

1979

Roger Schmitt v. Richard A. Billings et al : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Schmitt v. Billings*, No. 16084 (Utah Supreme Court, 1979).

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IN THE SUPREME COURT OF THE
STATE OF UTAH

ROGER SCHMITT, :

Plaintiff-Appellant, :

-vs- :

RICHARD A. BILLINGS, SAM SMITH, :
UTAH STATE PRISON, DIVISION OF :
CORRECTIONS, DEPARTMENT OF :
SOCIAL SERVICES OF THE STATE OF :
UTAH, and JAMES BARTELL, :

Case No. 16084

Defendants-Respondents.
:

BRIEF OF RESPONDENT

AN APPEAL FROM THE ORDER OF DISMISSAL AND
ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT
IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE G. HAL TAYLOR, JUDGE PRESIDENT

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FILED

FEB 1 1983

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IN THE SUPREME COURT OF THE
STATE OF UTAH

ROGER SCHMITT, :

Plaintiff-Appellant, :

-vs- :

RICHARD A. BILLINGS, SAM SMITH, :
UTAH STATE PRISON, DIVISION OF :
CORRECTIONS, DEPARTMENT OF :
SOCIAL SERVICES OF THE STATE OF :
UTAH, and JAMES BARTELL, :

Case No. 16034

Defendants-Respondents. :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This action, initiated by the plaintiff-appellant in the Court below, in a civil action for specific damages against officers of the Utah State Prison, the Warden of the Prison, the Division of Corrections Department of Social Services of the State of Utah, and the Prison itself for defendants-respondents alleged negligent handling of plaintiff-appellant's personal property.

DISPOSITION IN THE LOWER COURT

The lower Court granted the defendant's Motion to Dismiss the plaintiff's complaint and denied the plaintiff's Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

Respondent urges this Court to affirm the trial court's granting of the Motion to Dismiss and denial of plaintiff's Motion for Summary Judgment.

STATEMENT OF THE FACTS

The appellant is an inmate at the Utah State Prison at Draper, Utah (hereinafter, the prison). The respondents James Bartell and Richard A. Billings at all times pertinent to this action were employees of the prison and worked there as property officers under the direction of the respondent Samuel Smith and the respondent government agency. At the time of the filing of this action in the Court below, respondent Samuel Smith was warden of the prison and worked under the direction of the respondent government agency.

Directly prior to July 31, 1977, the appellant was an inmate housed in a cell on the fourth deck of A-Block at the prison, and was in possession of various items of personal property. On or about July 31, 1977, appellant was transferred to another cell within the prison located on B-Block North. The appellant was instructed not to bring his personal

property to his new cell, but was told by a prison officer that his personal property would be stored by the prison property officers, the respondents James Bartell and Richard A. Billings.

On or about November 22, 1977, the appellant was transferred from B-Block North to A-Block at the prison. Appellant requested that the respondents return the personal items left in his cell on July 31, 1977. On November 23, 1977, appellant was given the property and signed a receipt acknowledging receipt of "all the property stored on C-Block."

Appellant later alleged that some of the items of personal property in his "A" Block cell on July 31, 1977, had not been returned to him on November 23, 1977. Allegedly these missing items include a bathrobe, pair of sandals, wrist watch, rug, jacket, tape measure, pair of house slippers and two pair of jeans.

Appellant filed an action with the Prison Grievance Committee. It was determined that since appellant had signed the receipt, he had apparently lost no property and no further action was taken at the Prison level.

This action was filed in the Third Judicial District Court in and for the County of Salt Lake, seeking specific damages. The respondents were represented by their counsel,

and filed a Motion to Dismiss. The plaintiff filed a Motion for Summary Judgment. The Motion for Summary Judgment was supported by affidavit. Appellant also served the respondents with Interrogatories and Requests for Admissions. These were not answered. Both parties submitted Memoranda in support of their Motions. The Motions were argued to the Court on September 8, 1978. Both Motions were considered by the Court pursuant to Rule 56 of the Utah Rules of Civil Procedure. The Court granted the respondent's Motion to Dismiss and denied the appellant's Motion for Summary Judgment.

The appellant filed a timely notice of appeal on the dismissal of his Complaint and on the denial of his Motion for Summary Judgment.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

The standard or review for determining the propriety of a motion to dismiss is stated in Liquor Control Commission v. Athas, 121 Utah 457, 243 P.2d 441 (1952).

The Court in Athas held that:

"If the plaintiff would not be entitled to recover under any set of facts which could be proved in support of his claim, a motion to dismiss is properly granted." (242 P.2d at 443).

The Court in Athas, went further and stated with reference to the Utah Rules of Civil Procedure, that "trial courts have wide discretion in applying the rules."

The defense of immunity from liability is considered an affirmative defense under Rule 8(c) of the Utah Rules of Civil Procedure. Generally an affirmative defense is improperly plead in a motion to dismiss unless dispositive of the case on the face of the pleadings.

The Court has yet to rule specifically on the propriety of pleading the defense of immunity in a 12(b)(6) motion to dismiss. But guidance can be gained from other cases dealing with this issue. The Utah Rules of Civil Procedure are similar to the Federal Rules of Civil Procedure.

In light of the similarity between the two rules, Federal cases interpreting Federal Rule 12 should be considered in determining the propriety of pleading the defense of immunity in a 12(b)(6) motion.

A motion to dismiss requires the court to examine the allegations of the complaint and the responsive pleading without resort to other pleadings or outside evidence. Camero v. Kostos, 253 F. Supp. 331 (U.S. D.C. N.J. 1966). Affirmative defenses generally require going beyond the pleadings to determine their validity. A motion to dismiss is improperly granted if it is based on an affirmative defense which requires proof, i.e. res judicate release or discharge in bankruptcy. Immunity is statutory and requires no evidentiary proof.

The defense of governmental immunity is properly plead therefore in a motion to dismiss if dispositive of the case. Caruth v. Geddes, 443 F. Supp. 1295 (D.C. Ill. 1978), Rafferty v. Prince George County, 423 F. Supp. 1045, (D.C. Md. 1976).

Caruth, supra., dealt with a suit under 42 U.S.C. section 1983. It was a civil rights action by a state prisoner against a public defender. Cases construing 42 U.S.C. section 1983 provide that a public defender enjoys immunity from actions for damages when acting within the scope of his or her employment. The Court in Caruth stated immunity was a

defense properly plead in a motion to dismiss for failure to state a claim for which relief can be granted. The Court ruled, however, that the granting of the motion was improper where the complaint contained an allegation of intentional misconduct.

Rafferty, supra, was another suit based on 42 U.S.C. section 1983. Plaintiffs in Rafferty were suing police officers and firemen for misconduct in the investigation of an apartment fire. The defendants moved to dismiss on the ground of immunity. Defendants asserted that they were government officials and employees acting in their official capacities and therefore immune under 42 U.S.C. 1983. The court held that this immunity was qualified and that the dismissal of the suit by the trial court was improper where the complaint contained an allegation of malicious conduct.

Appellant's complaint alleges only negligence on the part of the defendants. Appellant further alleges this negligence occurred while the defendants were acting within the scope of their official employment.

The general presumption which accompanies a motion to dismiss, is that the allegations in the complaint must be taken as true. Miree v. Dekalb County Georgia, 97 S.Ct. 2490, 433 U.S. 25 (1977). Following the presumption as to

the truth of appellant's allegations, appellant has still failed to state a claim for which relief can be granted.

Appellant in his complaint has plead only negligence. Section 63-30-10(10) Utah Code Ann. states that:

"Immunity from suit of all governmental entities is waived for injury proximately caused by the negligent acts or omissions fo an employee committed within the scope of his employment except inter alia if the injury:

(10) arises out of the incarceration of any person in any state prison. . . ."

The appellant in his complaint alleges all the essential elements enumerated in section 63-30-10(10). Respondent plead the defense by motion to dismiss because it was dispositive. On the face of the pleadings, appellant can prove no set of facts which would entitle him to relief. The issue of negligence and liability of the individual defendants is discussed in point II.

The trial court as a matter of law, and in its discretion properly determined that appellant failed to state a claim for which relief can be granted.

The purpose of the Rules of Civil Procedure is to ensure a just, speedy and inexpensive determination of every action. Gardner v. Park West Village, 568 P.2d 734 (Utah 1977).

Respondent by filing a motion to dismiss rather than an answer sought to comply with the policy and purpose of the Rules of Civil Procedure. By disposing of this case on a motion to dismiss, respondent has avoided the time, expense and inconvenience of a hearing on the merits. Such a hearing would be unjustified in light of section 63-30-10(10).

Respondent asserts that on a motion to dismiss, it was improper for the trial court to go to the merits of the appellant's case. On the other hand, even if it were permissible to consider the merits, appellant was given a fair hearing on the merits at the prison level.

The Prison Rules and Procedures provide that an inmate may file a complaint with the Prison Grievance Committee. The inmate must put in writing the basic facts, the specific grievance and the relief sought. Appellant complied with these formalities. After the complaint is submitted to the Prison Grievance Committee, a formal hearing is held.

At this formal hearing, the defendants produced a receipt signed by the appellant. The receipt acknowledged the fact that appellant had received all his property. Appellant failed to produce at the hearing any inventory or other proof of the existence of the allegedly missing property.

The Grievance Committee determined after considering the evidence presented, specifically the signed receipt, that appellant's claim was without merit.

Despite the existence of section 63-30-10(10), the Prison has a procedure to give prisoners a remedy for internal problems. Respondent asserts that this remedy was more than generous in light of section 63-30-10(10). Respondent does not rely on the investigation of the Prison Grievance Committee as dispositive because this would go to the merits of appellant's case. However, appellant was not without a remedy and at this state of the litigation, section 63-30-10(10) controls and is dispositive of this case without reaching the merits.

While it would be improper for the trial court to consider the merits of appellant's claim should this court choose to do so, respondent asserts that the hearing at the prison level disposes of this case on the merits.

POINT II

THE RESPONDENTS MAY NOT BE SUED INDIVIDUALLY FOR ORDINARY NEGLIGENT ACTS COMMITTED WITHIN THE SCOPE OF THEIR EMPLOYMENT.

This Court has consistently held in ordinary negligence cases like this one that governmental immunity applies to the individual state employee acting within the scope of his employment. Sheffield v. Turner, 21 Utah 2d 314, 445 P.2d 367 (1968); Ohray v. Malmberg, 26 Utah 2d 17, 484 P.2d 160 (1971); Anderson Investment Corp. v. State, 28 Utah 2d 379, 503 P.2d 144 (1972); Roosendaal Construction v. Holman, 28 Utah 2d 396, 503 P.2d 446 (1972).

The Sheffield case is directly in point. There the plaintiff was suing the State, the Prison, the Warden and some prison personnel for negligence. The plaintiff claimed negligence in that he received injuries from another inmate of whose violent propensities the defendants were aware.

The Court stated that the Warden was not a "governmental entity" under the language of the statute (445 P.2d at 368).

The Court went further and held that the immunity doctrine upon which Section 63-30-10(10) is based applies to prison personnel in their individual

The Court in Sheffield, supra, was not unmindful of the possibility for abuse by prison personnel. They stated:

"We quite willingly agree that they [the inmates] should not be 'thrown to the wolves' without protection, and that some safeguards should be maintained to prevent such abuse or injury.

On the other side of this proposition is the imperative need for those in a supervisory capacity to have reasonable freedom to discharge the burdensome responsibilities of keeping in confinement and maintaining discipline of a large number of men who have been convicted of serious crime. If such officials are too vulnerable to lawsuits for anything untoward which may happen to inmates a number of evils follow, including a breakdown of discipline and the fact that capable persons would be discouraged from taking such public positions." 445 P.2d at 368-369.

Moreover, the Court went on to conclude:

". . . the Warden and other prison officers are protected by the doctrine of sovereign immunity against claims of negligence so long as they are acting in good faith and within the scope of their duties, and that they could not be held liable unless they were guilty of some conduct which transcended the bounds of good faith performance of their duty by a wilful or malicious wrongful act which they know or should know would result in injury." 445 P.2d at 369.

The appellant has failed to allege in any of his pleadings any intentional or malicious misconduct

which would bring him within the exception of Sheffield.

Appellant contends that the individual respondents are liable and relies on the recent case of Madsen v. State of Utah, 583 P.2d 92 (Utah 1978).

Respondent submits that Madsen is in complete accord with the reasoning and authorities already cited, and does not allow relief in this case.

Madsen, supra, was a suit for wrongful death by the wife and daughter of an inmate. The action in Madsen was brought in the Third District Court against the State of Utah, Division of Corrections, the Warden, and other prison personnel. The defendants in Madsen moved for a dismissal pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. In support of their motion, defendants cited Section 63-30-10(10) as dispositive. The trial court granted the motion to dismiss on that basis.

The plaintiffs in Madsen appealed the dismissal to this Court. This Court affirmed the trial court's ruling as to the State of Utah and the other governmental entities. The case was reversed and remanded as to the individual defendants to determine their liability for the wrongful death of Mr. Madsen.

Wrongful death has traditionally been a statutory tort, specifically giving the heirs of the decedent a cause of action. This follows from the traditional notion that a tort is personal to the injured party and the cause of action dies with him (see generally Prosser, Law of Torts section 127, Wrongful Death).

Wrongful death has traditionally been based on different or more than one degree of fault of the defendant, i.e., negligence, recklessness, malicious, wilful and/or intentional misconduct. There is some authority for strict liability in wrongful death actions as well. The Tungus v. Skougaard, 358 U.S. 589 (1958), Prosser, supra, section 127.

Utah Code Ann. § 76-11-7 (1933), allows the heirs of the deceased to maintain an action for wrongful death caused by the "wrongful act" or neglect of another. This Court has yet to define the bounds of "wrongful act." Presumably it covers intentional and malicious acts. Conceivably, it could even be interpreted to mean acts which amount to less than negligence and approach strict liability. 358 U.S. at 590.

The complaint in Madsen, being based on the wrongful death statute, by implication contained an

allegation of "wrongful acts." A motion to dismiss in Madsen could not properly dispose of the "wrongful acts" element of the cause of action. Section 63-30-10(10) refers only to negligent acts.

The Court in Madsen concluded that there were not enough facts before it to determine the degree of culpability of the individual defendants. Since wrongful death may be based on intentional or malicious acts, the Court remanded the case to determine liability. If on remand it was determined the death of Mr. Madsen resulted from ordinary negligence, Section 63-30-10(10) would apply as in Sheffield. Such a conclusion is consistent with the previous policy of this Court with regard to the governmental immunity statute.

Justice Maughan in a brief concurring opinion argued that Madsen should be limited to its facts. Justice Maughan asserts that Section 63-30-10(10) should be strictly construed and applied only to conduct related to incarceration, rather than surgery. This would take Madsen out of the exception of paragraph 10 of Section 63-30-10 and allow recovery.

The Court in Madsen declined to overrule the long line of cases disallowing recovery for negligent acts of state employees committed within the scope of their employment. The Court in Madsen states that the

legislative purpose of Section 63-30-10(10) is to prevent frivolous and harrassing suits against the state. 583 P.2d at 94. This is the same reasoning the Court in Sheffield applied.

The appellant by his complaint even if taken as true has alleged no more than negligence. Appellant has alleged the defendants were acting within the scope of their employment. Appellant has not alleged in his complaint bad faith or misconduct on the part of the defendants.

Furthermore, even if the trial court were to consider the requests for admissions and consider them as true, appellant is in no better position. The request for admissions if taken as true establish only negligence.

This case is the type the legislature sought to prevent by enacting Section 63-30-10(10). Factually Madsen and the present case show no similarity. In this case the appellant was transferred from Medium to Maximum Security for disciplinary action. Appellant claims certain property was in his cell and that the property was held for him by the prison officials. Appellant alleges that despite his signing a receipt for all his property, some of the property was missing

The missing property allegedly consisted of a bathrobe, a pair of slippers and two pair of blue jeans. Compared to the loss of life in Madsen, appellant's alleged loss of his bathrobe and blue jeans must be considered frivolous and fits and kind of lawsuit the legislature intended Section 63-30-10(10) to prevent.

Madsen is further distinguishable on its facts. In Madsen, the heirs are suing rather than an inmate himself. The statutory right is theirs and they are not incarcerated or the injury does not arise out of their incarceration.

The Madsen case, then, is distinguishable on its facts and consistent with the decisions previously cited, specifically Sheffield.

The controlling case in the circumstances of the present action is and should be Sheffield. Furthermore, from a policy standpoint, any other interpretation of Section 63-30-10(10) than the one given in Sheffield and urged by the respondents contravenes the purpose of an immunity statute.

Section 63-30-10(10) is limited to negligence. It does not forbid suits against either governmental entities or individual employees for intentional malicious or even reckless acts. The appellant is also given a remedy for negligence at the prison level.

Respondents submit the trial court properly granted respondents' Rule 12(b) (6) motion based on Section 63-30-10(10) and its proper application to the facts.

POINT III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

For the same reasons it was proper to grant respondents' motion to dismiss, it was proper to deny appellant's motion for summary judgment.

Summary judgment is proper only where there is no issue of material fact. Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975). Summary judgment is also improper where as here the defendant has a valid defense. Disabled American Veterans v. Hendrixson, 9 Utah 2d 152, 340 P.2d 416 (1959).

The defense of immunity in this case not only precludes summary judgment, but is dispositive of the case for the reasons stated in Point I. Appellant admits there is an issue of material fact and later claims there are no real issues of material fact. He states that defendants' failure to respond to the requests for admissions under Rule 36 of the Utah Rules of Civil

Procedure establishes all the elements of his claim. This is against the great weight of authority interpreting Rule 36 of the Federal Rules of Procedure.

Failure to answer requests for admissions does not automatically constitute an admission. The trial court in its discretion may allow additional time and refuse to grant summary judgment. French v. United States, 416 F.2d 1149 (9th Cir. 1968).

The trial court in this case had the discretion to disregard the requests for admission for several reasons. First, they were improper to consider on a motion to dismiss. Second, the defense of immunity was dispositive of the case even if the trial court were to consider the admission and deem them as true. The requests for admissions if taken as true establish no more than the negligence of the defendants.

Rule 37 of the Utah Rules of Civil Procedure illustrate the degree of discretion the trial court has in applying these rules. Rule 37 deals with the sanctions for failure to make discovery.

Rule 37(c) lists a number of findings the trial court can make justifying the failure to make discovery. The Court may find:

". . . (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for failure to admit."

Rule 37(a) also requires the appellant to move the court to order compliance with discovery. The appellant has not done that in this case. If the party fails to comply with the Rule 37 order compelling them to respond to the admissions, the requesting party must then prove the admissions. Rule 37(e) allows the party requesting the admissions to collect costs and expenses incurred in proving the unanswered admissions. As noted previously the trial court may find any one of a number of reasons justifying the failure to answer the requests for admissions.

Respondent in this case submits that the failure to answer the request for admissions was justified for several reasons. The admission was not important in that it would prove or disprove only ordinary negligence from which respondents are immune from liability. Respondents had reasonable ground to believe, based on Sheffield and similar cases, that they would prevail on the matter. Finally, respondents believed that the insignificance of the claim and the expense involved in responding to the request for admissions were good reasons for failing

Appellant seems to rely on the recent case of Gardner v. Park West Willage, supra, in support of his contention that summary judgment should have been granted. From the outset it should be noted that the result in Gardner is harsh. Gardner is also a case uncommon on its facts and in the result reached.

The plaintiff in Gardner filed a complaint and requested admissions under Rule 36. The defendant failed to answer on time and failed to request leave of the court for more time. After the Court granted more time the defendant failed to appear at the hearing on the motions and failed to respond to discovery. The defendant's dilatory tactics cost the plaintiff a great deal of both time and money in proving his claim.

The rules were designed to secure a just, speedy and inexpensive determination of every action. 568 P.2d at 738. The result in the Gardner case is harsh but justified in light of the defendant's costly delays and uncooperative attitude.

Respondent asserts that the failure to respond to the requests for admissions in this case was in the interest of a speedy and inexpensive determination of the case. The result would have been the same even though the respondent had answered the requests for admissions.

The trial court properly denied appellant's motion for summary judgment. The application of Rules 36 and 37 is largely a matter of discretion with the trial court. The Gardner court was careful to note:

" . . . the imposition of the sanctions of Rule 37 must be tempered by a careful exercise of judicial discretion." 568 P.2d at 738.

CONCLUSION

The trial court dismissed appellant's claim in a proper exercise of discretion. In a case such as this, appellant is afforded a remedy at an administrative level.

The intent of the Legislature in enacting Section 63-30-10(10) was to deal with cases like this.

The trial court properly interpreted the policy and purpose of both Section 63-30-10(10) and the Utah Rules of Civil Procedure.

Respectfully submitted,

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