

1977

Julie White v. State of Utah, Utah State Industrial  
Commission, Don Christiansen, Administrator,  
Utah State Occupational Safety And Health  
Division of The Utah State Industrial Commission :  
Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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JULIE WHITE,

Plaintiff and  
Appellant.

-VS-

STATE OF UTAH, UTAH STATE  
INDUSTRIAL COMMISSION, DON  
CHRISTIENSEN, ADMINISTRATOR,  
UTAH STATE OCCUPATIONAL SAFETY  
AND HEALTH DIVISION OF THE UTAH  
STATE INDUSTRIAL COMMISSION,

Defendants and  
Respondents.

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BRIEF OF

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APPEAL OF THE ORDER OF THE  
CACHE COUNTY, STATE OF UTAH  
VENOY CHRISTOFFERSEN

GORDON J. LOW, Esq.  
Millyard, Gunnell & Low  
175 East First North  
Logan, Utah 84321

Attorney for  
Plaintiff-Appellant

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AND HEALTH DIVISION OF THE UTAH  
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Respondents.

CASE NO. 15340

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

The Respondent State of Utah is responding to an appeal from a Memorandum Decision and Order of the Honorable VeNoy Christoffersen, Judge of the First Judicial District Court of Cache County, dismissing Appellant's cause of action.

## DISPOSITION IN THE LOWER COURT

Upon Motion by Respondents, the District Court below dismissed the cause of action filed by Appellant.

## RELIEF SOUGHT ON APPEAL

Respondents seek to have the Order of Dismissal affirmed.

## STATEMENT OF FACTS

The Statement of Facts contained in Appellant's brief sets forth a number of allegations based on the Complaint (R-1) and because this is an appeal to review an Order dismissing the Case, there have been no responsive pleadings or discovery proceedings, and Respondents therefore have no basis to agree or disagree with those allegations, except as to the course of this action.

A Notice of Claim was filed with the Attorney General in June of 1976, upon which no action was taken. Suit was then brought in the First District Court, County of Cache, against Respondents to seek relief for injuries allegedly suffered by the Appellant. There were no responsive pleadings filed to Appellant's Complaint (R-1). Respondents' Motion

to Dismiss (R-10) was filed with the lower Court and a Memorandum of Points and Authorities (R-12) and a Supplemental Memorandum of Points and Authorities (R-18) in support thereof were filed with the Court. Appellant filed an opposing Memorandum (R-21).

Based on these memorandums, the Court below dismissed the action. See: Memorandum Decision (R-26). The lower Court held that Appellant's cause of action arose out of the exercise and discharge of a governmental function, and thus was barred by governmental immunity, since the State had not waived sovereign immunity for failure to conduct an inspection or for an inadequate inspection or for an inadequate or negligent inspection (R-26, 28). The lower Court held further that Section 35-9-13, Utah Code Annotated 1953, as amended, did not provide a remedy to the Appellant to sue the State for relief and that the State or its agencies could not be held liable for Appellant's injuries (R-27, 28).

Appellant now appeals the Order of lower Court dismissing her cause of action.

# A R G U M E N T

## POINT I

THE TRIAL COURT PROPERLY DISMISSED THE ACTION BY FINDING THAT THE APPELLANT COULD NOT MAINTAIN AN ACTION UNDER SECTION 35-9-13, UTAH CODE ANNOTATED 1953, AS AMENDED

The Utah Occupational Safety and Health Act of 1973 was passed to supplement and create a new division of the State Industrial Commission, the Occupational Safety and Health Division (hereinafter "OSHD"). Title 35, Chapter 9, Utah Code Annotated 1953, as amended. (All references hereinafter shall be to the Utah Code Annotated 1953, as amended, unless otherwise noted.) The OSHD is empowered through an administrator to administer the law to ensure that every employee in the State has a workplace free of hazards. Section 35-9-4(1)(a). In order to accomplish that purpose, the Commission is to establish standards, rules and regulations to be followed by employers, Section 35-9-4, and the OSHD is charged with the enforcement of the standards, rules and regulations so established. Section 35-9-10.

Section 35-9-13 details the procedure which the Administrator of OSHD may follow if he is aware of an imminent danger in a place of employment which, by following the normal procedures of OSHD, could not be eliminated before such danger could



reasonably be expected to cause death or physical harm when the employer will not voluntarily remove the hazard. As outlined in the statute, the Administrator may petition any District Court to restrain any conditions or practices which meet the above mentioned criteria. Section 35-9-13(a), (b).

The Appellant seeks to hold the Respondents liable under subsection (d) of Section 35-9-13 which states in pertinent part:

"(d) If the administrator arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure . . . may bring an action against the administrator . . . for a writ of mandamus and for further appropriate relief."

The Appellant has relied on this subsection out of context and contends that the State has waived its immunity from suit by permitting the action against the Administrator and that, therefore, the Appellant may maintain a cause of action for damages against the Respondents. It is clear that subsection (d) must be read in light of the language of the preceding subsections, and that an action may be brought against the Administrator only if he arbitrarily or capriciously fails to petition the Court. A prerequisite to such judicial relief is that the Administrator must be aware of the dangerous conditions, which condition is discoverable only through inspections made by OSHD representatives pursuant to Section 35-9-8. After discovering the hazardous condition,

if the Administrator fails to obtain appropriate relief, then and only then may the employee bring an action against the Administrator.

To capriciously or arbitrarily fail to petition the Court to restrain a hazardous condition, implies a knowledge of such condition.

The record does not show that any inspections were made by OSHD, or that any complaints were filed with the OSHD by Del Monte employees. In Appellant's Brief (at page 2) and her Response to Defendants' Motion to Dismiss (R-21, 22) she alludes to inspections that were made in 1971 and 1972. Those inspections, however, were made prior to promulgation of the Occupational Safety and Health Act, which was passed in 1973, and therefore, before creation of the OSHD. There are no allegations in her Complaint of any inspections of her employment by the OSHD, nor is there any continuity between the authority given the Industrial Commission under Section 35-1-16 and the establishment of the OSHD by the Occupational Safety and Health Act of 1973. Appellant may not, therefore, maintain her action under Section 35-9-13(d) as the facts of her case do not meet the requirements of said Section in that: (a) the Administrator had not discovered an imminent danger as there were no inspections made of her place of employment, thus (b) he did not arbitrarily or capriciously fail to seek a court injunction as he had no cause to do so.

For the Court to hold that the Appellant has a cause of action under Section 39-9-13 is to hold that all who suffer injuries as the result of a dangerous condition while in the course of their employment have a cause of action for damages against the Administrator and the Industrial Commission, regardless of whether or not the Administrator was aware of the dangerous condition. In Olson v. State Industrial Commission, 538 P.2d 1038 (1975) the Court was concerned with a similar question which is dispositive of this issue. In that case, the Plaintiff was suing the State of Utah for failure to prevent an accident which had occurred in the course of Plaintiff's employment. The Court, referring to Section 35-1-16(1) (which states that the Industrial Commission has the duty to "enforce all laws for the protection of life, health, and safety and welfare of employees"), said that the State incurred no liability by not preventing the accident. Justice Henroid writing for a unanimous Court said:

"The citation of statutes and cases pointing up certain safety standards the State must meet, [Referring to Utah Industrial Commission regulations and Section 35-1-16] simply do not require the State to have done other than it did to meet the exigencies of the facts here, or to employ untold thousands to police every conceivable project whatever."  
[Emphasis added.]

Id. at 1040.

As Appellant states in her brief at page 5, the facts of Olsen are not identical to the present case, but the policy considerations are identical -- whether the statutes mandate that the State is to police every place of employment for potential hazards and thereafter incur liability when a hazard is not eradicated and someone is injured. The Court in Olsen held that the State did not incur any such liability.

Respondents respectfully submit that the facts of the case as plead by the Appellant do not support a cause of action under Section 35-9-13 as the requirements of the section have not been met.

## POINT II

APPELLANT'S ALLEGATIONS DO NOT SUPPORT A CAUSE OF ACTION AGAINST THE RESPONDENTS AS SUCH A CLAIM IS BARRED BY GOVERNMENTAL IMMUNITY.

As provided in Section 63-30-3, all governmental entities shall be immune from suit for any injury which arises out of the activities of said entities in the discharge of a governmental function. A governmental entity is defined to include the state and its political subdivisions, which definition encompasses the Respondents. Section 60-30-2(1), (3). Sovereign immunity is to be preserved through strict application of this Section and such is waived only when clearly expressed. Holt v. Utah State Road Commission, 511 P.2d 1286 (1973).

The doctrine of sovereign immunity, however, applies only to the discharge of "governmental functions", and not to proprietary activities. Greenhalgh v. Payson, 530 P.2d 799 (1975). In applying the factors set forth in Greenhalgh to determine whether an activity is governmental or proprietary (See: Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss, R-14), it is clear that Appellant's activities fall within the governmental function and would not, therefore, be subject to any claim by Appellant.

Immunity from suit, however, has been waived for injury proximately caused by a negligent act or omission of a government employee committed within the scope of his employment unless the act or omission is a specifically enumerated exception to the waiver. Section 63-30-10. Two of those exceptions are directly applicable to the present case. The statute and applicable exceptions state:

"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 except if the injury:

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

(4) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property."

Section 60-30-10.

The first exception states that immunity is not waived for those functions which are discretionary. Appellant deals with this exception indirectly in her brief. She claims relief under Section 35-9-13 by stating that the Administrator failed to seek relief as mandated by the statute and that he, therefore, was not performing a discretionary function. Appellant claims that because the statute requires the Administrator to petition the Court for a Restraining Order, his acts are at the "operational level of government and, therefore, do not fall within the exception of Section 63-30-10(1). The judicial relief of Section 35-9-13 is not available to an employee unless an inspection is made under Section 35-9-8 by the Administrator or his representative. The natural reading of Section 35-9-13 demands that the Administrator have an accurate knowledge of the hazardous condition before he can "arbitrarily and capriciously" fail to seek a Court injunction.

The OSHD Administrator can only obtain knowledge of such hazardous conditions through inspections of a workplace by himself or his representatives. Section 35-9-8. Such a function, the conducting of inspections, is clearly a discretionary function of the Administrator, for even upon receipt of a complaint by an employee of the existence of a hazard, the Administrator is to conduct such an investigation.

only upon reasonable grounds to believe that a violation or danger exists. Sections 35-9-4, 35-9-8. Respondents submit that Section 63-30-10(1) bars Appellant's claim, as the conduct of an investigation is discretionary with the Administrator.

In addition, Section 63-30-10(4) provides the second applicable exception to the waiver of immunity. It states that the governmental entity has not <sup>A</sup>w~~iv~~ed its immunity if the action arises out of a failure to perform an inspection or to perform such inadequately or negligently. Under the facts of the present case, Appellant seeks to hold the State liable for an inspection that was never conducted and an obvious reading of Section 63-30-10(4) bars any recovery for such a claim. The entire thrust of Appellant's argument under Point II of her brief is based upon the OSHD Administrator's alleged awareness of the alleged hazardous condition of the Del Monte plant, but Appellant has failed to show or allege in the pleadings that any inspections of the plant were ever carried out by the OSHD Administrator or his representatives. Section 63-30-10(4) bars any claim for injury for failure to make an inspection and, therefore, is a barrier to any recovery against the Respondents.

### POINT III

THE TRIAL COURT PROPERLY DISMISSED THE ACTION AS APPELLANT HAS NOT PRESENTED AN APPROPRIATE CLAIM OF RELIEF AS INTENDED BY THE LEGISLATURE UNDER SECTION 35-9-13.

Appellant is seeking relief for alleged damages using as authority for her claim, Section 35-9-13(d) which provides that an employee may bring an action against the Administrator "for a writ of mandamus and for further appropriate relief". Appellant relies on the phrase "for further appropriate relief" to support her claim for damages against the State. The issue presented by Appellant's claim is whether the phrase "for further appropriate relief" will support a claim for money damages against the State to compensate for an alleged injury suffered while in the course of her employment.

Under the generally accepted statutory construction doctrine of "ejusdem generis", a generally descriptive word or phrase which follows a specifically designated class of persons or things is to be interpreted as meaning the same general nature or class of persons or things it is preceded by. The rule is stated as follows:

"Under the rule of construction known as "ejusdem generis", where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the



obvious reason that if the legislature had intended the general words to be used in their unrestricted senses they would have made no mention of the particular classes."

82 Corpus Juris Secundum "Statutes", Section 332(b), p. 658.

Though the doctrine of ejusdem generis is most often applied to phrases which normally have more than one specific item enumerated and then followed by the general term, it is certainly applicable in this case to aid the Court in determining the full force of the term "further appropriate relief". A general term preceded by a specific term is restricted by that specific term. See: Hatch Company v. Public Service Commission, 3 Utah 2d 7, 277 P. 2d 809 (1954); Townsend v. Board of Review of Industrial Commission, 493 P.2d 614 (1972).

The main import of Section 35-9-13 is to give the courts jurisdiction to issue restraining orders upon petition of the Administrator to restrain any hazardous condition which the employer fails to remove voluntarily. Subsection (d) of that section permits an employee to bring an action against the Administrator for a writ of mandamus compelling the Administrator to petition the Court for such a restraining order. The subsection also permits the employee to seek other forms of relief if appropriate for the particular circumstances of the case. Interpreting the statute in view of the ejusdem generis doctrine, it is clear that the "further

appropriate relief" is to be relief consistent in form with the writ of mandamus. It is equally clear, however, that a suit for damages against the Administrator is quite a different form of relief than the writ of mandamus and does not fit generally with the interpretation and general meaning of Section 35-9-13. If the legislature had intended to permit suits for damages against the Administrator for his arbitrary or capricious failure to petition the Court, they would have expressly provided for such in the statute.

Another ~~argument~~ argument which supports the view that an action for damages may be brought against the administrator only if expressly provided for is found in Holt v. Utah State Road Commission, 511 P.2d 1286 (1973). In interpreting the Governmental Immunity Act, specifically Section 63-30-3, the Court stated that the doctrine of sovereign immunity is to be preserved, and will be deemed waived only when expressly provided for in the statute. To find that a suit for damages may be maintained against the administrator under Section 35-9-13, is to broaden the waiver of governmental immunity and controvert the policy and intent of the legislature in passing the Governmental Immunity Act and past decisions of this Court regarding sovereign immunity.

Respondents respectfully submit that Appellant has not sought for appropriate relief under Section 35-9-13. The doctrine of ejusdem generis and the policy of preserving

governmental immunity do not permit such a loose interpretation of subsection (d) of that statute so as to permit an action for damages against the State. It is clear from the face of the statute, that the legislature did not intend for such a result, nor do the accepted principles of construction allow such a result.

### CONCLUSION

Appellant's cause of action was properly dismissed by the Court below in that Section 35-9-13 supports no claim for relief against the Administrator and is further clearly barred under the terms of the Governmental Immunity Act. For the reasons stated above, Respondents pray that the Order of Dismissal of the First Judicial District Court of Cache County be affirmed.

Respectfully submitted,

ROBERT B. HANSEN  
Attorney General

HARRY E. McCOY II  
Special Assistant Attorney General

CERTIFICATE OF MAILING

This is to certify that I mailed two (2) copies of the foregoing Brief of Respondents to Gordon J. Low, Esq., of Hillyard, Gunnell and Low, 175 East 100 North, Logan, Utah, 84321, attorneys for Plaintiff-Appellant, postage thereon fully prepaid, this \_\_\_\_\_ day of October, 1977.

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