

1979

Tim themy v. Seagull Enterprises, Inc., A Utah Corporation, Shirley K. Watson, United Bank, A Utah Corporation, Zions First National Bank and Murray Broadcasting Company, . Inc : Petition For Rehearing and Memoradum In Support thereof

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Steven H. Gunn; Attorney for Plaintiff-Respondent Gary A. Frank; Attorney for Defendants-Appellants

Recommended Citation

Petition for Rehearing, *Themy v. Seagull Enterprises*, No. 15641 (Utah Supreme Court, 1979).
https://digitalcommons.law.byu.edu/uofu_sc2/1086

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

TIM THEM,)

Plaintiff-Respondent)

vs.)

CASE NO.
15641

SEAGULL ENTERPRISES, INC.,)

a Utah Corporation, SHIRLEY)

K. WATSON, UNITED BANK, a)

Utah Corporation, ZIONS FIRST)

NATIONAL BANK and MURRAY)

BROADCASTING COMPANY, INC.,)

Defendants-Appellants)

PETITION FOR REHEARING
AND MEMORANDUM IN
SUPPORT THEREOF

GARY A. FRANK
5085 South State
Murray, Utah 84107
Attorney for Defendants-Appellants

STEVEN H. GUNN
RAY, QUINNEY & NEBEKER
Suite 400, Deseret Building
79 South Main
Salt Lake City, Utah 84111
Attorney for Plaintiff-Respondent

IN THE SUPREME COURT OF THE
STATE OF UTAH

TIM THEM,)	
Plaintiff-Respondent)	
vs.)	CASE NO.
SEAGULL ENTERPRISES, INC.,)	15641
a Utah Corporation, SHIRLEY)	
K. WATSON, UNITED BANK, a)	
Utah Corporation, ZIONS FIRST)	
NATIONAL BANK and MURRAY)	
BROADCASTING COMPANY, INC.,)	
Defendants-Appellants)	

PETITION FOR REHEARING

Defendant-Appellant Murray Broadcasting Company, Inc., pursuant to Rule 76(e) of the Utah Rules of Civil Procedure, hereby petitions the above entitled Court for a rehearing on the limited issue of the affirmation by the above entitled Court of the order by the lower court appointing a receiver, on the grounds and for the reasons that:

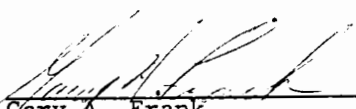
1. The affirmation of the order appointing a receiver is contrary to the basic holding of the Court that a state

court may, "...adjudicate issues involving F.C.C. licenses as long as the state court does not affirmatively interfere with the authority of the F.C.C. to authorize the transfer, assignment or other disposition of licenses...";

2. The affirmation of the order of the lower court appointing a receiver violates the established and recognized principle of exclusive jurisdiction of the Federal Communications Commission in matters involving the transfer, assignment or other disposition of licenses; and,

3. The order of the lower court appointing a receiver exceeded the relief granted plaintiff-respondent by the Summary Judgment.

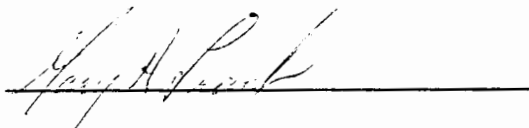
DATED this 26th day of April, 1979.


Gary A. Frank
Attorney for Defendant-Appellant
Murray Broadcasting Company, Inc.
5085 South State
Murray, Utah

CERTIFICATE OF DELIVERY

Gary A. Frank, attorney for defendant-appellant Murray Broadcasting Company, Inc., hereby certifies that two copies of the foregoing Petition for Rehearing were served on Steven H. Gunn of Ray, Quinney & Nebeker, attorneys for

plaintiff-respondent, Suite 400, Deseret Building, 79 South Main, Salt Lake City, Utah 84111 on the 20th day of April, 1979, prior to the filing thereof with the above entitled Court.

A handwritten signature in dark ink, appearing to read "Gary H. P. L.", is written over a solid horizontal line.

IN THE SUPREME COURT OF THE
STATE OF UTAH

TIM THEM,)
)
Plaintiff-Respondent)

vs.)

CASE NO.
15641

SEAGULL ENTERPRISES, INC.,)
a Utah Corporation, SHIRLEY)
K. WATSON, UNITED BANK, a)
Utah Corporation, ZIONS FIRST)
NATIONAL BANK and MURRAY)
BROADCASTING COMPANY, INC.,)
)
Defendants-Appellants)

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

STATEMENT OF FACTS

By its opinion filed on the 4th day of April, 1979,
the above entitled Court affirmed the order of the lower
court appointing a receiver by reference to Rule 66 of the
Utah Rules of Civil Procedure which provides, in part:

"(4) After judgment, to dispose of the property
according to the judgment or to preserve it
during the pendency of an appeal,..."

Because plaintiff-respondent's motion for the appointment
of a receiver was filed after defendants-appellants' notice of

appeal, the above entitled Court held the appointment proper to preserve the property during the pendency of the appeal. The long reaching implication of this holding is that the same may be erroneously utilized as authorizing the appointment of a post-appeal receiver. Accordingly, defendant-appellant Murray Broadcasting Company, Inc., has filed its Petition for Rehearing seeking either a reversal of the holding affirming the appointment of the receiver or a statement expressly limiting the holding to the appointment of a receiver during the pendency of an appeal with all other considerations as to the propriety of a receiver appointment being reserved for future consideration.

It may be noted that the Order Appointing Receiver or in the Alternative, Setting Supersedeas Bond, specifically provided:

"In the alternative to the establishment of the above entitled receivership, and at the option of defendants Seagull, Watson, and Murray Broadcasting Company, said defendants may post a supersedeas bond in the amount of \$25,000.00 provided that the same is furnished pursuant to the provisions of Rule 73(d). If such supersedeas bond is furnished by said defendants...plaintiff's Motion for Appointment of a Receiver will be denied."

The Order was subsequently modified and pursuant thereto, a Pledge Agreement was duly signed by Shirley K. Watson, individually and for and on behalf of Murray Broadcasting Company, Inc. whereby an irrevocable letter of credit dated

the 19th day of July, 1978, in the aggregate amount of \$25,000.00 was pledged to plaintiff-respondent. The irrevocable letter of credit and Pledge Agreement were accepted by plaintiff-respondent to stay execution on the judgment during the pendency of the appeal. Because of the defendants-appellants' compliance with the alternative provision of the Order Appointing Receiver or in the Alternative, Setting Supersedeas Bond, the motion for the appointment of the receiver was denied.

The position of the defendant-appellant Murray Broadcasting Company, Inc. was and continues to be that the order authorizing the appointment of a receiver was erroneous and contrary to law even though the alternative option was exercised by defendants-appellants so that the ultimate appointment of a receiver was denied. Even in this procedural posture, the Order Appointing Receiver or in the Alternative Setting Supersedeas Bond granted by the lower court and affirmed by this Court could arguably stand for the proposition that the appointment of a receiver is proper, when the same is for the purpose of preserving the property during the pendency of an appeal or as a post-appeal matter.

This defendant-appellant respectfully submits that under the facts and circumstances of this matter, the appoint-

ment of a receiver is erroneous and contrary to law regardless of the stage of the proceedings at which the appointment is judicially sanctioned.

ARGUMENT

POINT I

THE AFFIRMATION OF THE ORDER APPOINTING A RECEIVER IS CONTRARY TO THE BASIC HOLDING OF THE COURT THAT A STATE COURT MAY, "...ADJUDICATE ISSUES INVOLVING F.C.C. LICENSES AS LONG AS THE STATE COURT DOES NOT AFFIRMATIVELY INTERFERE WITH THE AUTHORITY OF THE F.C.C. TO AUTHORIZE THE TRANSFER, ASSIGNMENT OR OTHER DISPOSITION OF LICENSES..."

In its consideration of Radion Station WOW, Inc. vs. Johnson, 325 US 120, 89 L Ed 2092 (1945), this Court recognized that a judicial mandate directing the holder of an Federal Communications Commission, hereinafter Commission, license to, "...do all things necessary..." to effectuate a retransfer of an F.C.C. license imposed restrictions on the congressional licensing system. This Court recognized:

"...the power of the state court to adjudicate issues involving F.C.C. licenses as long as the state court does not affirmatively interfere with the authority of the F.C.C. to authorize the transfer assignment or other disposition of licenses..."

The difficulty in this Court's opinion is the conclusion

"The judgment simply enforces the terms of the agreements providing for forfeiture upon default by the purchaser, and declares the owner of the interest in the radio station and the license to be Themy. It does not require the parties to take any specific action regarding a retransfer of the license...". (Emphasis added)

This defendant-appellant respectfully submits that by declaring ownership in an F.C.C. broadcasting license, the state court has invaded the exclusive jurisdiction of the F.C.C. contrary to the authorities relied on by the Court to establish state court jurisdiction within limited parameter.

Additionally, the above quoted conclusion that the Summary Judgment enforces rights but does not require affirmative action in violation of the congressional scheme of things may not be applied to the appointment of a receiver. The sole purpose of the appointment was to divest this defendant-appellant of the F.C.C. license which is a sanction that may be imposed only by the F.C.C.

The Order Appointing Receiver or in the Alternative, Setting Supersedeas Bond, specifically authorized the receiver to take transfer of the F.C.C. license, sell the same and take over management of the radio station.

It may be noted that the present physical site of the radio station is located on real property other than the real property involved in the agreements that constituted the subject matter of this proceeding and the personal property and equipment identified in the subject agreements is not utilized by this defendant-appellant in the operation of the radio station. The critical consideration is that the Order

Appointing Receiver or in the Alternative, Setting Supersedeas Bond did affirmatively direct this defendant-appellant to relinquish possession of the F.C.C. license and operation of the radio station which matters are within the exclusive authority of the F.C.C.

This defendant-appellant respectfully submits that the authorities relied on by this Court in determining the jurisdiction of a state court to resolve issues of private dispute may not be extended to an ancillary proceeding to support the appointment of a receiver. Rather, the recognized authorities establish a jurisdictional limitation that this Court recognizes in principle but violates in application by the affirmation of the Order Appointing Receiver or in the Alternative, Setting Supersedeas Bond.

POINT II

THE AFFIRMATION OF THE ORDER OF THE LOWER COURT APPOINTING A RECEIVER VIOLATES THE ESTABLISHED AND RECOGNIZED PRINCIPLE OF EXCLUSIVE JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION IN MATTERS INVOLVING THE TRANSFER, ASSIGNMENT OR OTHER DISPOSITION OF LICENSES.

By its very nature, the appointment of a receiver to take transfer of an F.C.C. broadcasting license with authority to sell the same violates the very principle recognized and adopted by this Court that state court jurisdiction exists to the extent that it, "...does not affirmatively interfere with the authority of the F.C.C. to authorize the transfer,

assignment or other disposition of licenses...".

The critical distinction that must be kept in mind and considered in disputes of this nature is the difference between a state court's jurisdiction to resolve private disputes as against the state court's authority to order and direct conduct that is properly within the supervision and control of the congressional licensing system. In this proceeding, plaintiff-respondent sought and obtained a determination of the respective rights of the parties under a private agreement; however, the Order Appointing Receiver or in the Alternative, Setting Supersedeas Bond resulted from an ancillary proceeding that exceeded the state court's recognized jurisdictional limitations. While the posting of a supersedeas bond is normally a valid condition to stay execution on a judgment during the pendency of an appeal, the Summary Judgment rendered in this matter did not involve or justify for the proceedings in the nature of collection or satisfaction of the judgment. Accordingly, the order of the lower court appointing the receiver unless proper security was posted constituted an improper sanction against this defendant-appellant. This is especially so in light of the fact that the subject Order included authority for the receiver to assume management of the radio station even though the physical site

and broadcasting equipment occupied and utilized by this defendant-appellant were not subject to the agreements between the parties.

In any event, the Order Appointing Receiver or in the Alternative, Setting Supersedeas Bond was clearly the result of an ancillary proceeding and the authority relied on by this Court in determining the principal jurisdiction of a state court to resolve private disputes of this nature are the same authorities that preclude the assertion of state court jurisdiction into the exclusive realm of the F.C.C. as that accomplished by the Order Appointing Receiver or in the Alternative, Setting Supersedeas Bond.

POINT III

THE ORDER OF THE LOWER COURT APPOINTING A RECEIVER EXCEEDED THE RELIEF GRANTED PLAINTIFF-RESPONDENT BY THE SUMMARY JUDGMENT.

As previously noted, the Summary Judgment entered by the lower court declared a forfeiture of the subject agreement by defendants-appellants. It is respectfully submitted that a declaration of forfeiture requires no further involvement by the state court. The jurisdictional considerations with respect to the broadcasting license should now be vested in the F.C.C. for such disposition as the F.C.C. may be improper.


By affirming the Order Appointing Receiver or in the

Alternative, Setting Supersedeas Bond in light of the provisions of the Order authorizing the receiver to take transfer of the F.C.C. license, sell the same and assume management of the radio station, this Court has sanctioned an extension of state court jurisdiction contrary to the state court jurisdictional limitations recognized and adopted by this Court in the main opinion and, also, approved sanctions against this defendant-appellant that exceed the original relief granted by the Summary Judgment.

SUMMARY

For the reasons herein stated, the Petition for Rehearing of this defendant-appellant on the limited issue of the affirmation by this Court of the Order Appointing Receiver or in the Alternative, Setting Supersedeas Bond should be granted.

Respectfully submitted this 30 day of April, 1979.



Gary A. Frank
Attorney for Defendant-appellant
Murray Broadcasting Company, Inc.
5085 South State
Murray, Utah

CERTIFICATE OF DELIVERY

Gary A. Frank, attorney for defendant-appellant

Murray Broadcasting Company, Inc., hereby certifies that two copies of the foregoing Memorandum in Support of Petition for Rehearing were served on Steven H. Gunn of Ray, Quinney & Nebeker, attorneys for plaintiff-respondent, Suite 400, Deseret Building, 79 South Main, Salt Lake City, Utah 84111 on the 20 day of April, 1979 prior to the filing thereof with the above entitled Court.

