

1986

Lee R. Meyers v. Salt Lake City Corporation, a municipal corporation of the State of Utah : Brief of Appellant

Utah Supreme Court

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Roger F. Cutler; Salt Lake City Attorney; Greg R. Hawkins; Assistant City Attorney; attorneys for appellant.

Timothy C. Houpt; Houpt, Eckersley & Downes; attorney for respondent.

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DOCKET NO. 860183-CA

IN THE SUPREME COURT

OF THE STATE OF UTAH

860183-CA

LEE R. MEYERS,

Plaintiff and Respondent,
vs.

SALT LAKE CITY CORPORATION, a
municipal corporation of
the State of Utah,

Defendant and Appellant.

Corr # 860141

13b

BRIEF OF APPELLANT SALT LAKE CITY CORPORATION

Appeal from decision rendered by the
Third District Court for Salt Lake County
Honorable Kenneth Rigtrup, presiding

ROGER F. CUTLER
Salt Lake City Attorney

GREG R. HAWKINS
Assistant City Attorney
100 City & County Building
Salt Lake City, Utah 84111

Attorneys for Appellant

Timothy C. Houpt
HOUP, ECKERSLEY & DOWNES
419 Boston Building
Salt Lake City, Utah 84111

Attorney for Respondent

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LEE R. MEYERS,

Plaintiff and Respondent,

vs.

SALT LAKE CITY CORPORATION, a
municipal corporation of
the State of Utah,

Defendant and Appellant.

Case No. 860141

BRIEF OF APPELLANT
SALT LAKE CITY CORPORATION

I

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Is a letter from the police department, notifying a complaining citizen of the results of an internal investigation an "admission against interest" in a subsequent civil tort suit for the allegedly tortious conduct of the police officer?

2. Is an internal police department investigation of alleged police officer misconduct (which is undertaken for the purpose of determining whether or not an officer's actions warrant administrative action pursuant to civil service regulations) considered to have the same standards and elements as tort negligence, so that an administrative finding of police misconduct is also an admission of tort liability?

3. Is the evidentiary value of the results of an internal

police investigation of alleged police officer misconduct (undertaken for administrative purposes) outweighed by "unfair prejudice", "confusion of issues" and "misleading the jury", so that it should have been excluded from evidence under Rule 404 of the Utah Rules of Evidence?

4. Does public policy (which requires prompt, fair and open investigations of alleged police misconduct by superiors), give the City a privilege or justification to insist that findings of police officer misconduct and any sanctions imposed against an officer be excluded from evidence in a subsequent civil tort trial, under the provisions of Section 78-24-8 Utah Code Ann., 1953?

5. Is an internal investigation of alleged police officer misconduct, its findings and any administrative sanctions imposed on a police officer excludable evidence from a civil tort trial as "Subsequent Remedial Measures" under the provisions of Rule 407 of the Utah Rules of Evidence?

II

STATEMENT OF CASE

Plaintiff-Meyers sued Salt Lake City, under the doctrine of respondeat superior for the alleged negligent or willful and intentional misconduct of a police officer, who purportedly shut plaintiff's leg in a car door when this citizen attempted to exit his vehicle after disobeying police traffic control instructions. During trial, the issue arose as to whether or not to

admit a letter from the Police Department to the Plaintiff, which informed the Plaintiff-Meyers of the results of his complaint.

III

COURSE OF PROCEEDINGS

The intentional and willful misconduct allegations of the complaint were dismissed, upon stipulation of the parties, and the case proceeded to trial upon the negligence cause of action. Contrary to Salt Lake City's Motion in Limini and over trial objection, the lower court admitted, in evidence, a letter from the police department, advising Plaintiff-Meyers, in general terms, of the results of an internal affairs police investigation; the Court ruled the letter constituted an "admission against interest." A subsequent motion by the City for a new trial, based on the error of admitting the subject letter, was denied.

IV

DISPOSITION IN COURT BELOW

The jury found Salt Lake City liable and awarded damages totalling \$26,962.84. The Court entered Judgment against Salt Lake City for the sum of \$22,676.55.

V

STATEMENT OF FACTS

The facts, when viewed in a light most favorable to the jury verdict, demonstrate the following:

1. During the floods of 1983, water was diverted down State

Street in Salt Lake City, necessitating a rerouting of traffic.
(R-2)

2. Officer James R. Nelson was stationed at 600 South and Main Street, in his official capacity as a sworn City police officer, to direct that traffic. (R-2,3)

3. Plaintiff-Meyers was driving southbound on Main Street looking to make a left turn to proceed east. (R-2).

4. An argument developed between Plaintiff-Meyers and Officer Nelson as to whether or not Plaintiff-Meyers was allowed to turn left. (R-3) Officer Nelson struck Plaintiff-Meyers' vehicle to stop. Plaintiff-Meyers stopped, opened his car door and attempted to exit the vehicle. Nelson attempted to keep Mr. Meyers in the car by forcing the door shut and Plaintiff-Meyers' foot was caught between the door and the car. Plaintiff-Meyers claimed injury from the door being closed on his ankle. (R-246; R-239,240)

5. Plaintiff-Meyers complained to Salt Lake City Police Internal Affairs Department concerning the conduct of Officer Nelson. Under Civil Service Rules and State law, the police chief has the duty to supervise this para-military force and may administer discipline for up to 15 days, without appeal rights of the officer; more severe sanctions permit an appeal to a citizen member Civil Service Commission. Section 10-3-909-912; 10-3-1001-13 Utah Code Ann., 1953, as amended. Thus, pursuant to departmental practice, an department investigation was conducted

to determine if some police administrative action was in order against Officer Nelson. (R-182)

6. During a police department internal investigation, the officer is required, on pain of dismissal, to give a statement. (R-89) No Miranda warning is usually given and the inquiry is directed at determining if the officer violated department rules, procedure or Civil Service Rules and Regulations, including such ethical and public policy matters as acting in a manner to "bring discredit on the department." Salt Lake Civil Service Rule 2.2-6(e), Appendix C; (R-88, 89)

7. The Internal Affairs Division of the City police department conducted an investigation of Plaintiff-Meyers' complaint. It found the actions of Officer Nelson inappropriate for a City officer and notified the Chief of Police, who imposed administrative sanctions on the officer, which included a one day suspension. (R-184) All of these events occurred prior to the filing of any civil suit by Plaintiff-Meyers. (R-3)

8. Plaintiff-Meyers was notified of the disposition of the Internal Affairs complaint by letter from Lt. Duncan of the Internal Affairs Division. The letter stated the complaint was "sustained". "Sustained" was defined in the letter as a ruling that: "the event did occur and the officer is guilty of the complaint alleged or other infraction." (R-183, emphasis added; attached as Appendix "A")

9. Plaintiff-Meyers subsequently filed civil suit, alleging

negligent and willful misconduct on the part of Officer Nelson. (R-2, 3) He, further, asserted the City was vicariously liable under the doctrine of respondeat superior. (R-2, 3) To prove the alleged negligence, Plaintiff-Meyers sought to introduce the police department's Internal Affairs investigation and letter to him, advising that his complaint to the police had been investigated and that Officer Nelson had been found to have acted inappropriately. (R-183, 275) Defendant-Salt Lake City objected vigorously to the discovery of internal affairs investigation matters and made a Motion in Limini to exclude from evidence all materials pertaining to the Internal Affairs investigation, including the subject letter. (R-227-228, 276-280)

10. The lower court took the Motion in Limini under advisement, with the indication that such evidence would not be admitted. (R-282)

11. However, at trial, just before close of Plaintiff-Meyer's case, Judge Rigtrup reversed his previous direction and admitted the Internal Affairs letter from Lt. Duncan. The stated grounds for admission of the letter was that the letter was an "admission against interest." (R-284). Not discussed by the Court were the City's evidentiary objections, other than the hearsay rule. A subsequent motion for a new trial was briefed and argued before Judge Rigtrup, based again on the error of admitting the letter. The motion was denied. (R-253)

12. The jury returned a verdict against Salt Lake City for

the acts of Officer Nelson and assessed damages in the sum of \$26,962.84.

VI

SUMMARY OF ARGUMENT

1. Rule 407 applicable. Rule 407 of the Utah Rules of Evidence clearly provides that evidence of subsequent measures taken to avoid future harm or to make a similar event less likely to occur is not admissible to prove negligence in a civil suit. Public policy demands that people take steps in the furtherance of safety and judicially treating corrective acts as admissions of liability would chill that sound policy.

Investigations of police misconduct, discipline or retraining are subsequent measures protected by this public policy. Among others, the reasons for disallowing the results of an internal investigation and results of sanctions imposed against a police officer for misconduct are the following:

(1) The City and the police administration would be discouraged- from making a timely, independent and comprehensive evaluation of a citizen's charge of police misconduct, if any subsequent discipline or finding would constitute an admission of civil liability;

(2) There would be a motivation to "whitewash" or make the findings justify otherwise improper conduct in order to build a record of non-liability in subsequent civil litigation;

(3) Allowing these matters in evidence would be a

motivation to delay any investigation past applicable statutes of limitation or past the conclusion of civil cases and, thus, delay retraining, termination of a bad officer or other appropriate corrective sanctions against errant police officers; and

(4) Confidence and respect for civilian control of the para-military police forces of the City would be undermined if delay, whitewash or secrecy of results were maintained.

A complaining citizen has a right to expect and to receive knowledge that his complaint was timely addressed and to be advised, at least generally, of the results of that investigation.

Thus, the underlying philosophy and express provisions of excluding subsequent remedial activities found in Rule 407 are applicable to police internal affairs investigations and any sanctions or notice of that investigation. The lower court erred and must be reversed as a statement of public policy.

2. The subject letter was not competent, relevant or material. A letter written to a citizen advising him that his complaint of police officer misconduct had been received, the issues investigated and that the Officer was ". . . guilty of the complaint alleged or other infraction" was not competent, relevant or material to the tort issues of negligence.

The issues of negligence are whether or not a defendant breached the "duty of due care" owed by a "reasonable man" to a defendant under the circumstances, and whether or not the breach

of duty caused injury. Contrarywise, an internal affairs investigation is concerned with whether or not the police administrative rules or policies were violated. Included in such a review is the non-tort concept of whether the police officer acted in a manner to "bring discredit to the department."

Because the elements of determining whether or not an officer violated the rules and regulations of the department are totally dissimilar to the elements of tort, the finding of a violation of police rules is not an admission of tort negligence. The lower court erred in admitting the letter as an "admission against interests" when the letter merely advised the complaining citizen that his complaint had been sustained and that the officer had violated the rules of the department.

The prejudicial effect of the admission and the abuse of discretion of the lower court is apparent from the verdict. The undisputed evidence demonstrated that the citizen had refused to follow the lawful orders of a police officer in directing traffic during a flood emergency and then attempted to exit his vehicle in a threatening situation. The officer was attempting to keep Mr. Meyer in the car and the undisputed testimony demonstrated that the alleged injury to his ankle could not have occurred in a pincer movement; it would have had to have occurred in a twisting motion. Plaintiff-Meyers admitted he sustained a twisting injury to the same ankle in elk and deer hunting incidents, following the confrontation with Officer Nelson.

The admission of the subject letter was prejudicial and was tantamount to an improper directed verdict on the issues of liability. Thus the lower court should be reversed on the basis that the letter and the results of the investigation were irrelevant, immaterial and incompetent on the tort issues before the jury.

3. Any relevance and materiality of the letter was totally outweighed by the prejudicial effect. In the context of this litigation, the judge had indicated in response to the City's Motion in Limini that the letter was inappropriate and would not be admitted. Near the conclusion of the trial, the Court reversed this preliminary indication and gave the letter to the jury as an "admission against interest."

The letter discusses the Officer being "guilty" of the matters alleged by the complainant or "other applicable regulations." Any marginal relevance, materiality or competence of the letter on the issue of negligence are off-set by the substantial prejudice apparent from the wording of the letter, against the employing entity of the police officer, Salt Lake City Corporation.

The letter was written in fulfillment of public policy dictating a fair and prompt review of a citizen complaint charging police misconduct. The letter was written in furtherance of the public right to be informed of the results of such an investigation. The prejudicial aspect of the letter in

this context should have been recognized by the lower court and excluded from evidence to protect the City against prejudice and preserve the societal interests it was seeking to advance.

VII

RELIEF SOUGHT ON APPEAL

The City seeks a ruling that police Internal Affairs investigations and reports thereof to complaining citizens are not admissible evidence in subsequent civil trials against the City or its police officers. The verdict should be vacated with instructions to the lower court to exclude the internal affairs letter from evidence in any future proceeding.

VIII

ARGUMENT

POINT I

THE LETTER IS INADMISSIBLE AS EVIDENCE BECAUSE
SUBSEQUENT MEASURES TAKEN TO PROTECT PUBLIC
SAFETY MAY NOT BE USED TO PROVE NEGLIGENCE.

Rule of Evidence 407 states,

"When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event."

Nearly a century ago, the United States Supreme Court explained the reasoning that eventually formed the basis for this rule:

"...The evidence is incompetent because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident

happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant." Columbia and Puget Sound Ry. Co. v. Hawthorne, 144 U.S. 202, 207, 36 L.Ed.405, 12 S.Ct. 591, 593 (1892) (Emphasis added).

The drafters of Rule 407 of the Federal Rules of Evidence, which was adopted verbatim by Utah, reiterated this reasoning in support of the modern rule;

"The rule rests on two grounds, (1) the conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence . . . (2) the other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." (Emphasis added) Advisory Committee Notes to Rules of Evidence 407.

Most modern writers and courts acknowledge the social policy rationale as the basis for Rule 407. See, 29 Am Jur 2d "Evidence" §275 p. 323; 64 ALR 2d "Annotation Evidence--Precautions After Accident" 1296 §3(B); Wright and Graham, Federal Practice and Procedure, Vol. 23 §. 5282, p. 88.

The drafters of Rule 407 specifically note that:

"courts have applied this principle to exclude evidence of . . . discharge of employees, and the language of the present rule is broad enough to encompass this issue." See, Advisory Committee Notes to Evidentiary Rule 407 (emphasis added).

In a case virtually identical to the case at bar the California Supreme Court held disciplinary action following an incident was inadmissible. Here, the city of Los Angeles was the defendant in a personal injury action, arising out of an alleged assault made on a citizen by a city police officer. The

complainant citizen served an interrogatory on the city, requesting any information concerning suspensions of the police officer. The trial and appellate courts both ruled such information was discoverable; however, the appellate court noted that:

"Any suspension resulting from the incident [in question] would not be discoverable in view of the settled rule prohibiting the use of remedial measures undertaken after an event to prove negligence or culpability in connection with the event itself." City of L.A. v. Superior Court of City of L.A., 109 Cal. Rptr. 365, 368 (1973) (Emphasis added).

Similar to the California case facts and the Advisory Committee observations, the case at bar presents a case where, following a police officer/citizen confrontation, an internal police department administrative review was undertaken. The officer was determined to have violated department rules and was suspended one day's pay.¹ Also, the complaining citizen was generically informed that his allegations had been investigated and that the police department had found the officer had violated department rules of conduct towards citizens. Such an investigation and its results and sanctions against the officer are "measures" taken following an "event" which are those which would have made the "event less likely to occur" within the meaning of Rule 407. The letter, thus, should not have been

¹R-184.

admitted in evidence before the jury.

The act of promptly investigating complaints and timely informing a complaining citizen of the results of that investigation promotes the spirit of Rule 407. It promotes public confidence that wrongdoing is appropriately punished, that government is responsive to their charges of official misconduct and their police can be administratively controlled. More significantly, it encourages police self-management and discourages conspiracies of silence to avoid civil liability. Overall public safety from vigorous internal investigation is enhanced, as per the Rule's philosophy.

The policy reasons militating that Utah follow the intent of the drafters of Rule 407 and the California holding are, thus, commanding. Obviously, if an investigation will be evidence of civil liability, a police administration will be motivated to: (a) "white-wash" an incident; (b) fail to notify interested or complaining parties that appropriate action was taken on a complaint of police misconduct; or (c) delay investigations past applicable statutes of limitations or past the conclusion of civil cases. These are the precise types of concerns the common-law and statutory exclusions were intended to prevent.

This conclusion of non-admissibility, also, finds support in the related issue of the privilege against evidentiary discovery of internal affairs investigatory matters in a civil tort proceeding. These internal affairs investigations are protected

under Utah law, which provides:

"There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

. . .

"(5) A public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure." 78-24-8(5) Utah Code Ann., 1953 as amended (Emphasis added).

This general statement of executive privilege has been recognized by the Tenth Circuit Court of Appeals in the context of police internal affairs investigations. Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432 (1981). Regarding this issue, the Tenth Circuit ruled,

"The executive privilege allows governmental department heads to prevent disclosure of documents within their control, if nondisclosure would serve the public interest. Id. 660 F.2d at 437 (Emphasis added).

The Lichtenstein court applied a "balancing test" to the criminal defendant's attempt to discover the internal investigation files which he believed contained exculpatory material necessary to his effective defense. The Court remanded to allow only an in camera review by the trial court to see if any such material existed. However, the court clearly recognized the important individual rights of privacy that may be invaded by discovery and significant societal interests at issue. It cited with approval a Colorado State Court decision approving a recognition of these interests, stating:

"'. . . a court should consider and weigh whether disclosure would be contrary to the public interest.'" Id. at p. 438, quoting Martinelli v. Dist. Ct. in and for County of Denver, 612 P.2d 1083, 1093 (Colo. 1980) (Emphasis added).

An often cited federal court suggests a 10 part analysis is applicable, before civil discovery is permitted of any police investigatory file. Those criteria are:

"(1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is nonfrivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case."
Frankenouser v. Rizzo, 59 F.R.D. 339, 344 (E.D.Pa. 1973) (Emphasis added).

Certainly, if the just discovery of police investigatory files are recognized to be done only on a "balancing test", evidence of the results of that investigation should not be given a jury, without, at least, an equally thoughtful review of the societal interests involved. More correctly, if courts are compelled to evaluate the effect simple factual discovery would have as a "chilling effect of police self-improvement programs"

or to consider if "disciplinary proceedings" have arisen, "a court should more than just balance" the impact of admitting in evidence a letter announcing the conclusions of such an investigation. It should not admit the opinions, conclusion or evidence of discipline in evidence, without a compelling justification.

However, in the case at bar, Judge Rigtrup of the lower court applied no "balancing test", prior to admitting the letter into evidence and did not consider the public policy issues which common-law and Rule of Evidence 407 are designed to advance.

In sum, non-disclosure and non-admissibility of the letter greatly serves the public interests. By maintaining the confidentiality of internal affairs investigations and the non-admissibility of announced results, three vital public interests are served and advanced:

(1) Prompt and fair investigations of every citizen complaint is encouraged. Obviously, if disciplinary action against police officers or conclusions of wrong-doing are "admissions" of civil liability, there is judicially treated significant deterrent against police departments making fair investigation or disclosing the results thereof. This axiom is even more apparent than allowing factual discovery of evidence developed in an internal investigation, which on occasion may be justified as the only source of witness names or other data.

(2) Timely administrative sanctions against errant police

officers and/or retraining of them should be encouraged, to protect others in society from similar problems.

(3) Notice of the results of the investigation to complaining citizens is essential and their rightful expectation. The public perception, knowledge and reality that grievances will be timely reviewed is a "must",² if public confidence in police is to be maintained.

All of these important interests are defeated by Judge Rigtrup's adverse ruling. It must be reversed to encourage Utah's largest urban police force to properly manage its armed para-military organization and to maintain public confidence in that control. Common-law, executive privilege and Rule of Evidence 407, which requires excluding subsequent remedial measures from evidence, bar the letter's admissibility.

POINT II

THE POLICE DEPARTMENT'S LETTER TO A COMPLAINING CITIZEN WAS AN INFORMATIONAL STATEMENT CONCERNING POLICE ADMINISTRATIVE POLICY; AS SUCH, IT WAS IRRELEVANT, IMMATERIAL AND INCOMPETENT ON THE ISSUES IN CIVIL TORT LITIGATION.

The trial court allowed a letter from police department's internal affairs office, advising a citizen of the police department's administrative decision on this complaint. The

²See Chief Willoughby's Affidavit filed in support of the Motion in Limini seeking to exclude the letter announcing the results of the Internal Affairs investigation. R-117-123; Appendix "B".

lower court's rationale for admission of this letter in a tort suit against the disciplined officer was that it was an "admission against interest." (R-183, 279) However, an admission or statement "against interest" is an exception to the evidentiary rule barring the admission of hearsay, when the declarant is unavailable. Rule of Evidence 804(B)(3). It does not on admissibility solve against every other evidentiary objection.

More importantly, the trial court made no determination as to the availability of the declarant of the letter. Thus, the trial court erred in admitting the letter under the hearsay exception.

Further, even if the hearsay exception was proper, the lower court overlooked the fact that just because a statement is not hearsay, that fact alone does not qualify it as admissible evidence. A fundamental rule of admissibility is "relevance", "materiality" and "competence."

"Relevance" is defined as matters

". . . having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Utah Rule of Evidence 401.

The issue in the case below was whether or not Officer Nelson acted negligently; that is, breached a duty of due care owed by a reasonably prudent man under the circumstances which caused another injury. The conclusion by the Internal Affairs Division

of the police department did not concern these issues of negligence; rather, the police department was concerned with the question of whether Officer Nelson violated departmental guidelines justifying personnel sanctions or retraining. (Fact No. 5, 6); Affidavit of Chief Willoughby, Appendix "B", R-88.

Those administrative issues have no necessary connection in determining civil tort negligence and, in fact, involve wholly different factual and legal predicates. The police chief may, for example, discipline a police officer for violations of police rules and procedures that may or may not constitute a tort, but deal exclusively with Civil Service Rules or administrative procedural orders calculated to manage a para-military force. Alternatively, they may deal with management decisions designed to preserve the public confidence in its police force and avoid the appearance of impropriety, such as the rule requiring the police to act so as "not to bring discredit on the department." (Fact Nos. 5, 6)

In his affidavit, Chief E. L. Bud Willoughby explained under oath to the lower court in a pre-trial motion that the function of the Internal Affairs Division and the police disciplinary process. Internal affairs' main function is to conduct formal internal investigations concerning possible instances of misconduct by police departmental personnel. These investigations "may" be initiated either by a senior member of the department or automatically instituted upon the filing of a

complaint alleging police misconduct by a citizen. (R-88) If an investigation reveals the existence of misconduct, the police personnel involved are appropriately disciplined and/or retrained. (R-88)

State statutes recognized the unique need to manage this force and vest in the police chief power to discipline "when in his judgment the good of the service demands it." 10-3-912, Utah Code Ann., 1953, as amended. The discretion given the chief to act "as the good of the service demands it" supercedes even the elected Mayor, who may discharge the chief but not directly supervise the individual officer. See 10-3-1219 and 10-3-911(4), 912; cf. 10-3-1012 Utah Code Ann., 1953. This legislative recognition of the unique status of sworn, gun-carrying peace officers and the discretion given the chief to discipline an officer (if he breaches administrative rules or acts to bring discredit to the department) is clearly not a "negligence" standard.

The Restatement (Second) of Torts §286 (1965) provides an outline illustrating the error of the lower court in ruling otherwise; it summarizes the law regarding when rules and ordinances may be used as establishing a duty of due care, as follows:

"The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

"(a) to protect a class of persons which includes the one whose interest is invaded, and

"(b) to protect the particular interest which is invaded, and

"(c) to protect that interest against the kind of harm which has resulted, and

"(d) to protect that interest against the particular hazard from which the harm results."

See also: Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980); Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840 (Ore. 1981); Iverson v. Solsbery, 641 P.2d 314 (Col. 1982); Stafford v. United Farm Workers of America, 656 P.2d 564 (Ca., 1983); Sagebrush, Ltd. v. Carson City, (Nev. 1983).

In other words, the duty or standard of conduct articulated by a statute or administrative regulation may establish the "reasonable person" standard of "due care" in tort negligence, only after a finding that the purpose of the statute or regulation includes all of the four above listed elements.

The Alaska Supreme Court elaborated further on this rule.

The Court held,

"Substitution of a statute or regulation is only appropriate where the statute or regulation prescribes specific conduct. Substitution is not appropriate where the statute or regulation sets out a general or abstract standard of care." Bailey v. Lenord, 625 P.2d 849, 856 (1981) (Emphasis added).

In looking at the standards of conduct for the police department (as established by statute and regulation) no specific conduct is prescribed. It is patently obvious that the police regulations under which Officer Nelson was being judged in the Internal Affairs Investigation were not those which created a

tort "duty of due care." Such disciplinary standards as: "Conduct which may tend to bring discredit on the department", or "when . . . the good of the service demands it" are not designed to protect a specific class of persons which includes Plaintiff-Meyers. Further, they are not designed to protect Mr. Meyers' allegedly invaded interests of assault and battery or personal injury.

Rather, it is clear from the wording that these statutes and regulations were more designed to protect the interests of the police department, public confidence, assure police discipline and assure civil control of a para-military force.

In the instant case, respondent Lee Meyers filed a complaint with the police department alleging misconduct during the encounter on the part of Officer Nelson. (R-2, 3) Pursuant to City Police Department policy, an investigation was initiated by Lieutenant William Duncan, acting commander of the Internal Affairs Unit. (R-83-85) Following such an investigation, any of four determinations may be made: (1) unfounded, (2) exonerated, (3) not sustained, or (4) sustained. Mr. Meyer's allegation was determined to be "sustained". (R-183)

In a letter to Mr. Meyers from the police department, he was informed of that determination. The letter went on to explain that "sustained" means the event did occur and the officer is guilty of the complaint alleged or other infraction" (emphasis added). (R-183). Facially patent it was not an admission of

violating the element of tort law.

In sharp contrast to these personnel and police administrative determinations, the trial jury's duty was to determine whether or not Officer Nelson was "negligent" in his conduct towards Mr. Meyers. The standard negligence is that:

"The failure to do what a reasonably prudent person would have done under the circumstances of the situation, or doing what such person under such existing circumstances would not have done. The essence of the fault may lie in acting or omitting to act. The jury is dictated and measured by the exigencies of the occasion." (See Instruction No. 12, R-202)

The issue for the jury is what "a reasonable person" would do under the circumstances and a violation of that standard, not what Chief Willoughby or Lt. Duncan may think administratively appropriate for a Salt Lake City Police Officer under the chief's duty to manage the police force and instill public confidence in it.

The lower court's equating this administrative finding with that of tort was patently improper and reversible error. This error was magnified by the circumstance of the Court's admittance over vigorous objection. The jury was likely influenced by "an admission against interest" after objection was made by the City. The admission had the appearance of giving the Judge's blessing to the conclusion that the City had, in effect, confessed negligence following its own investigation.

In sum, tort negligence theory is based on a reasonable

prudent person standard. For training and discipline, police officers are held to a much different, stricter standard than that of a "reasonably prudent person." A breach of police department regulations does not, as a matter of law or by reasonable inference, show a breach of civil law. Such demands of professionalism which prescribed conduct "unbecoming a police officer" or that "bringing discredit to the department" are not the elements of "negligence" in a civil tort action. Rather, they are higher and different standard imposed for entirely different objectives.

Thus, the letter "sustaining" a charge that Officer Nelson had violated some department regulation or policy was not material, relevant or competent evidence as to the breach of a tort duty of due care. The lower court, through Judge Rigtrup, prejudicially erred in its admission of this letter and should be reversed.

POINT III

EVEN IF RELEVANT, THE LETTER IS INADMISSIBLE, ITS PREJUDICIAL EFFECT FAR OUTWEIGHS ITS PROBATIVE VALUE.

Even accepting arguendo that the letter was relevant, material or competent evidence, it should still have been excluded under Rule of Evidence 403, which states:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ..." (emphasis added)

The letter at issue concerned a police administrative decision on how Officer Nelson handled the situation. The jury was never instructed that the determination made in the latter was not based upon negligence. Further, they were not instructed that the police department based its determination on an entirely different factual and legal standard than that which concerned the tort case.

The letter itself was unclear as to what conduct had been evaluated; it left open to conjecture and speculation which portions, if any, of the respondent's civil case had been evaluated. Allowing the letter into evidence by surprise and at the last minute not only confused the issue as to what constitutes negligence, but it also left open for speculation what the police department actually concluded.

Concerning the danger of unfair prejudice, this Court has provided a definition; it observed:

"Evidence is unfairly prejudicial if it has a tendency to ... [cause] a jury to base its decision on something other than the established propositions of the case." Terry v. Zions Co-Op Merchantile Institution, 605 P.2d 314, 323 (1979).

By admitting the letter, the jury was left with the impression that the City admitted or confessed (considering the use of the term "guilty" in the letter) negligence and liability. The jury obviously gave great credence to the letter, as evidenced by their finding of 99% negligence on Officer Nelson's part and 1% on Mr. Meyers' part, on evidence which showed among other things:

1. The Plaintiff's ankle injury could not have been sustained by the compression of a door on the ankle; rather, Plaintiff Meyers' own physician testified it must have been the result of a twisting action. No twisting occurred at the scene. (R-303) Additionally, the medical records show Plaintiff-Meyers severely twisted his ankle while elk hunting. Later, on a deer hunt he also, apparently, injured his ankle requiring medical attention. (Pl. Ex. 1, R-188)

2. The whole incident was caused by Plaintiff-Meyers refusing to obey the lawful direction of a Police Officer, controlling traffic, during a public flooding emergency and, then, attempted to exit his car, leaving it blocking the intersection during a time of massive traffic disruption. (R-330, 341)

Any probative value of administrative investigation of the Police Officer was outweighed by its prejudicial effect of suggesting, improperly, that the City confessed tortious wrongdoing. The admission was tantamount to an improper judicial directed verdict as to liability against the City. As such, it should be reversed.

IX

CONCLUSION

The lower court, through the Honorable Judge Kenneth Rigtrup materially and prejudicially erred admitting in evidence a letter advising a complaining citizen of the results of an internal

investigation concerning alleged Police Officer misconduct. Admission of the letter violated the fundamental evidentiary requirement that evidence be relevant, material and competent on the issues before the trial. In this case, the letter reflected only conclusions related to violation of Police administrative policies, rules and regulations. Since the letter did not involve the elements of tort, it was incompetent, immaterial and irrelevant.

More importantly, the letter at issue in the case at bar violated the clear public policy as announced in Rule of Evidence 407 which makes inadmissible subsequent corrective action. It is in the City's and society's interest to encourage prompt, fair and timely investigations of alleged police misconduct. It is, further, important that wrongdoing police officers be disciplined or appropriately retrained. In addition, a citizen has a right to be made aware of that the complaint has been reviewed and of the police department's findings. This two-way communication is essential to preserve public confidence in the management of this para-military force.

Public policy, therefore, demands that these investigations and corrective actions be encouraged and not be treated as admission of civil liability. The lower court's contrary ruling encourages City and police officials to act contrary to the public interest and should be reversed.

Lastly, the highly prejudicial affect of admitting this

letter, in the context of a civil trial against the employing City entity, were highly prejudicial. That prejudicial effect should have been recognized by the lower court; it abused its discretion by admitting the letter, over objection.

It is respectfully submitted that the lower court materially erred to the substantial prejudice of the public and the City. The verdict should be reversed and the case remanded, with instructions to the lower court to exclude the letter from evidence in any further proceedings.

DATED this 18th day of July, 1986

Respectfully submitted,

ROGER F. CUTLER
Salt Lake City Attorney

GREG R. HAWKINS
Assistant City Attorney

cc124

APPENDIX

APPENDIX "A"

CONFIDENTIAL
RESTRICTED MATERIAL
INTERNAL AFFAIRS INVESTIGATION

SALT LAKE CITY CORPORATION



POLICE DEPARTMENT

E.L. "BUD" WILLOUGHBY
CHIEF OF POLICE

450 SOUTH THIRD EAST
TELEPHONE 535-7222
SALT LAKE CITY, UTAH 84111

July 1, 1983

Lee R. Meyers
885 East 575 North
Layton, Utah
84041

Re: I.A. Case #83/032

Dear Sir,

On 5/31/83, you filed a complaint with our Internal Affairs Unit charging Officer James R. Nelson with excessive force. Your complaint was relative to an incident which occurred on 5/31/83, at 6th South and Main St.

This letter is to inform you that the investigation is completed and the allegation contained in your complaint was determined to be "Sustained" by the Officer's division commander, Captain O.J. Peck.

"Sustained" means: The event did occur and the officer is guilty of the complaint alleged or other infraction.

We thank you for bringing this matter to our attention. If you have any questions concerning this investigation please contact Lt. W.C. Duncan, during normal working hours.

Sincerely,

E.L. "Bud" willoughby
Chief of Police

Lt W.C. Duncan

W.C. Duncan
Lieutenant
Internal Affairs Division
Salt Lake City Police Department

WCD:lf

cc: file

APPENDIX "B"

GREG R. HAWKINS
Assistant City Attorney
Utah State Bar No. 1429
Attorney for Defendant
100 City & County Building
Salt Lake City, Utah 84111
Telephone: 535-7788

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

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LEE R. MEYERS,

Plaintiff,

vs.

SALT LAKE CITY CORPORATION,
and JAMES R. NELSON,

Defendants.

AFFIDAVIT OF
E.L. BUD WILLOUGHBY

Civil No. C-84-2838
(Judge Kenneth Rigtrup)

STATE OF UTAH)
 : ss.
County of Salt Lake)

COMES NOW E. L. (BUD) WILLOUGHBY, who having been first duly sworn upon oath, deposes and says as follows:

1. Affiant is the Chief of Police of the Salt Lake City Corporation. He has been employed in police work for more than 29 years, becoming a major in the Kansas City Police Department, and as Chief of Police of the Pueblo, Colorado and Salt Lake City Police Departments. As Chief of Police, affiant directs the affairs and operations of the police department. As part of his duties, affiant has an internal affairs section to assist him.

2. Affiant has had experience in working in internal affairs departments as well as directing those departments and has personal knowledge of the matters set forth herein.

3. The function of the Internal Affairs Section is to conduct formal internal investigations concerning possible instances of misconduct by departmental personnel. These internal investigations are initiated automatically upon the filing of a complaint by a citizen, which alleges misconduct by a police officer. Such investigations may, also, be initiated by a senior member of the Police Department. All formal personnel investigation reports are kept in the Internal Affairs Section, and the commanding officer of said section is the custodian thereof.

4. One main purpose of these internal investigations is to enable the department to ascertain the existence or non-existence of misconduct on the part of police officers for possible disciplinary action or training. Every effort is made to gather as much information as possible pertaining to any instances of alleged misconduct by a police officer.

5. Any time an investigation reveals the existence of sufficient misconduct, the offending personnel involved are appropriately disciplined. If disciplinary action is taken, the police officer involved has a right to a full civil service or other grievance hearing relating to the propriety of the discipline. One of the purposes of the internal investigation is

to develop facts that will allow the City Attorney to present sufficient evidence to sustain any discipline imposed by me, if my decision is appealed to the civil service and the courts.

6. To ensure and encourage full and complete disclosure of relevant information, personnel of the Police Department are assured that statements made by them to the investigating officers will be treated confidentially. When an officer is interviewed who may have been involved in improper conduct, he is generally not given a Constitutional Miranda type warning.

7. Under the department's written policies, an officer must respond to questions asked of him in any internal investigation. If he refuses to cooperate in such an investigation, he will be disciplined. He is told that he must tell the truth and that to conceal any information, no matter how incriminating of himself or his fellow officers, may result in disciplinary action, possibly including dismissal. Furthermore, the use of a lie detector test is employed in appropriate cases.

8. A police officer being interviewed as part of an internal investigation generally does not have an attorney present during the interview. Statements obtained from departmental personnel are generally obtained without legal representation.

9. When persons other than members of the department are interviewed in connection with such an investigation, they are commonly told that any information they give to the investigating

officers will be treated as being completely confidential. When citizens give statements (either as witnesses or as complainants), this assurance of confidentiality is often essential to obtain their cooperation. Sometimes citizens are apprehensive that the officers about whom a statement is made will be able to discover the contents of the statement or who made it. Furthermore, a citizen being interviewed by an investigator may make statements that not only implicate a police officer in improper conduct but also may implicate citizens in acts of an improper or criminal nature. Many of these citizens would be unwilling to give forthright information to investigative officers, if they were not convinced that the information given would be treated confidentially.

10. It is affiant's experience that if citizens feel that they might be revealed as "informants" in their community, they would be reluctant to give any information to investigating officers. Many citizens, who in the past have cooperated with internal investigators, are genuinely fearful if their statements to or contact with Internal Investigation personnel are revealed. Any revelations would be a breach of the promises of confidentiality that were made to those citizens.

11. The only departmental personnel outside of the Internal Investigation Section that have access to the files of the Internal Investigation Division, are personnel of the rank of Major or higher; i.e., high ranking administrative personnel

possessing a legitimate business purpose such as the advisability of discipline, dismissal, promotion, or transfer. No other Police Department personnel are permitted access to these materials at any time. The only exception is an officer under investigation may, in certain cases, review the findings of the Internal Investigation Section, when there appears to be no basis for complaint and confidentialities will not be compromised. Private citizens are never allowed to review or to have access to these files, even if it is a file compiled pursuant to a complaint by that citizen. The files themselves are maintained in locked files in the office of the Internal Investigation Section and are stamped "Confidential." All of the foregoing access procedures are derived from the Police Department's overall policy (and the absolute necessity) of treating all such investigations and investigation reports as strictly confidential.

12. The Police Department's investigation files often contain heresay, gossip, and other remote information from which the department hopes to develop leads in its investigation. Public disclosure of such trivia and possible falsehoods could work grave injury and injustice to those involved in the investigation.

13. It has been affiant's experience that disclosure of the internal investigation in any action, including this one, seriously impairs internal investigations. It undermines the

expectation of police officers and of witnesses that their statements during an internal investigation will always be treated in a confidential manner and closes sources of information we must have in order to develop leads to keep our department free from corruption.

14. The information which led to the arrest and conviction of the police officer bank robbers came from personnel who gave information only on the guarantee of confidentiality. Had we not been able to give this guarantee, we would have had more difficulty in developing leads we needed to break the case. This is also true of less spectacular problems. We have been able to develop information about an officer's unfitness for the job only from leads given by sources who have been promised confidentiality.

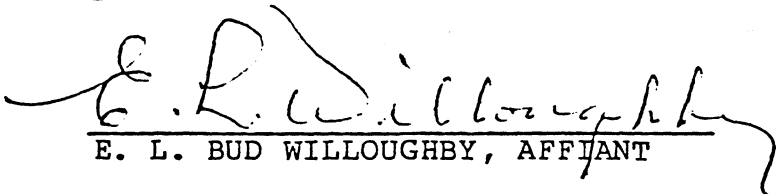
15. The possibility of disclosure of the Internal Affairs files substantially interferes with the department's ability to determine wrongful conduct by its officers.

16. It is affiant's experience that if citizens believe that any complaint they file against a peace officer is freely subject to discovery proceedings, they are inhibited in filing such complaints and do not come forward with their complaints. If citizens are inhibited in filing complaints, it seriously prejudices the department's efforts to maintain proper discipline and a corruption-free police force.

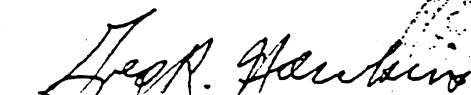
17. Due to the nature of police work and the powers peace officers have, it has been affiant's experience that the confidentiality of materials obtained in Internal Affairs acts as a significant deterrent to improper police action. This deterrent can only be maintained if citizens, who know of the unfitness of an officer, come forward with their information.

18. It is affiant's experience that the promise of confidentiality materially promotes citizen involvement as well as materially promoting free and candid comments of police officers.

DATED this 5 day of July, 1984.


E. L. BUD WILLOUGHBY, AFFIANT

SUBSCRIBED AND SWORN to before me this 5 day of July, 1984.


NOTARY PUBLIC, residing in Salt Lake County, Utah

My Commission Expires:

3/24/88

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Affidavit of E.L. Bud Willoughby to Timothy C. Houpt, Attorney for Plaintiff, at 419 Boston Building, Salt Lake City, Utah 84111, by depositing same in the U.S. mail with

postage prepaid thereon this 5th day of July, 1984.

Ruth Christensen
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or misconduct, penalties like in character shall be imposed for like offenses.

2.2-6 MISCONDUCT

Among other things, the following shall be grounds for a charge of misconduct:

- a. Violation of the Laws of the State of Utah or the ordinances of Salt Lake City relating to the conduct and authority of employees.

Revised Ordinances of Salt Lake City, Section 25-1-9---Employees under Civil Service not to strike or join certain organizations.

- b. The commission of any crime relating to the public morals and decency; drunkenness or violation of the liquor laws.
- c. The commission of any act, or participating in any understanding, for the purpose of causing the merit rating of any member in the Classified Civil Service to be either unfairly or dishonestly affected by either raising or lowering his rating.
- d. Failure properly to observe the rules and regulations of the Civil Service Commission.
- e. Reprehensible or indecent language or conduct tending to bring discredit upon the department.

2.2-7 INCOMPETENCY

Among other things, the following shall be grounds for a charge of incompetency:

- a. Failure to maintain an overall merit rating of satisfactory for any one year, under a rating plan approved by the Commission.
- b. Failure to maintain a satisfactory physical record.
- c. Habitual neglect of personal appearance while on duty.
- d. Cowardice or indolence.

Compiler's Note:

Rule 2.2-7 was amended May 27, 1982, and can be found on the Commission's minutes.

2.2-8 FAILURE TO PERFORM DUTY

Among other things, the following shall be grounds for a charge of failure in the performance of duty:

- a. Failure in the performance of those duties that are required under the law to be performed by the person charged.
- b. Neglect of duty.