act should be confined to those decisions and acts occurring at the basic policymaking level, and not extended to those acts and decisions taking place at the operational level, or in other words . . . those which concern routine everyday matters not requiring evaluation of broad policy factors.

Id. at 519-520. [Emphasis added.]

The respondents are not immune from suit under the discretionary function exception to the waiver of governmental immunity for negligent injuries because the negligent acts occurred when the respondents were operating at the operational level. An examination of the relevant statutes in this case clearly indicates that the respondents were not operating at the broad policymaking level in making the determinations that the respondents now claim are immune from suit based on the discretionary function exemption.

B. The Legislature Not The Respondents Set The Policy As To Which Financial Institutions Are Subject To The Jurisdiction Of The Department Of Financial Institutions.

The respondents alleged in the lower court that they were responsible to make the basic policy determinations as to which financial institutions are statutorily subject to the Department of Financial Institutions. (R. at 614.) This broad policy, however, was not left up to the discretion of the respondents in this case, but rather was specifically prescribed by the State Legislature. Section 7-3-3 states:

Any corporation holding itself out to the public as receiving money on deposit, whether evidenced by a certificate, promissory note or otherwise, shall be considered as doing a banking business and shall be subject to the provisions of this Chapter as to such business. [Emphasis added.]

Clearly in this section of the banking code the State Legislature and not the Department of Financial Institutions has made the broad policymaking decision as to which institutions are subject to banking supervision. was made at the Legislative level. The subsequent determinations by the Commissioner of the Department of Financial Institutions as to which corporations in this state do and do not fit this rather clear definition are on the operational level and are not immune from suit.

In Fidelity Casualty Company of New York v. Brightman, 53 F.2d 161 (8th Cir. 1931), the court in considering the distinction between discretionary and ministerial functions stated:

The Missouri rule is in line with the general run of authority that a public official charged with discretionary duties is not liable for a mistake of judgment or an erroneous performance of said duties unless he be guilty of willful wrong in relation thereto, but as to ministerial duties he is liable for the violation or neglect thereof to the party injured thereby and that a mistake of judgment does not excuse him.

Id. at 165. [Emphasis added.]

There may be some judgment required even in the performance of mandatory ministerial duties. However, even if, as claimed by the respondents, the Commissioner of the Department of Financial Institutions had to exercise judgment in determining which financial institutions came within the very specific definition of Section 7-3-3 of the Utah Code, such judgment making does not become transformed into a discretionary function. The Commissioner of the Department of Financial Institutions remains liable for a mistake in judgment in such a case.

C. The Legislature Not The Respondents Set The Policy As To The Kind Of Supervision To Be Exercised By The Department Of Financial Institutions.

The respondents claimed further in the lower court that they were required to make a discretionary decision as to what kind of supervision the Department of Financial Institutions was to exercise over the financial institutions in its jurisdiction. (R. at 614.) Again, it is clear from the law that this policymaking decision has already been made by

the Legislature and was not left up to the Department of Financial Institutions. Section 7-1-8 of the Utah Code specifically set forth:

The bank commissioner, or an examiner, shall visit and examine every bank, savings bank, every loan and trust corporation, every building and loan association, every industrial loan company, every small loan business, and every cooperative bank, at least one a year. At every such examination careful inquiry shall be made as to the condition and resources of the institution examined, the mode of conducting and managing its affairs, the official actions of its directors and officers, and investment and disposition of its funds, the security afforded its members, if any, and to those by whom its engagements are held, whether or not it is violating any provisions of law relating to corporations or to the business of the institution examined, whether or not it is complying with its articles of incorporation and bylaws, and as to such other matters as the commissioner may prescribe.
[Emphasis added.]

In addition, Sections 7-1-8 and 7-1-13 through 7-1-23 further set forth in detail the kind of supervision which is to be exercised by the Department of Financial Institutions over the financial institutions under its jurisdiction. The carrying out of the specific statutory requirements are therefore ministerial acts and not discretionary acts.

In State ex rel. Funk v. Turner, et al., 42 S.W.2d 594 (Mo. 1931), the Missouri Supreme Court considered the responsibility of the bank examiner and stated as follows:

The difficulty arises in the classification of the duties of a bank examiner, whether discretionary or ministerial. To solve this question we must refer to Section 11689 R.S. Mo. 1919. This section makes it mandatory that every bank be examined at least once a year. Additional examinations may be made when deemed necessary in the judgment of the commissioner. The section further provides:

On every such examination inquiry shall be made as to the condition and resources of such corporation or banker, the mode of conducting and managing its affairs, the actions of its directors or trustees if a corporation, the investment of its funds, the safety and prudence of its management, the security afforded to those by whom its engagements are held, and whether the requirements of its charter and the law have been complied with in the administration of its affairs; and as to such other matters as the commissioner may prescribe.

. . .

By the provisions of this section the commissioner must make at least one examination each year. This duty is not a discretionary one, but it is ministerial; he has no alternative or choice in the matter. The same section leaves it to the judgment of the commissioner to make additional examinations We are also of the opinion that the section makes it the mandatory duty of the officer who conducts the examination, to inquire into the various matters set out in the statute. Since it is mandatory it becomes a ministerial duty, the examiner must make the inquiry with reference to the various matters set forth in the statute.

A haphazard examination by an examiner into the matters required by the statute is not sufficient. Where a statute requires an act to be done, it must be performed with a reasonable degree of diligence, care and prudence. Failure to so perform that duty is in law negligence.

Id. at 598. [Emphasis added.]

The respondents thus had a clear mandated duty to examine each year all financial institutions which came within the definition set by the Legislature in Section 7-3-3. Even the type and extent of inspection was set by the Legislature. Respondents cannot therefore say that they had to exercise discretionary judgment in determining the kind of supervision

which the Department of Financial Institutions should exercise over the financial institutions within the State of Utah.

D. The Respondents Decisions As To The Manner In Which They Would Supervise Does Not Rise To The Policymaking Level.

The respondents claimed in the lower court that they also had discretionary decisions as to the manner in which such supervision was to be carried out by the Department of Financial Institutions. Although some discretion may have had to be exercised, it would not rise to the level of basic policymaking and therefore does not come within the exception to the waiver set forth in the Governmental Immunity Act. Carroll v. State Road Commission, 27 Utah 2d 384, 496 P.2d 888 (1972).

In the 1965 debates over Senate Bill No. 4, which later became the Governmental Immunity Act, Senator Welch, the sponsor of the bill, explained to his Senate colleagues that the proposed Utah Governmental Immunity Act was patterned after the Governmental Immunity Act which had been enacted in California in 1963. Section 820.2 of the Government Code of California is California's equivalent to Utah's Section 63-30-10(1). The California statute reads as follows:

A public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

The California courts, like the courts in Utah, have considered a great number of cases defining this discretion exception to the waiver of governmental immunity. In Johnson v. State, 73 Cal. 240, 447 P.2d 352 (1968), the California Supreme Court noted:

It would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit some discretion in the manner of its performance, even if it involved only the hammering of a nail.

Id. at 357.

The court therefore looked to the legislative purpose for this discretion exception to the waiver of governmental immunity and determined:

Courts and commentators have therefore centered their attention on the assurance of judicial abstention in areas in which the responsibility for basic policy decisions has been committed to coordinate branches of government

Id. at 360.

In Ramos v. County of Madera, 94 Cal. 421, 484 P.2d 93 (1971), the California Court stated:

In Johnson we reviewed the semantic quicksand which had ensnared the concept of "discretion" in the unyielding trap of incomprehensibility. We noted that discretionary acts have been defined as those wherein no hard and fast rule as to the court of conduct that one must or must not take

Finding the semantic distinction between discretionary and ministerial inadequate as a method of deciding actual controversies, we followed our landmark precedent of Lipman v. Brisbane Elementary School District, (citation omitted), in concentrating on policy considerations relevant to the governmental claim of immunity. Discretionary activity, we held, is related to basic policy decision, or that

activity sometimes characterized as the "planning" as opposed to the operational level of decisionmaking.

Id. at 98-99.

It is clear, therefore, that this discretionary exception to the waiver of governmental immunity for negligent action of employees of public entities both as interpreted in the State of Utah and in the State of California only applies to basic policymaking decisions. In the instant case, the State Legislature, and not the respondents, made the basic policy decisions and the respondents were left simply to implement those decisions on an operational level. Respondents therefore are not entitled to the protection of the discretionary exception to the waiver of governmental immunity.

E. Examination of the Statutory Language Establishes Appellants' Position.

In dealing with the problem of whether a statute is mandatory or directory, this Court has stated:

We are impressed with the difficulty that would be encountered in attempting to state any definite and invariable rule by which directory provisions of a statute could always be distinguished from those which are mandatory. It best serves our purpose here to point out generally that there are at least some guidelines to be followed. The most fundamental one is that the court should give effect to the intention of the legislature. That requires us to consider what the figurative "legislative mind" would have intended had it adverted to the particular circumstances we are confronted with for adjudication. This in turn leads us to analyze the statute in the light of its history and background; the purpose it was designed to accomplish; and what interpretation and application will best serve that purpose in practical application.

Sjostrom v. Bishop, 15 Utah 2d 373, 393, P.2d 472 (1964).

With respect to its use in a statute, the word "shall" is usually presumed to be mandatory. State v. Zeimer, 10 Utah 2d 45, 347, P.2d 1111 (1960).

Examination of the relevant statutes upon which the appellants rely in asserting a duty on the State shows extensive use of the word "shall."

The bank commissioner, or an examiner shall visit and examine every bank . . . at least once in each year.

. . .

At every such examination, careful inquiry shall be made as to the condition and resources of the institution examined . . .

Section 7-1-8, U.C.A. [Emphasis added.]

The bank commissioner may at any time, and at least once a year shall require the board of directors of every institution . . . to examine or cause to be examined fully the books, papers and affairs of the institution . . .

Section 7-1-14, U.C.A. [Emphasis added.]

The bank commissioner shall each year make not less than four calls for report of condition upon each bank . . .

Section 7-1-17, U.C.A. [Emphasis added.]

The administrator shall examine . . . the loans, business and records of every licensee . . .

Section 70B-3-506, U.C.A. [Emphasis added.]

This may be contrasted with use of the word "may" or the phrase "shall have power to" in other various sections of Title 7. See, for example, Sections 7-1-12, 7-1-16 and 7-1-18, U.C.A.

The manner of use of the word "shall" in these statutes is entirely consistent with language specifically directing that something be done. There is no discretion involved.

POINT III

RESPONDENTS' NEGLIGENT CONDUCT WAS MORE THAN A FAILURE TO MAKE AN INSPECTION OF PROPERTY

Appellants alleged in their complaint that the respondents had a duty to:

- (A) Visit and examine every banking business at least once a year.
- (B) At the time of each annual visit to inquire into the condition and resources of the institution examined, the mode of conducting and managing its affairs, the official actions of its directors and officers, the investment and disposition of its funds, the security offered to members and whether or not it was violating any provision of law;
- (C) Notify the board of directors of any banking business in writing if any officer or employee of that bank was found to be dishonest, reckless or incompetent or fail to perform any duty of his office;
- (D) Require the board of directors of each banking business to examine the affairs of the institution with a special purpose of ascertaining the value of the security thereof;
- (E) Call for not less than four separate reports each year concerning the condition of each banking business to certify such report for publication;
- (F) To call for special reports as may be necessary for the protection of the public;
- (G) Inform the county attorney of any violation of any provision of law which constitutes a misdemeanor or felony by any officer, director or employee of any banking business

Utah Code Ann. §§7-1-8, 7-1-13, 7-1-14, 7-1-17, 7-1-18 and 7-1-23.)

The respondents, as well as the district court, apparently lumped these duties together and defined them as a duty to make an inspection of the records of Grove Finance Company.

The district court granted respondents' motion for summary judgment in part on the basis that Section 63-30-10(1)(d), Utah Code Ann., operates as an exception to waiver of immunity from suit for the breach of these duties.

Section 63-30-10(1)(d), Utah Code Ann., states:

Immunity from suit of all governmental entities is waived for injury proximately committed within the scope of his employment except if the injury . . . (d) Arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property . . .

This section does not have applicability to the duties of respondents as found in Titles 7 or 70B of the Utah Code. Hence, the court erred in holding that an inspection of property was involved in this case and thus granting governmental immunity.

To understand this concept, it is necessary to first consider how Section 63-30-10(1)(d) is to be applied.

The fundamental consideration which transcends all others in regard to the interpretation and application of a statute is: What was the intent of the legislature?

. . .
In determining that intent, the statute should be considered in the light of the purpose it was designed to serve and so applied as to carry out that purpose.

Johnson v. State Tax Commission, 17 Utah 2d 337, 411 P.2d 831 (1966).

There is apparently no case law in Utah which specifically interprets what constitutes an inspection of property within the meaning of §63-30-10(1(d), Utah Code Ann. However, the transcript of the 1965 State Senate debates over Senate Bill No. 4, which later became the Governmental Immunity Act, is instructive. As noted above, Senator Welch, the sponsor of the bill, explained to his senate colleagues that the proposed Utah Governmental Immunity Act was patterned after the Governmental Immunity Act which had been enacted in California in 1963.

The California statute reads as follows:

A public entity is not liable for injury caused by its failure to make an inspection, or by reason or making an inadequate or negligent inspection of any property, . . . for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to public health or safety.

Deering's Gov. C. §818.6.

The purpose of this section of the California Code is to retain governmental immunity where an inspection of physical property is involved in determining whether or not it complies with safety standards or constitutes a hazard to health.

The corresponding section of the Utah Act was intended to have the same purpose. During the senate debates over the Utah Governmental Immunity Act, Senator Welch explained the purpose of this section of the Governmental Immunity Act:

So if the city turns up a plumbing inspector who inspects the plumbing or inspects the furnace and something goes wrong and it explodes, you can't sue the city on account of that by saying that the inspector was negligent. You cannot bring an action against that individual or entity.

(R. at 664.)

The only Utah cases decided under Section 63-30-19(d) confirm this meaning.

Velasquez v. Union Pacific Railroad Company, 24 Utah 2d 217, 469 P.2d 5 (1970), involved application of the statute to deny liability for the failure of the state to inspect safety devices at railroad crossings.

White v. State, 579 P.2d 921 (Utah 1978), involved a claim of injury due to the failure of certain vegetable canning equipment to meet prescribed safety standards. Section 63-30-10(1)(d) was applied in finding the State not liable for failure to take action after an O.S.H.A. inspection revealed safety violations.

It is clear from the foregoing that there is a clear distinction between making an inspection of property within the meaning of Section 63-30-10(4) and the statutory duty imposed upon respondents to at least once a year visit and examine each corporation in the state doing a banking business. The latter with its detailed duties specified in Section 7-1-8 is more like an audit of books and records than an inspection of property.

POINT IV

GOVERNMENTAL IMMUNITY DOES NOT SHIELD THE RESPONDENTS NEGLIGENT FAILURE TO ENFOCE THE CEASE AND DESIST ORDER

The respondents claimed in the lower court that they further had the discretionary decision of whether or not to issue administrative orders. The appellants do not deny that such might be the case. However, once the decision had been made to issue a cease and desist order and such an order was issued to Grove Finance Company, a duty arose at that time to properly enforce such an order. In Seymour National Bank v. State, 384 N.E.2d 1177, 1185 (Ind. 1979), the Court held that a public official had discretion in formulating policy. Once the policy was formulated, however, the same official acted in a ministerial capacity in the implementation of the policy. The respondents in this case totally failed to enforce the cease and desist order and substantial deposits were made in Grove Finance after the order was issued.
property.

POINT V

THE UTAH GOVERNMENTAL IMMUNITY ACT IS UNCONSTITUTIONAL AS IT VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND STATE OF UTAH CONSTITUTIONS

The limitation imposed upon any potential recovery of the appellants due to the operation of the Governmental Immunity Act is a denial of equal protection.

The Governmental Immunity Act violates equal protection by classifying people in three different ways:

1. It classifies victims of negligence by whether they have been injured by a non-governmental tort-feasor or a government tort-feasor. It denies or places significant limitations on recovery to the latter class. (See Sections 63-30-10, 63-30-29, Utah Code Ann.)

2. It classifies victims of government tort-feasors by whether they have suffered personal injury or property damage. It differentiates between the groups by the amount of recovery allowed.

3. It classifies victims of government tort-feasors negligence by the severity of the injury. It may grant full recovery to those victims who have not sustained significant injury by allowing them to recover up to \$100,000 in damages. It discriminates against the severely injured victims by denying any recovery for any injuries over \$100,000.

The guarantees of equal protection under the consideration requires all persons to be treated alike under like circumstances. See U.S. Constitution, Amendment XIV, Section 1, and Utah Constitution, Article I, Section 24. When a fundamental right is affected, the State must show a compelling state interest in order to justify the complained of discrimination. J.J.N.P. Co. v. State, ETC., 655, P.2d 1133 (Utah 1982); Utah Public Employees Ass'n. v. State, 610 P.2d 1272 (Utah 1980).

The right to bring a civil action for personal injuries has been recognized as being a fundamental right. White v. State, 661 P.2d 1272 (Mont. 1983).

CONCLUSION

The summary judgment rendered in favor of the defendants-respondents in the Third Judicial District Court of Salt Lake County State of Utah, should be reversed. The duties of inspection of the Utah Department of Financial Institutions imposed by Title 7 and Title 70B are in fact mandatory or ministerial and the negligent failure of the State to perform its duties cannot be waived. Further, the Utah Governmental Immunity Act as applied by the Third Judicial District Court of Salt Lake County State of Utah in reaching its decision is unconstitutional as it violates the equal protection clauses found in the Fourteenth Admendment, Section 1 of the United State Constitution and Article 1, Section 24 of the Utah Constitution.

DATED this 11 day of October, 1984

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CERTIFICATE OF DELIVERY

This is to certify that four true and correct copies
of the foregoing Appellant's Brief in Case No. 20040 were
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