

1978

Patricia Mellor, James White, Nedra Allred,
Thomas Pirtle and Tonia Pirtle v. Mark Cook,
Bryant Madsen, Kenneth Strate, (and Thomas R.
Blonquist) : Brief of Plaintiffs-Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PATRICIA MELLOR, JAMES WHITE,
NEDRA ALLRED, THOMAS PIRTLE
and TONIA PIRTLE,

Plaintiffs-
Respondents,

-vs-

MARK COOK, BRYANT MADSEN,
KENNETH STRATE,

Defendants-
Appellants.

Civil No. 15639

BRIEF OF PLAINTIFFS-RESPONDENTS

APPEAL FROM THE SIXTH JUDICIAL DISTRICT COURT OF
SANPETE COUNTY, HONORABLE DON V. TIBBS, JUDGE

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MARK COOK, BRYANT MADSEN, :
KENNETH STRATE, :

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Appellants. :

BRIEF OF PLAINTIFFS-RESPONDENTS

NATURE OF THE CASE

Defendants-Appellants appeal the order of the Sixth
Judicial District Court of Sanpete County, State of Utah,
holding the Appellants and their attorney in contempt of court.

DISPOSITION OF CASE BY LOWER COURT

The lower court ruled that the Appellants and Thomas R.
Blonquist, their attorney wilfully violated the express terms
of a temporary restraining order within a few hours of a valid
service of said order upon them.

RELIEF ON APPEAL

Respondents seek an affirmation of the lower court's
judgment.

STATEMENT OF FACTS

Respondents agree with the Statement of Facts set forth in Appellants' brief as an adequate narration of the circumstances of this case.

ARGUMENT

POINT I

JUDGE DEE HAD "AUTHORITY" TO HEAR
AND SIGN THE TEMPORARY RESTRAINING
ORDER.

Appellants first assert that Judge Dee had no "authority" to hear Plaintiffs-Respondents' Motion for Temporary Restraining Order on September 22, 1977. In Appellants' attempt to discredit Judge Dee's authority to hear the motion, they rely on Section 78-3-14 of the Utah Code Annotated (1953) which they claim prohibited Judge Dee from hearing the matter. That section states as follows:

78-3-14. Ex parte applications from another district. A judge of the district court may, in his own district, hear any ex parte application, and make any order concerning the same, in any action or proceeding pending or about to be commenced in another judicial district, in the following cases:

(1) Upon the written request of the judge of the district in which the action or proceeding is at the time pending or is about to be commenced.

(2) When it shall be made to appear by affidavit to the satisfaction of such judge that the judge of the district court in which the action or proceeding is at the time pending or is about to be commenced is absent from his district, or is

incapacitated, or is disqualified to act therein; such application shall be made only to the judge of the adjoining district.

Appellants submit that there was no "written" request by Judge Tibbs so that any reassignment would have to come under subsection (2). Under that subsection, Appellants submit that a judge in the Third Judicial District is not adjoining to the Sixth Judicial District and hence had no authority to hear the matter.

Appellants' reliance on the above-quoted section is unfounded. Subsection (1) of Section 78-3-14 deals with situations where a Judge wishes to personally assign a hearing to a Judge of another district. For example, if Judge Tibbs had called Judge Dee himself and requested the latter to handle the hearing for him, the procedure would have had to follow the guidelines of Subsection 78-3-14(1) and Judge Tibbs would have had to make a "written request".

Subsection (2) deals with situations where a judge in a bordering district is asked by the parties themselves to hear a motion. In that case, the guidelines require the application be made to a judge of an "adjoining district" and can only be granted where the "adjoining" judge finds through "affidavit" that the first judge is absent from his district, is incapacitated, or is disqualified. Thus, for the present situation to fall under Subsection 78-3-14(2), the Plaintiffs

would have had to contact Judge Dee themselves and request the hearing. Such was not the case.

The procedure followed herein was not the case of Judge Tibbs personally contacting Judge Dee, nor was it a case of the Plaintiffs personally contacting Judge Dee. It is a case where Judge Tibbs channelled the assignment of Judge Dee through the Court Administrator's Office pursuant to Section 78-3-18 et seq. of the Utah Code Annotated (1953)("Court Administrator Act"). It goes without saying that an assignment of judges by the Court Administrator's Office falls within the guidelines of the Court Administrator Act and not within the framework of the statute regulating assignments by judges themselves.

The Court Administrator Act establishes an administrative system for Utah courts to provide uniformity and coordination in the administration of justice. See §78-3-19, Utah Code Annotated (1953).

Among the powers delegated to the Administrator's Office by Section 78-3-24 of the Utah Code Annotated (1953) are the following:

(k) Schedule trials or court sessions and designate a judge to preside at said trials or court sessions,

* * *

(m) Assign judges within courts and throughout the state, and reassign cases to judges.
(emphasis added).

Thus, as Judge Tibbs was out of his district and there being no other judge therein who could hear Plaintiff's Motion for a Temporary Restraining Order, he called the Court Administrator's Office pursuant to the statute for reassignment of the hearing of Plaintiff's motion to another judge. Ronald W. Gibson, Assistant Court Administrator thereupon assigned Judge David Dee of the Third District to sit in Judge Tibbs' stead and hear the Motion. (R. at 57).

POINT II

JUDGE DEE HAD "JURISDICTION" TO SIGN THE TEMPORARY RESTRAINING ORDER.

In justifying their decision to ignore the Temporary Restraining Order, Appellants rely upon Rule 3(c) of the Utah Rules of Civil Procedure which states that jurisdiction of the court takes effect when a complaint is filed or a summons is served.

Rule 3(c) of the Utah Rules of Civil Procedure sets out the general rule that a court acquires jurisdiction in a matter when the complaint is filed or the summons is served. However, it does not prevent the issuance of the summons by the attorney and placing it in the hands of the sheriff for service. Nor does such a rule prevent a court from issuing orders in a matter, including a temporary restraining order, before the complaint was filed.

It is clear that a court may issue a temporary restraining order at any time, not only after a complaint has been filed, but prior to the actual docketing of the pleading. As a matter of fact, this is a rather well known practice, i.e., to present all the papers to the Court for signature and thereafter to file them with the Clerk.

That a court may grant a temporary restraining order before pleadings are on file is evidenced by the language in Section 78-3-14 of the Utah Code Annotated (1953), which is the section relied heavily upon by Appellants. This section deals with the authority of a judge in one district to assign a judge in another district the jurisdiction to hear ex parte motions. Although Plaintiff does not believe it necessary to rely on this section to confer authority on Judge Dee to hear the Motion (see §78-3-18, et seq., Utah Code Annotated (1953)), the language of the statute is instructive:

A judge of the district court may, in his own district, hear any ex parte application, and make any order concerning the same, in any action or proceeding pending or about to be commenced in another judicial district
(Emphasis added) U.C.A., §78-3-14 (Repl. Vol. 9A 1977)

If, as Appellants suggest, it is necessary for the complaint to be filed in a case before the court can hear an ex parte motion, the words "pending or about to be commenced" are meaningless. The clear language thereof implies that a

motion for a temporary restraining order can be heard before the complaint is filed because that would constitute an action "about to be commenced." Judge Dee was informed that the papers were being taken to Manti for filing later that afternoon, so he obviously knew the action was "about to be commenced."

Rule 65(A) of the Utah Rules of Civil Procedure governs the issuance of injunctions and temporary restraining orders. Nowhere therein can be found a requirement that pleadings must have been previously filed before the court may issue a temporary restraining order. To the contrary, language therein allows for the issuance of such an order before a complaint has been filed. Rule 65(A) (e) provides for the granting of such an order:

(2) When it appears from the pleadings or by affidavit that the commission or continuance of some act during the litigation would produce great or irreparable injury to the party seeking injunctive relief. (Emphasis added)

This rule should be read in contrast with the preceding subsection which requires the pleadings to be "on file." Under Subsection (2) there is no such requirement.

Rule 65(A) (e) continues and allows such an order:

(4) In all other cases where an injunction would be proper in equity.

It has been stated that "irreparable injury and the inadequacy of remedy at law" confer equity power upon a court and supply the "jurisdictional requisites" to grant the order,

42 Am. Jur. 2d, Injunctions, §269. Thus, Judge Dee had jurisdiction at the time he signed the Order because he found that the board's actions would cause immediate and irreparable harm.

To argue that a court cannot issue a temporary restraining order before pleadings have been filed is to argue that the court has no equity power. In this case Judge Dee had all the pleadings before him when he made his decision to sign the Order and he was informed that the pleadings would be filed later that afternoon as soon as they could be taken to Manti, Utah.

Moreover, Rule 5(e), Utah Rules of Civil Procedure, allows the filing of pleadings by delivering them to the judge who must note the date thereon and transmit the papers to the clerk forthwith. This was done by Judge Dee and the papers were delivered to Plaintiffs' counsel for transmittal to the District Court. Thus, even if the filing of the complaint were a prerequisite to the court's obtaining jurisdiction, the papers were "filed" with Judge Dee.

Even if there were a requirement that some initial pleadings be filed before the temporary restraining order became valid, the filing of the pleadings on the afternoon of September 22, and prior to service upon the Defendants would immediately confer jurisdiction upon the Court and the Order

would be effective as issued at that time from the Clerk's office. Thus, even if the Defendants' argument had any merit that Judge Dee had no jurisdiction at 2:15 o'clock p.m. to sign the Order, jurisdiction would have automatically attached at 5:00 o'clock p.m. when all the pleadings were filed. See e.g. Ballard v. Buist, 8 U.2d 308, 333 P.2d 1071 (1959).

The lower court rightfully held that Judge Dee had been properly appointed by the Court Administrator's Office, that Judge Dee had authority to hear the matter, that he had jurisdiction over the matter even before the filing of the complaint, and that even if a defect existed, it was cured through the subsequent filing of the papers with the Sanpete County Clerk. (see R. at 178-180.)

POINT III

THE DEFENDANTS AND MR. BLONQUIST WERE
IN CONTEMPT OF THE LOWER COURT'S ORDER.

The Court's Order of September 22, 1977, prohibited and restrained the Defendants "from appointing a new superintendent of the North Sanpete School District". Appellants do not contend that the contemptuous actions were not taken, but only that their intentional disregard of the restraining order is not punishable on technical grounds.

Rule 65(d) provides that a restraining order is binding "upon the parties to the action, their officers, agents,

servants, employees and attorneys and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." (emphasis added). (Rule 65(d), U.R.C.P.) Defendants and their legal counsel had actual notice of the restraining order. (R. at 178). Defendants' counsel knew that Judge Dee had been appointed to hear the matter in the absence of Judge Tibbs and that the Sworn Accusation and Order had been filed with the Clerk in Sanpete County and that it bore the seal of the Court. (Tr. at 234). In spite of this, Defendants and their counsel decided to "ignore" the Order. (Tr. at 239, 240). Thereupon the Appellants and each of them, intentionally and knowingly defied the Court Order and selected a new Superintendent of Schools for the North Sanpete School District. Such actions were in contempt of the Court Order issued earlier that day. Moreover, acting in good faith or on the advice of counsel is not a defense available to Defendants. Gunnison Irrigation Co. v. Peterson, 74 Utah 460, 466, 280 P. 715 (1929).

Section 78-32-1 of the Utah Code Annotated (1953) defines what actions or omissions constitute contempt under Utah law. Among those actions listed are:

(5) Disobedience of any lawful judgment, order or process of the court.

* * *

(9) Any other unlawful interference with the process or proceedings of a court.

Appellants intentionally defied the Court's Temporary Restraining Order and were in contempt of Court for such dis-

obedience. Defendants and their counsel had available to them the appropriate means to test the order of the Court as suggested by the Code of Professional Responsibility:

A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling. Code of Prof. Resp. DR 7-106 (A).

POINT IV

THE ACTIONS OF DEFENDANTS AND THEIR LEGAL COUNSEL IN VIOLATING THE COURT'S ORDER WERE CONTEMPTUOUS EVEN IF THE ORDER WAS INVALID.

Appellants argue that disobedience of an "unlawful" order is not punishable as contempt. Respondents assume that "unlawful" is meant thereby to connote "invalidity" due to lack of jurisdiction. Respondents submit that a temporary restraining order of the court is not "unlawful", nor "invalid" until set aside through "orderly" means.

In Bullock v. United States, 265 F.2d 683 (6th Cir. 1959), the court considered the question of contempt. The lower court had issued an injunction restraining the school district from segregation within the schools. That injunction was violated and contempt proceedings were had. The defendants argued that they could not be guilty of contempt because the injunction was invalid. The sixth circuit held that the injunction was valid, but stated:

Even if the injunction was invalid, appellant was chargeable with criminal contempt for violating it, for the order of the District Court was in full force and effect until set aside in an orderly way. (Cites omitted) 265 F.2d at 691.

Likewise, the parties in this case had an obligation to obey the Order even if invalid and should have tried to set the Order aside through "orderly" means rather than simply decide to choose whether they wanted to obey the authority of this Court.

The Idaho Supreme Court has held that one may be punished for contempt for violating a temporary restraining order even if the court subsequently found that it could not make the injunction permanent. In Hayes v. Towles, 95 Idaho 208, 506 P.2d 105 (1973), the court said:

The order violated by the petitioner was in the nature of a temporary restraining order issued pending a determination of jurisdiction. In general, a court has the power to order the preservation of the status quo while it determines its own authority to grant relief, and the violation of a restraining order issued for that purpose may be punished as criminal contempt, even if the court subsequently determines that it is without jurisdiction to grant the ultimate relief requested. 506 P.2d at 109.

Appellants reliance on the case of In Re Rogers' Estate, 75 Utah 290, 284 P. 992 (1930) is unwarranted. That case dealt with a probate court order which exceeded the bounds of jurisdiction granted probate courts under the statutory laws of Utah. In the present case, we are not dealing with the question of whether a temporary restraining order can ever be issued by a district court, but only with the question of the timing of the order. Unlike Rogers, Appellants make no claims that the temporary restraining order exceeded the jurisdictional grant of the district court.

The Defendants and their counsel should have sought to challenge the order or waited until the hearing of the preliminary

injunction. For them to have substituted their own judgment as to the validity of the order is unacceptable. In this regard our own Utah Supreme Court has stated:

"The defendant in this case was bound to obey the injunction, and, when he interfered with the court's order, he was acting at his peril. He certainly ought not to have acted upon his own judgment as to what his rights were, when it was manifest that his acts would, at least, amount to a technical violation of the terms of the injunction. It was not for him to set up his own opinion as to the meaning and effect of the injunction. If he entertained any doubt as to what he might do without violating the injunction, he should have applied to the court for a modification of the injunction, or for the privilege of doing certain acts which, by the advice of counsel, he claims he had the right to do." Gunnison Irrigation Co. v. Peterson, supra at 74 U. 466.

POINT V

THIS COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL.

On May 1, 1978, the parties orally argued Respondents' Motion To Dismiss. The basis behind Respondents' motion was that no timely notice of appeal had been filed by either Mr. Blonquist, nor the three Defendant Board Members. On that same date, this Court denied the motion to dismiss and the parties continued with the appeal.

Despite the fact that no Notice of Appeal was filed within one month after the contempt order was signed and entered, the thrust of Appellants argument was that the order appealed from was continuing in nature in that the court reserved jurisdiction thereon as to a possible jail sentence and award of attorneys fees.

Such an argument flies in the face of the one month requirement to file a Notice of Appeal. (See Rule 73(a) of the Utah Rules of Civil Procedure). Appellants are not appealing the punishment ordered by the court, but only the correctness of the finding of the contempt order itself. Appellants' brief does not object to any error in the fines, jail sentence, or award of attorneys fees ordered by the lower court, but only object to whether or not they were in contempt. The contempt order was made on September 30, 1977 and entered in December 12, 1977. (R. at 177-180). The Notice of Appeal was filed January 25, 1978. (R. at 197). Every order to which Appellants object was made on September 30, 1977.

Furthermore, the fact that the court retained jurisdiction of both the main case and the issues of the suspended jail sentence and of attorney's fees on the contempt charge does not toll the period of time in which a notice of appeal was required by Rule 73(a). In re Estate of Voorhees, 12 Utah 2d 361, 366 P. 2d 977 (1961) dealt with a problem where the court made an order but retained jurisdiction to decide further related matters. This court held that the appealing party only had one month from the date of the first adjudication in which to appeal that order, stating:

"However, cutting through the brush of attempted procedural forensics, it will be seen that the real issue between the parties and before the court has whether the mountain ground belonged to Mrs. Voorhees or to the estate. Upon plenary hearing thereon, the issue was resolved against her. The fact that the court retained jurisdiction as mentioned above to adjudicate further matters did not leave open for reconsideration

the question as to who owned that property. There was nothing further to be decided on that particular issue and she was ordered to transfer it to the estate. That being so, the decree entered thereon was final and therefore appealable. Since she took no appeal within the time allowed by law, that decree is conclusive." 366 P. 2d at 980.

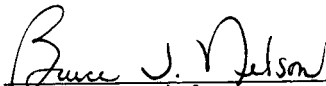
In the present case, the contempt order was final and the court's retention of jurisdiction does not toll the appeal time. The Notice of Appeal filed January 25, 1978 was not timely and this Court "is compelled to order a dismissal thereof" if it makes such a finding. In Re Estate of Ratliff, 19 Utah 2d 346, 431 P.2d 571, 574-75 (1967).

CONCLUSION

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery. Gompers v. Bucks Stove & Range Co. 221 US 418, 450, 55 L. ed 797, 809, 31 S. Ct. 492, 34 LRA (NS) 874 (1911). (Cited in United States v. United Mine Workers of America, 330 U.S. 258 at 288, 67 S.Ct. at 694, 91 L.ed at 884 (1946)).

Plaintiffs-Respondents pray for affirmance of the lower court's order, in addition to awarding to the Plaintiffs their costs and reasonable legal fees on this appeal.

Respectfully submitted,



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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the Brief of Plaintiffs-Respondents to Robert C. Fillerup at 120 East 3rd North, Provo, Utah 84601, postage pre-paid this 25th day of July, 1978.

Bruce J. Nelson