

1978

Gerald E. Hulbert v. State of Utah : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

GERALD E. HULBERT,	:	
Plaintiff and Respondent,	:	
-vs-	:	Case No.
	:	16197
THE STATE OF UTAH,	:	
Defendant and Appellant.	:	

REPLY BRIEF OF APPELLANT

There are some basic errors in Respondent's analysis of this case and the law applicable thereto as reflected in his brief. It is therefore incumbent upon the appellant to point these out to the court in order that the issues herewith presented may be fully analyzed and more fairly determined.

ARGUMENT

POINT I

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO HEAR THIS CASE AND THE GOVERNMENTAL IMMUNITY ACT DOES NOT APPLY TO RESPONDENT'S RIGHT OF ACTION AGAINST THE STATE OF UTAH EXCEPT AS TO THE MANNER IN WHICH HIS CLAIM WAS FILED.

The respondent asserts that the statute under which he sought relief in this case was governed by all the procedures of the Governmental Immunity Act which he alleges supersedes the constitutional power of the Board of Examiners to hear and determine his claim by vesting such jurisdiction in the district courts. (See pages 10-14 of respondent's brief.) Section 63-30a-3, Utah Code Annotated 1953, as enacted specially for the benefit of the respondent as a result of his lobbying efforts in 1977, provides as follows:

This act shall apply to claims arising prior to the effective date of this act so long as those claims are filed in the manner provided in the Utah Governmental Immunity Act and within two years after the cause of action arises. (Emphasis added.)

The foregoing statute contains the only reference in Chapter 30a to the Governmental Immunity Act and there is no ambiguity or uncertainty as to its provisions requiring retroactive claims to be filed in accordance with that act. Recognizing this fact the respondent has resourcefully resorted to the title of the act (Chapter 245, Laws of Utah 1977) to support his thesis. That title is as follows:

An act relating to governmental affairs; providing for the reimbursement to officers and employees of the state for legal fees and costs necessarily incurred in the successful defense of grand jury indictments; defining terms; and providing that the act shall apply to all claims submitted within

the time limits and in the manner provided in the Utah Governmental Immunity Act. (Emphasis Added.)

Thus the respondent would supplant the substantive and limited provisions of the act with the descriptive and general terms set forth in the title of the act. No support in American and English jurisprudence can be cited for such a principle. The universal rule is set forth as follows in 73 Am. Jur. 2d, Statutes, §98:

The rule which permits reading the title of an act in aid of statutory construction applies only in cases where the legislative meaning is left in doubt by failure to clearly express it in the law. Moreover, the ambiguity which justifies a resort to the title must arise in the body of the act; an ambiguity arising from the title is not sufficient. Thus where the punctuation in the body of the act conforms to the intent otherwise disclosed therein, a different punctuation of corresponding language in the title is of no consequence. Similarly the use of a singular number in the title is not persuasive against the application of the plural to the same subject matter in accordance with the words of the act. The title cannot be resorted to for the purpose of restricting or enlarging the scope of a positive and explicit clause in the body of the act, or setting at naught the obvious meaning thereof. The title of an act cannot limit the plain meaning of the text. Indeed, resort to the title of a statute as an aid in the interpretation thereof has even been declared to be an unsafe criterion, and entitled to little weight, although this statement authorities as a whole warrant. The title is not conclusive in regard to the meaning of a statute.

And, with respect to constitutional provisions such as our own (Article VI, Section 22, Utah Constitution, as amended in 1972 to include the matter formerly contained in Section 23 of said Article pertaining to the subject of a bill being clearly expressed in the title) it is stated as follows in 73 Am. Jur. 2d, Statutes, §99:

With regard to a constitutional provision requiring the subject or object of a statute to be expressed in its title, it has been said that the effect thereof is to render a title indispensable. Although the courts do regard the rule which permits the consideration of the title in cases where an enactment is susceptible of diverse construction, as especially applicable, where the constitutional provision under consideration is in effect, the courts do not, as a whole, go further than this.

In the case at bar there is no ambiguity, uncertainty or lack of plain meaning in the statute involved (Section 63-30a-3) which renders it susceptible of diverse construction. It is a clear and unambiguous statement of the manner in which retroactive claims, such as the respondent's, are to be filed and makes no provision whatsoever for the application of the Governmental Immunity Act otherwise to claims arising under that statute. Under the foregoing legal principles it is absolutely clear that the title to the act in question cannot be incorporated as the substantive law in lieu of the unambiguous provisions of the statute itself.

POINT II

THE EVIDENCE FAILS TO SUPPORT THE DECREE
AND JUDGMENT OF THE LOWER COURT AND THE
SUBSEQUENT "AGREEMENT" BETWEEN RESPONDENT
AND HIS ATTORNEYS, IF ANY, IS INVALID.

The respondent relies heavily upon the case of Oliver v. Mitchell, 14 U.2d 9, 376 P.2d 390 (1962) as support for the lower court's finding that the respondent and his counsel agreed that he would pay reasonable attorneys fees if and when he obtained the means and that the passage of the statute here involved provided him with such means and he thereby "incurred" reasonable attorneys fees of \$61,820.00 at the expense of Utah taxpayers. In the Oliver case the plaintiff sought recovery of attorney's fees for defending one Mitchell on a first-degree murder charge even though the plaintiff had been appointed by the court to do so at a time when no public compensation was provided for the defense of impecunious persons charged with crime. The lower court found that a contract existed whereby Oliver was to represent Mitchell for a fee of \$5,000 and awarded judgment to the plaintiff for \$2,500 plus interest and costs which he sought to recover from insurance moneys received in prison by Mitchell as beneficiary of his brother who was accidentally killed in military service.

The holding of this court was that indigents are as legally competent to contract as other men and the attorney was entitled to recover his fee although the judgment was limited to half of the fee agreed upon.

The respondent claims that there is no distinguishable difference between the Oliver case and this action. (Page 18 of Respondent's brief.) First of all, that action was predicated upon a contract for a fixed sum payable by the client himself and not by the body politic through legislative lobbying efforts. Secondly, the action was brought by the attorney himself to recover a fee due and owing to him under contract. Third, the judgment awarded to the attorney was less than the fee which the court found the parties had agreed upon. Fourth, the attorney was appointed as an officer of the court to defend his indigent client in a first-degree murder case which did not preclude an agreement for the payment of his services. Fifth, the agreement between the parties was not subsequently changed to increase the attorney's compensation. Sixth, the obligation of the client was fixed by agreement and not by a statute limiting the recovery of attorneys fees to those which are "reasonable" and "necessarily incurred". Eighth, the attorney, and not the client, was the person benefitted by the judgment. Ninth, a real controversy and adversary proceeding existed between the attorney and his client with respect to the fee

payable for the attorney's services. Tenth, the ability of the client to pay was measured by his own resources and not by those of the State of Utah. It is difficult to understand how counsel for the respondent could find no distinguishable differences between the case at bar and the Oliver case in which Mr. Wayne Black, the ostensible beneficiary of the lower court's judgment in the instant case, was counsel for Mr. Oliver.

The ultimate question to be resolved in this case is the amount of the "reasonable attorneys' fees and court costs necessarily incurred" by the respondent in the defense of the indictments issued against him pursuant to Section 63-30a-2, Utah Code Annotated 1953, as enacted in 1977. It is undisputed that the respondent's attorneys agreed in writing to accept \$18,500 as their total fee for services rendered by letter dated September 3, 1976. (Exhibit 4-P.) That such fee was approved and accepted by the respondent is clearly established by his subsequent written statements. His immediate response to the foregoing letter from his attorneys was a note dated September 10, 1976, in which he acknowledged receiving their "bill", expressed his gratefulness "for all you have done" and stated his realization that "the fee you have charged me is very, very minimal" (Emphasis added), and then declared that "(m)y only concern is making prompt payment to you." (Exhibit 5-P.) And then as late as

September 9, 1977, in a letter to his attorneys (Exhibit 1-D) he stated:

. Dear Mr. Black:

You have indicated that Mr. Joseph McCarthy, Deputy Attorney General, has suggested I write you a letter regarding our final understanding with regard to the attorneys fee in connection with my indictments.

My best recollection is that in early October of 1976 I was in your office and discussed this matter with you. At that time, I had paid a total of \$8,500 on the fee. You indicated to me at that time you thought there was an excellent chance the remaining indictments would be dismissed and that you realized I had been through a hard financial time. You said if I paid an additional \$10,000 or a total of \$18,500.00, I could consider the attorneys fee paid in full and that I could have as much time as I needed to make the payment. I said I realized that this amount would nowhere near pay you and your firm for all you had done for me, and I told you how grateful I was for your help and friendship.

I am sure that a day or two after our conversation you sent me a letter confirming the above fee arrangement. My best recollection is that I received the letter shortly before October 8, 1976. I relate to this date because on said date I again came to your office and paid an additional \$2,000.00. I believe that I returned the letter signed approved to your office.

At your request, I have searched my personal effects in the event a copy of the letter might be among them, and I cannot find a copy. I am not really sure whether you sent me an extra copy.

I made one additional payment of \$1,000 on the fee, bringing the total payments I have made to date up to \$11,500.00.

Yours sincerely,

/s/ Gerald E. Hulbert

Gerald E. Hulbert

(Emphasis added.)

Thus, at least a full year after receiving the bill in letter form from his attorneys, the respondent acknowledged the fee arrangement contained therein and stated that he had returned the letter "signed approved" to his attorney's office. The absence of that original letter as an evidentiary exhibit in this case is of singular interest. Certainly the letter containing the only bill ever submitted by the attorneys in this case to their client and its return with the client's approval of a fee amounting to \$18,500 would constitute an important document to the respondent and his attorneys in this case. Such letter was in the exclusive possession of the respondent or his attorneys and its introduction in evidence would have been extremely damaging to the plaintiff's case if it did contain the approval of the fee arrangement by the respondent. A copy of that letter before its return with the express approval of the respondent is all that is contained in the record of this case. See Exhibit 4-P. However, we have the respondent's unambiguous admission in Exhibit 1-D (introduced by the defendant, not the plaintiff, in the court below) that he had indeed approved of the bill

and fee arrangement submitted to him by his attorneys. This court has recognized that in judging credibility of witnesses it is usually assumed that a person is more likely to be telling the truth with respect to matters adverse to his own interests than where it may benefit him. Cannon v. Wright, 531 P.2d 1290 (Utah, 1975).

From the foregoing it is absolutely clear that the "reasonable" attorneys' fees "necessarily incurred" by the respondent in the defense of the grand jury indictments against him cannot exceed the agreed-upon amount of \$18,500.. The judgment of the lower court was not based upon the undisputed written documentation in evidence, the credibility of which is certainly superior to the self-serving statements of the respondent and his beneficiary attorney upon which the trial judge concluded that "the plaintiff intended his obligation to be one for reasonable fees at a then undetermined level" and that Mr. Black "apparently intended that obligation to be contingent upon plaintiff's future ability to pay, if any." (See memorandum decision, R. 98-99, quoted at pages 15-16 of respondent's brief.) As stated before, it this court recognizes the dual-fee standard espoused by the respondent—one fee based upon the individual's ability to pay when he is found guilty under the indictments, the other based upon the state's ability to pay when he is found not guilty—the mischief that could result from defense counsels' efforts to guarantee themselves a sweepstakes prize in the event of success would be

inimical to the ends of justice. The bribing of jurors or witnesses by attorneys in litigation is not an unheard-of matter and certainly should not be encouraged by the courts in this day of increasing disregard of perjury laws, ethics standards and the criminal law in general by persons of all walks of life who weigh their own guilt in monetary scams only in terms of the risk of being caught.

In an apparent effort to overcome the prior holdings of this court in Skeen v. Peterson, 113 U. 483, 196 P.2d 708, and Ashton v. Skeen, 85 U. 489, 39 P.2d 1072, pointed out at pages 42-45 of appellant's brief on appeal, that contracts between attorney and client whereby the former's compensation is increased after the attorney-client relationship is established are presumptively invalid, the respondent cites the case of Rudd v. Crown International, 26 U.2d 263, 488 P.2d 298 (1971) involving the recovery of attorney's fees pursuant to contract. The entire statement of the court on that matter is as follows, at pages 301-302 of the P.2d Reporter:

Finally, defendant challenges the reasonableness of the sum of \$10,000, as found by the trial court in the award of attorney's fees. The evidence as testified to by the plaintiff indicates that plaintiffs counsel originally agreed to work for \$35 per hour; as the action progressed, and the motions and hearings multiplied, the fee was raised to \$5,000 and ultimately to \$10,000. Defendant claims that counsel is limited to \$35 per hour and that there was no evidence as to the exact number of hours so devoted; and, therefore, there

is insufficient evidence to support the sum awarded. This argument is without merit.

* * *The question of what is a reasonable attorney's fee in a contested matter is not necessarily controlled by any set formula. What is reasonable depends upon a number of factors, the amount in controversy, the extent of services rendered and other factors which the trial court is in an advantaged position to judge. (Quoting from Wallace v. Build, Inc., 16 U.2d 401, 405, 402 P.2d 699)

The judgment of the trial court is affirmed; costs are awarded to plaintiff.

It is clear from the foregoing that the court's ruling was limited solely to the sufficiency of the evidence to sustain the award and did not address the underlying question as to the validity of subsequent agreements whereby an attorney's fees are increased from those originally agreed upon. It cannot be determined from the facts stated in the Rudd case whether the attorney's fee awarded actually exceeded that originally contracted by the parties. All that can be said for the above ruling is that there may be some cases in which an increase in an attorney's fee from that originally contracted may be justified. It certainly does not stand for the proposition that an increase in an attorney's compensation is valid under all circumstances, and the circumstances of this case fall squarely within the prohibition of the Skeen v. Peterson and Ashton v. Skeen cases, *supra*, particularly where

the "agreement" entered into subsequent to the original attorney-client fee relationship increases the attorney's compensation by 3 1/2 times at the "understood" expense of the hapless public rather than the client himself. It is interesting to note that the respondent has not even mentioned the Skeen and Ashton cases in his brief on appeal although they were prominently featured in appellant's POINT II, at pages 42-45, to which the court is referred to avoid repetition.

POINT III

THE APPELLANT IS CONSTITUTIONALLY ENTITLED TO AN APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT AND THE ISSUES RAISED HEREIN ARE NOT MOOT.

Under POINT IV of respondent's brief it is claimed that this appeal presents no justiciable claim and the issues raised are moot. The chronology of events leading to the respondent's efforts to avoid the appeal of the State of Utah in this case is an interesting study in leap-frogging from one branch of state government to another and back again with great resourcefulness but little regard for the doctrine of separation of powers. This process may be summarized as follows:

1. Following the successful defense of several indictments consisting of twelve criminal courts arising from the respondent's activities as Chairman and Director of the

Utah State Liquor Control Commission, the respondent personally lobbied a bill through a receptive legislature in 1977 authorizing the retroactive recovery of the "reasonable attorney's fees and court costs necessarily incurred" by the respondent therein.

2. The respondent thereupon filed a claim with the Governor, Lieutenant Governor/Secretary of State and Attorney General (who collectively constitute the Board of Examiners of the State of Utah) although the respondent was only required to file the claim with the Attorney General in compliance with the Governmental Immunity Act (§63-30-12, Utah Code Annotated 1953, as amended) as provided in the retroactive provision of the statute setting forth the manner in which such claims were to be filed (§63-30a-3, Utah Code Annotated 1953, as amended).

3. The respondent then filed his action against the State of Utah following the 90-day period as provided in the Governmental Immunity Act without the Board of Examiners of the State of Utah ever having considered his claim.

4. After successfully convincing the lower court that it had jurisdiction to hear the case, against the strong opposition of the appellant, the respondent obtained a judgment of \$62,384.99 from which the appellant has appealed to this court on several grounds, including the jurisdiction of the lower court.

5. The respondent then sought relief from the Board of Examiners of the State of Utah in the amount of his judgment which was then being appealed by the State of Utah. The Board of Examiners, by a 2-1 vote, determined that no action should be taken upon his claim until the Supreme Court of Utah had rendered a decision on the appeal from the district court decision and specifically requested that the state legislature take no action until the appeal was resolved. (See Exhibits "A" and "B" attached to appellant's prior Memorandum in Response to Motion to Dismiss Appeal and Oral Argument by Counsel for Respondent.)

6. Not wishing to have the appeal heard by this court in an action which he himself had engineered from the beginning, the respondent then went directly to the 1979 legislature offering to accept \$50,000 in satisfaction of his district court judgment if the legislature would appropriate that sum for payment to him. The legislature, disregarding the appeal in which the brief of the State of Utah had already been filed and the foregoing recommendation of the Board of Examiners, approved payment to the respondent of \$50,000 in the 1979 Supplemental Appropriations Act (H.B. No. 426).

Even if we assume that the lower court had jurisdiction to reduce the unliquidated claim of the respondent to judgment, a position which the appellant has opposed from the commencement of this action, the question is raised as to the appellant's

right of review by appeal to the Supreme Court pursuant to Article VIII, Section 9, of the Utah Constitution which provides:

From all final judgments of the district court, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below and under such regulations as may be provided by law.

* * *

The respondent asserts that the appropriation of the \$50,000 by the legislature renders the case moot and the appeal thereof subject to dismissal. In order to make such assertion he claims that the Board of Examiners did exercise its constitutional power under Article VIII, Section 13, of the Utah Constitution, by considering and acting upon the respondent's claim prior to legislative action thereon. Such claim is clearly erroneous in light of the minutes of the Board of Examiners meeting on November 29, 1978, and letter to the Claims Committee of the 1979 Utah Legislature from the Board of Examiners dated March 1, 1979, which are attached as Exhibits "A" and "B" to appellant's prior Memorandum in Response to Motion to Dismiss Appeal and Oral Argument by Counsel for Respondent and are also attached to Mr. Brant Wall's letter dated April 2, 1979, to Chief Justice Crockett. The only action taken by the Board of Examiners upon the respondent's claim was to defer action thereon until such time as the Supreme Court had rendered a final decision on the appeal from the district court. It is therefore evident that the Legislature totally disregarded the constitutional powers of the Board of Examiners, as more fully set forth

in Point I of the appellant's brief on appeal, and then arrogated to itself the right of appellate review vested exclusively in the Supreme Court. Thus, if this appeal is dismissed as moot, the legislature, with the active participation and initiative of the respondent, will have: (1) denied the executive branch of the State of Utah (the Board of Examiners) its constitutional right to consider and act upon claims of this sort; (2) pre-empted this court in the exercise of its appellate powers in a case initiated by the respondent himself; and (3) denied to the taxpayers of the State of Utah the right to have a substantial judgment against the State of Utah reviewed in the Supreme Court as vouchsafed by the Utah Constitution. Such a scenario mocks the provisions of Article V of the Utah Constitution which reads:

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislature, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

In this case the Board of Examiners, as an arm of the Executive branch of our state government, acted exactly as it should have done by withholding any action upon the respondent's claim until all parties had exhausted their

constitutionally protected right to have the issues determined in the state's highest court. The Legislature would have been well advised to follow the same constitutional pathway but chose not to do so in an arrogant disregard of this court's appellate powers under the Utah Constitution, Article VIII, Section 4. It has long been the law of this state that those powers cannot be enlarged or abridged by the legislature. Robinson v. Durand, 36 U. 93, 104 P. 760. Having usurped the functions of this court by attempting to contravene the constitutionally protected rights of the appellant on behalf of the citizenry of this state to have this case reviewed in the Supreme Court, the Legislature has exceeded its powers and, therefore, it is incumbent upon this court to hear this appeal upon its merits and declare that portion of the 1979 Supplemental Appropriations Act pertaining to the claim of the respondent to be an invalid exercise of legislative power.

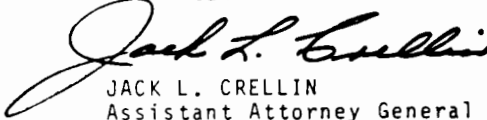
The foregoing argument is based on the initial vesting of jurisdiction in the lower court to adjudicate the respondent's claim as claimed by the respondent. Certainly if such jurisdiction never attached and the Board of Examiners had exclusive jurisdiction to consider and act upon the respondent's unliquidated claim, as set forth in POINT I of appellant's brief on appeal, then this appeal should be permitted to proceed in due course to establish that jurisdictional right.

This appeal involves the jurisdiction of the lower court. Either it had jurisdiction or it did not. If it did the legislature should not be permitted to intervene after that jurisdiction has attached to deprive any party of its constitutional right to appeal from an adverse judgment of the district court. If it did not, it is the constitutional prerogative of this court to so declare and not for the legislature to arrogate that judicial function to itself. The whole thrust of the respondent's argument is that it may invoke the jurisdiction of the courts part way and, after obtaining a generous district court judgment, preclude any appellate review of that judgment by running to a long friendly legislature for a most lucrative settlement of hotly contested legal issues against the opposition of the Board of Examiners. Such an abuse of the long-established concept of separation of powers in our state government simply should not be tolerated by this court. The faceless mass of this state's taxpayers deserve better treatment than the respondent, and the legislature, are willing to grant them.

Dated this 13th day of August, 1979.


Respectfully submitted,

ROBERT B. HANSEN
Attorney General of the State
of Utah


JACK L. CRELLIN
Assistant Attorney General

CERTIFICATE

I hereby certify that ten copies of the foregoing reply brief were filed with the Supreme Court of the State of Utah on the 13~~th~~ day of August, 1979, and that two copies of said brief were served upon the respondent by depositing the same in the United States Mail, postage prepaid, addressed to Brant H. Wall, 500 Judge Building, Salt Lake City, Utah 84111, Attorney for respondent, on the 13~~th~~ day of August, 1977.


JACK L. CRELLIN
Assistant Attorney General