

1987

Walter K. Gilmore v. Salt Lake Community Action Program, Hal J. Schultz, Robert E. Philbrick, Fred Geter, Richard Fields, Ann O'Connell, John Does 1-30 : Response to Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John K. Rice; Stephen W. Cook; Cook & Wilde, P.C.; Attorneys for Defendants.

Nann Novinski-Durando; Mark S. Miner; Attorney for Appellant.

Recommended Citation

Legal Brief, *Gilmore v. Community Action Program*, No. 870395 (Utah Court of Appeals, 1987).
https://digitalcommons.law.byu.edu/byu_ca1/599

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
50

BRIEF

.A10

DOCKET NO.

870395-CA

IN THE UTAH COURT OF APPEALS

WALTER K. GILMORE,

Plaintiff/Appellant,

vs.

Case No. 870395-CA

SALT LAKE COMMUNITY

ACTION PROGRAM,

HAL J. SCHULTZ,

ROBERT E. PHILBRICK,

FRED GETER,

RICHARD FIELDS,

ANN O'CONNELL,

JOHN DOES 1-30,

Defendants/Respondents.

PLAINTIFF'S RESPONSE TO DEFENDANTS' PETITION FOR REHEARING

Appeal from a Summary Judgment
Third District Court
The Honorable Homer F. Wilkinson

John K. Rice
Stephen W. Cook
Cook & Wilde P.C.
Suite 490
6925 Union Park Center
Salt Lake City, Utah 84047
801-255-6000

Attorneys for
Defendants/Respondents

Nann Novinski-Durando
4348 S. Jupiter Drive
Salt Lake City, Utah 84124
801-277-8853

Mark S. Miner
525 Newhouse Building
Salt Lake City, Utah 84111
801-363-1449

Attorneys for
Plaintiff/Appellant

IN THE UTAH COURT OF APPEALS

WALTER K. GILMORE,

Plaintiff/Appellant,

vs.

Case No. 870395-CA

SALT LAKE COMMUNITY

ACTION PROGRAM,

HAL J. SCHULTZ,

ROBERT E. PHILBRICK,

FRED GETER,

RICHARD FIELDS,

ANN O'CONNELL,

JOHN DOES 1-30,

Defendants/Respondents.

PLAINTIFF'S RESPONSE TO DEFENDANTS' PETITION FOR REHEARING

Appeal from a Summary Judgment
Third District Court
The Honorable Homer F. Wilkinson

John K. Rice
Stephen W. Cook
Cook & Wilde P.C.
Suite 490
6925 Union Park Center
Salt Lake City, Utah 84047
801-255-6000

Attorneys for
Defendants/Respondents

Nann Novinski-Durando
4348 S. Jupiter Drive
Salt Lake City, Utah 84124
801-277-8853

Mark S. Miner
525 Newhouse Building
Salt Lake City, Utah 84111
801-363-1449

Attorneys for
Plaintiff/Appellant

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Filing of Response.....	1
Reply to Argument.....	1
Point I.....	1
Point II.....	6
Conclusion.....	7
Certificate of Mailing.....	8

TABLE OF AUTHORITIES

STATUTES

Rule 34, Rules of the Utah Court of Appeals.....	7
Rule 35, Rules of the Utah Court of Appeals.....	1

CASES

<u>Andrews v. Morris</u> 677 P.2d 81 (Utah 1983).....	3
<u>Belden v. Dalbo Inc.</u> 752 P.2d 1317 (Uth App. 1988).....	2
<u>Berube v. Fashion Centre Inc. Ltd.</u> 104 Utah Adv. Rep. 4.....	1,4,5,7
<u>Bimbo v. Burdette Tomlin Memorial Hospital</u> 644 F.Supp. 1033 (D.N.J. 1986).....	4
<u>Cole v. Carteret Savings Bank</u> 540 A.2d 923 (N.J.Super.L. 1988).....	5
<u>Golden v. Anderson</u> 256 Cal.App.2d 714, 64 Cal.Rptr. 404 (1967).....	6
<u>Grigoletti v. Ortho Pharmeceutical</u> 545 A.2d 185 (N.J.Super.A.D. 1988).....	5,6
<u>Malan v. Lewis</u> 693 P.2d 661 (Utah 1984).....	1,2,4
<u>McFarland v. Skaggs Companies Inc.</u> 678 P.2d 298 (Utah 1984).....	3,4
<u>Moniodis v. Cook</u> 494 A.2d 212 (Md.App. 1985).....	6
<u>Rutherford Education Assn. v. Board of Ed.</u> 489 A.2d 1148 (N.J. 1985).....	5
<u>Timpanogos Planning & Water Management v. Central Utah Water Conservancy District</u> 690 P.2d 562 (Utah 1984).....	2,3,4
<u>Wise v. Southern Pacific Co.</u> 223 Ca.App.2d 50, 35 Cal. Rptr. 659 (1953).....	6
<u>Woolley v.Hoffman-LaRoche Inc.</u> 491 A.2d 1257 (N.J.1985).....	5,6

FILING OF RESPONSE

Plaintiff's Response to Defendants' Petition for Rehearing is filed pursuant to Rule 35, Rules of the Utah Court of Appeals, and at the specific request of the Court.

REPLY TO DEFENDANTS' ARGUMENT FOR REHEARING

REPLY TO POINT I.

THE BERUBE CASE SHOULD APPLY RETROACTIVELY TO THE INSTANT CASE. DEFENDANTS HAVE MISREPRESENTED CASE LAW ON THE QUESTION OF RETROACTIVITY.

In reversing the lower court's summary judgment for Defendants, this court relied on Berube v. Fashion Centre Inc. Ltd, 104 Utah Adv. Rep 4, decided recently by the Utah Supreme Court. (The facts and the course in the lower court of that case are remarkably similar to the instant case.) Defendants, in their petition for rehearing, argue that Berube should not be applied retroactively to the instant case. In so arguing, Defendants have quoted most selectively from among cases on the subject of retroactivity with the result that the picture presented can at best be described as distorted.

Defendants, for instance, ignore Malan v. Lewis. 693 P.2d 661 (Utah 1984), a significant Utah case on the question of retroactivity and a case similar to the instant case concerning that issue. In Malan, the lower court granted summary judgment to defendants on the grounds that the Utah

Guest Statute (which had previously been found constitutional) precluded plaintiff's suit. On appeal, the Utah Supreme Court reversed earlier positions that the Guest Statute was constitutional, held the statute unconstitutional and ordered a trial for plaintiffs. Defendants petitioned for a rehearing, contending that the ruling that the statute was now unconstitutional should be applied prospectively only. The court denied the petition for rehearing, defining the Utah position on retroactivity:

The general rule from time immemorial is that the ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively...in the vast majority of cases a decision is effective both prospectively and retrospectively, even an overruling decision...Whether the general rule should be departed from depends on whether a substantial injustice would occur...

We may, in our discretion, prohibit retroactive operation where the 'overruled law has been justifiably relied upon or where retroactive operation creates a burden.' Loyal Order of Moose, 657 P.2d at 265...

The defendants in this case do not argue that they justifiably relied on our prior decisions sustaining the constitutionality of the Guest Statute. There is no evidence that the defendants knew of the Guest Statute and relied upon it in offering a ride to the plaintiff. The bare assertion by defendants that our decision overrules prior cases sustaining the constitutionality of the Guest Statute is insufficient to prohibit its retroactive application. [At 676; emphasis added.]

Malan was quoted and followed in the later case of Belden v. Dalbo Inc., 752 P.2d 1317 (Uth App. 1988).

The Defendants here rely on Timpanogos Planning & Water Management v. Central Utah Water Conservancy District, 690 P.2d 562 (Utah 1984). But the Supreme Court in Malan

specifically rejected that case as support for prospective only application of the Guest Statute ruling, pointing out that the ruling in Timpanogos was prospective only because of the actual reliance on the statute by various entities. In Timpanogos, members of certain boards had been appointed by a method later found unconstitutional. The court ruled that giving that determination retroactive application would call into question all of the actions taken by the board and would unreasonably burden the administration of justice. That would not be the situation in the instant case.

The Supreme Court had earlier discussed the standards concerning retroactivity in criminal cases in Andrews v. Morris, 677 P.2d 81 (Utah 1983), and "explicitely adopted[ed] the following analytic standards for determining the retroactivity of new rules....:1) the purpose to be served by the new rule; 2) the extent of reliance on the old rule, and 3) the effect on the administration of justice of a retoractive application of the new rule. " [At 91.]

Although these were the standards for examining the question in a criminal case, they can easily be adapted in the analysis of a civil case.

The Defendants rely on McFarland v. Skaggs Companies Inc., 678 P.2d 298 (Utah 1984), where the court discussed whether a new actual malace standard should be applied prospectively only. The court did discuss the general rule as quoted in Defendants' Petition but Defendants failed to quote the *application* of the general rule in that case. The

court declined to limit the application of the new standard to future cases, pointing out: "There is no showing of reliance upon the former standard or of any resulting burden to the administration of justice. We therefore hold that the Sunburst doctrine does not preclude application of the new 'actual malice' standard in the present case." [At 305.]

Likewise, in the instant case, Defendants have shown no reliance on the pre-Berube standard nor have they shown any great burden on the administration of justice that would result from a retroactive application of Berube. Under the Malan case, their bare assertions are insufficient to prohibit retroactive application. If Plaintiff Gilmore prevails, the fact that Defendants would face "the possibility of a judgment for Gilmore's back pay in a catastrophic amount" (as they describe it in their petition) is not the type of burden on the administration of justice that the Timpanogos case spoke of. That may be a burden on Defendants but it is not a burden on the administration of justice. Defendants could have avoided such a "catastrophic" possibility simply by following the rules that they promulgated and discharging Gilmore properly.

Defendants present a less than accurate picture of the retroactive application of rulings in wrongful discharge cases in New Jersey. They cite Bimbo v. Burdette Tomlin Memorial Hospital, 644 F.Supp. 1033 (D.N.J. 1986), as support for their position. In Bimbo, the federal court in New Jersey refused prospective application of a New Jersey

Supreme Court case (Woolley v. Hoffman-LaRoche Inc., 491 A.2d 1257 (N.J. 1985)), which had for the first time recognized an exception to the at-will doctrine based on a contract implied from a policy manual (as Berube has done in Utah). What Defendants failed to point out to this court in their petition is that the New Jersey state court specifically rejected this federal court interpretation of its law in Cole v. Carteret Savings Bank, 540 A.2d 923 (N.J. Super. L. 1988): "This court respectfully disagrees with that holding [in Bimbo] and concludes that the Supreme Court in Woolley intended to include all claimants." The court also pointed out that the New Jersey Supreme Court in Rutherford Education Assn. v. Board of Ed., 489 A.2d 1148 (N.J. 1985), had thoroughly analyzed the retroactive-prospective application of its decisions:

Not only is it made clear that retroactive application is presumed, but a review of the various factors the court listed to apply in such test, makes it abundantly clear that a *breach of an implied contract would be the type of justifiable claim that would be considered retroactively.* [At 927; emphasis added.]

The prospective application of the Woolley case was explored again in Grigoletti v. Ortho Pharmaceutical, 545 A.2d 185 (N.J. Super. A.D. 1988):

The theory underpinning prospective application of important changes in the law is that retroactivity is unfair to those who relied on the prior state of the law... Here, plaintiffs contend that Ortho voluntarily published a set of employment promises in the manual upon which the plaintiffs relied and that Ortho failed to live up to those promises. Assuming that these claims are

established, Ortho's only unfairness defense to the retroactive application of Wooley would have to be that it never intended to live up to the promises contained in the manual it published, and upon which its employees allegedly relied. That argument will not wash. *If plaintiffs are proved, there would be nothing unfair about holding Ortho to workplace standards it voluntarily promulgated.* [At 189; emphasis added.]

RESPONSE TO POINT II.

THE INDIVIDUAL DEFENDANTS ARE
PERSONALLY LIABLE.

Defendants briefed this point in their original Brief of Respondents. In fact, the argument in their Petition for Rehearing is a verbatim repeat of that portion of their original brief.

Plaintiff replied to that argument in his Reply Brief, pages 21-23, and will not repeat the argument here. In summary, however, Plaintiff will point out:

1. Golden v. Anderson, 256 Cal.App.2d 714, 64 Cal.Rptr. 404 (1967), cited by Defendants, reaches the conclusion opposite to that suggested by Defendants and holds that corporate officials may be held personally liable.
2. Wise v. Southern Pacific Co., 223 Ca.App.2d 50, 35 Cal. Rptr. 659 (1953), cited by Defendants, concerns conspiracy and has no application to the instant case.
3. Moniodis v. Cook, 494 A.2d 212 (Md.App. 1985), ignored by Defendants, directly addressed the question of whether an employee or an officer of a corporation can be sued individually and held liable for the wrongful discharge of an employee and discussed the criteria for answering that

question. Applying those criteria to the Gilmore case would lead to an answer in the affirmative.

See Reply Brief of Plaintiff/Appellant for the expanded discussion of these points.

CONCLUSION

Based on the foregoing, Plaintiff respectfully asks this court:

1. To refuse to rehear this case, or
2. If the case is reheard, to rule:
 - a. That the Berube case does have retroactive application,
 - b. That the individual Defendants may be held personally liable.

Plaintiff also seeks an award of costs pursuant to Rule 34, Rules of the Utah Court of Appeals.

DATED: 6-29-89

Nann Novinski-Durando

Nann Novinski-Durando
Attorney for Plaintiff

DATED: 6-29-89

Mark S. Miner

Mark S. Miner
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on June 29, 1989, I mailed by first class mail, postage pre-paid, four copies of Plaintiff's Response to Defendants' Petition for Rehearing to John K. Rice and Stephen W. Cook, Cook & Wilde, P.C., attorneys for Defendants, Suite 490, 6925, Union Park Center, Salt Lake City, Utah 84047.

Nann Novinski-Durando

Nann Novinski-Durando