

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 : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

JULIE WHITE, *

Plaintiff-Appellant *

vs. *

Case No. 15340

STATE OF UTAH, UTAH STATE *
INDUSTRIAL COMMISSION, DON *
CHRISTIANSEN, Administrator *
UTAH STATE OCCUPATIONAL *
safety AND HEALTH DIVISION *
OF THE UTAH STATE INDUSTRIAL *
COMMISSION, *

Defendants-Respondents *

APPELLANT'S REPLY BRIEF

APPEAL OF THE ORDER OF THE FIRST JUDICIAL DISTRICT COURT OF
CACHE COUNTY, STATE OF UTAH, THE HONORABLE
VENOY CHRISTOFFERSEN, JUDGE, PRESIDING.

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AUTHORITIES CITED

	Page
Utah Code Annotated, Section 35-9-13(d)	1, 2
Utah Code Annotated, Section 63-30-10	4

CASES CITED

<u>Carroll v. State Road Commission</u> , 27 U. 384, 496, P. 2d 888 (1972).	4
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IN THE SUPREME COURT OF THE
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JULIE WHITE,	*	
plaintiff-Appellant	*	
vs.	*	Case No. 15340
STATE OF UTAH, UTAH STATE	*	
INDUSTRIAL COMMISSION, DON	*	
CHRISTIANSEN, Administrator	*	
UTAH STATE OCCUPATIONAL	*	
safety AND HEALTH DIVISION	*	
OF THE UTAH STATE INDUSTRIAL	*	
COMMISSION,	*	
Defendants-Respondents	*	

APPELLANT'S REPLY BRIEF

Respondent correctly states that this appeal is one to review an Order dismissing the above entitled case and one in which there have been no responsive pleadings or discovery proceedings. Herein lies Appellant's very point - that based on the pleadings and record before the lower Court, there were insufficient grounds for issuing the Order to Dismiss. Clearly there needs to be a trial on the merits in order that Appellant may properly present evidence relevant to the case.

First and foremost, Appellant has a proper remedy as provided in § 35-9-13(d) Utah Code Annotated, 1953 [hereinafter cited as U.C.A.]. Although it is not specifically stated, Appellant may seek appropriate relief if the Administrator

has arbitrarily or capriciously failed to correct a hazardous condition. Whether the conditions are made manifest to the Administrator through inspection turns on the facts and proof, which Appellant has already stated she is prepared to present at trial. The lower court, however, arbitrarily failed to recognize this eventuality in dismissing the action without trial. Whether the inspections were made by the Administrator or his agents is subject to a determination by a trier of fact and is not the proper basis of a motion to dismiss.

Secondly, Respondents themselves admit that action may be brought by an employee against the Administrator if he arbitrarily or capriciously fails to obtain appropriate relief. Respondent's brief, p. 6. However, contrary to Respondent's contention, the statutory construction doctrine of "ejusdem generis" can not and does not apply in the instant case because here in § 35-9-13(d) a general word does not follow an enumeration of persons or things by which the meaning of that general word must be colored. "Appropriate relief" is preceded only by a "writ of mandamus" in part (d). Further, if Respondent's interpretation were correct there must be some other "appropriate relief" which the legislature deemed consistent in form with the Writ of Mandamus. Respondent's conspicuously fail to edify the Court concerning the legislature's intention on this point. To simply say that the legislature would have expressly provided for the remedy here requested if it had so intended

is to simply imply a statutory lucidity and precision which are notoriously lacking. Rather, it is this Court's prerogative to interpret what the statutes do say within both the context of the section and the context of the chapter which embody the disputed text.

With this prerogative in mind, Appellant respectfully submits that "further appropriate relief" is not limited to the writ of mandamus, there being no other "form" similar to this summary writ. "[F]urther appropriate relief" must include relief in damages to comfort with the preceding text. The elected representatives who drafted this particular legislation had the welfare of the people in mind. The Occupational Safety and Health Act was an attempt to ameliorate the problems of bureaucratic favors, convenient oversights and financial kickbacks which previous law could not prohibit and which encouraged the maintenance of hazardous working conditions by businesses. The Act, an instance of effective consumer legislation which requires governmental action, not inaction, should not be stripped of the impact which it was created to have. The State should and must be held accountable for negligence which amounts to professional malpractice. Appropriate relief in the instant case is properly sought in this suit for damages in negligence.


Finally, conceding this Court's pronouncements that sovereign immunity shall be preserved and shall only be waived under the specific exceptions, some of which are

enumerated in §63-30-10 U.C.A., Appellant submits that the State has waived immunity to the facts. Appellant does not allege negligent inspections, the facts of which Respondent insists on arguing despite the lack of discovery proceedings or trial. However, Appellant does affirmatively submit that the immunity waiver exception of §63-30-10(1) does not bar action in this case. §63-30-10(1), U.C.A. provides that the State waives immunity from suit for an action arising out of the exercise or failure to exercise a discretionary function. The decision not to enforce a penalty for violating a State regulation - that is, the Administrator's failure to enforce the statutes and regulations concerning the existence of hazardous working conditions - is at the "operational" level rather than at the "discretionary" level of decision making. The policy, program or objections of the Occupational Safety and Health Act were not affected by the Administrator's inaction; the act was not discretionary. See Carroll v. State Road Commission, 27 U. 2d 384, 496 P. 2d 888 (1972). Appellant respectfully submits that it is an operational decision whether or not to correct known violations of the Occupational Safety and Health Act and the regulations promulgated thereunder. Therefore, the State has waived immunity for the negligence of an employee committed within the scope of his employment.

For the reasons stated above, Appellant prays that the Order of the lower Court be reversed or remanded for trial on the merits.

Respectfully Submitted,

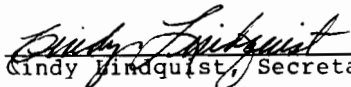
HILLYARD, GUNNELL & LOW



Gordon J. Low
Attorney for Plaintiff-Appellant

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Brief was mailed, postpaid to attorneys for Defendants-Respondents, ROBERT B. HANSEN, Attorney General and HARRY E. McCOY II, special Assistant Attorney General, 2000 Beneficial Life Tower, Salt Lake City, Utah 84111 this 9th day of December, 1977.



Cindy Lindquist, Secretary