

2001

Joseph L. Mills v. C.N. Ottosen, Commissioner of Insurance and the State of Utah, by and through its Insurance Department : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

14496 AA

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IN THE SUPREME COURT
OF THE STATE OF UTAH

BRIEF
J. Reuben

JOSEPH L. MILLS)

Plaintiff-Respondent)

vs.)

Case No. 14496

C.N. OTTOSEN, Commissioner)
of Insurance and the STATE)
OF UTAH, by and through its)
Insurance Department,)

Defendants-Appellants)

BRIEF OF DEFENDANTS-APPELLANTS

Appeal from the Judgment of the Third Judicial District
Court for Salt Lake County,
Honorable Stewart M. Hanson, Sr.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JOSEPH L. MILLS)	
)	
Plaintiff-Respondent)	
)	
vs.)	
)	
C.N. OTTOSEN, Commissioner)	Case No. 14496
of Insurance and the STATE OF)	
UTAH, by and through its)	
Insurance Department)	
)	
Defendants-Appellants)	

BRIEF OF DEFENDANTS-APPELLANTS

NATURE OF THE CASE

This action involves the revocation of an insurance brokers license for violations of the Insurance Code.

DISPOSITION IN LOWER COURT

The action was initiated by the Plaintiff to review an order by the Utah State Insurance Commissioner who revoked Plaintiff's Insurance licenses. The Court below held that while Plaintiff may have violated the Insurance Code, the violations were not such as should have deprived Plaintiff of his insurance licenses.

RELIEF SOUGHT ON APPEAL

Defendants-Appellants seek a reversal of the Judgment of the Trial Court on the grounds that Plaintiff's violations of the Insurance Code were of such a serious nature that the integrity of the insurance industry demands that he not be licensed to practice the business of insurance in Utah.

STATEMENT OF FACTS

1. Riddco Inc., as a building contractor, contracted with H. Shirl Wright as an owner, to construct a shopping center to be known as Garden Square. The construction contract did not require a performance bond (Exhibit 1-B).

2. Valley Mortgage agreed to provide interim financing for the owner, Mr. Wright, but required Mr. Wright to post a performance bond in the amount of \$1,000,000. (R.52)

3. Riddco, through its vice president, Larry Bradshaw, asked Mills, Gundry and Associates Inc. to provide a performance bond in the amount of \$1,000,000 for the project. (R.36).

4. Mills delayed providing the bond until after construction started, but before Valley Mortgage would disburse further money, Valley Mortgage required a letter from Mills stating the bond would be forthcoming. (R.37). Mills wrote the letter saying he would provide the bond. (Exhibit 6-D)

5. Thereafter, Mr. Mills reported to Mr. Bradshaw that he

could not obtain a bond on the project. Bradshaw pressed him for the bond. (R.38-39). Mr. Mills then delivered to Mr. Bradshaw a bond form on St. Paul Fire & Marine Insurance Co. which had been signed by Mr. Mills, together with a Mills, Gundry & Associates business card to be used in place of the St. Paul Fire & Marine Insurance Company's name. (R.38-41, Exhibits 2-D and 3-D).

6. It was intended by Mr. Mills and Mr. Bradshaw that Mr. Bradshaw would fill in the executed bond form to meet Mr. Bradshaw's requirements. (Exhibit 4-D).

7. The bond form showed Mills, Gundry Insurance Agency as the surety, firmly bound to H. Shirl Wright and Commercial Enterprises Inc. for \$1,000,000 conditioned on the performance by Riddco of the construction contract. The bond was in standard form except that Mills, Gundry was not a licensed surety. (R.63, Exhibit 2-D).

8. Mills, Gundry did not have and has never had a certificate to do business as an insurer, nor did Mr. Mills personally. (R.63).

9. The bond form as signed by Mr. Mills was then submitted to the owner, Mr. Wright, who in turn submitted it to Valley Mortgage. Valley Mortgage did not accept the bond. (R.52).

10. Thereafter, the matter came to the attention of the Insurance Commissioner who commenced an investigation. During the investigation, the Commissioner and his deputy met with

Mr. Mills and Mr. Mills wrote out and signed his statement detailing what had happened and waived further hearing.

(R.61-62 and Exhibit 4-D).

11. The statement written by Mr. Mills reads as follows:

"After attempting to get a bond for Riddco from several bonding companies and being turned down. In talking to Larry Bradshaw he wanted a bond and did not care whether I personally bonded him or not as long as the bank would accept it. I did leave a blank bond form and sign it and left my business card with Larry and his office typed it up. Changing the form to show Mills, Gundry & Associates as the bonding company for one million dollars.

I knew that the business card of Mills, Gundry & Associates would be used in place of the insurance company's name. That the insurance company's name would be deleted from the bond on all places.

That I had no authority to issue the bond.

In submitting this statement, I do it in lieu of and waive any further hearing on the facts and that the State Insurance Department is authorized to take action on this statement of fact.

/s/Joseph L. Mills." (Exhibit 4-D)

12. As a result of the hearing, the Commissioner ordered Mr. Mills' insurance licenses revoked. The Commissioner then gave notice of the revocation to the insurance companies represented by Mr. Mills. (R.69).

13. The Trial Court determined:

"A complete review of the evidence adduced at this hearing, which was a hearing de novo, would indicate to this Court that there may have been a breach of the insurance laws on the part of the Plaintiff and that under the circumstances which existed at the time of the revocation the Insurance Commissioner was justified in the action which he took. But after hearing the evidence this Court is of the opinion that the breach, if any, was a breach not intentionally

or wilfully committed by the Plaintiff but merely as an accomodation breach in an attempt to do a favor to a friend. The Plaintiff gained nothing by his breach, he did not intend to breach the law, if there was a breach, and the Court is of the opinion that the evidence indicates that the Plaintiff has been sufficiently punished by his suspension, although temporary in nature, and that to make the Plaintiff suffer any longer would be in injustice to him, and the Court, therefore, finds and concludes that the relief requested by the Plaintiff and the demand of his complaint be granted." (R.15,16)

STATEMENT OF THE LAW

The pertinent law in this case is contained in the Insurance Code as follows:

1. In executing the performance bond and delivering it in the manner described, Mr. Mills falsely held the Mills, Gundry corporation out as an insurer in violation of the Utah Insurance Code. Section 31-1-7 defines insurance as follows:

"Insurance is a contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk or contingency."

Section 31-1-10 defines insurer as:

"Insurer" includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or annuity..."

Section 31-5-2 provides:

"(1) No insurer shall transact any insurance in this state except that authorized by a valid and existing certificate of authority issued to it by the Commissioner."

Section 31-11-1 provides:

"(1) Stock insurers may transact kinds of insurance in this state upon qualifying therefor and by having paid in capital and surplus represented by admitted assets, as follows:

...
(f) Suretyship insurances: (a) Surety...minimum capital required...\$300,000...minimum surplus required...\$500,000."

Section 31-11-8 provides:

"Surety insurance includes...(4) insurance guaranteeing the performance of contracts...and guaranteeing and executing bonds, undertakings, and contracts of suretyship;..."

2. The Insurance Commissioner may revoke an insurance license for the violations of the Insurance Code committed by Mr. Mills. Section 31-17-50 provides:

"The Commissioner may suspend, revoke, or refuse to renew any license issued under this chapter...for any cause specified in any other provision of this Code, or for any of the following causes:

...
(b) If the licensee wilfully violates or knowingly participates in the violation of any provision of this Code;

...
(h) If in the conduct of his affairs under the license, the licensee has shown himself to be and is so deemed by the Commissioner, incompetent or untrustworthy, a source of injury and loss to the public;

(i) If the licensee has dealt with, or attempted to deal with, insurances or to exercise powers relative to insurance outside the scope of his licensing."

Section 31-27-6 provides:

"No person who is not an insurer shall assume or use any name which deceptively infers or suggests that it is an insurer."

Section 31-1-8 provides:

"Within the intent of this Code, the business of insurance is one affected with the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured and their

representatives rests the duty of preserving inviolate the integrity of insurance."

ARGUMENT

THE TRIAL COURT ERRED IN FINDING PLAINTIFF MAY HAVE BEEN GUILTY OF A VIOLATION OF THE INSURANCE CODE BUT FINDING THE VIOLATION NOT SO SERIOUS AS TO WARRANT A REVOCATION OF HIS LICENSE.

The facts in this case are not in dispute. The conclusions to be drawn from the facts may be in dispute. Simply stated, the Plaintiff issued a surety bond on the Mills, Gundry Insurance Agency in the sum of \$1,000,000, knowing the bond would be used to satisfy a lending institution so it would disburse money on a construction loan. It is true no damage resulted to the bank in this case because the bank did not accept the instrument as a proper bond of a licensed surety company and the construction was completed without incident. The fact there was no damage in no way excuses the exposure to which Mr. Mills would have subjected the bank as a result of his improprieties. Mr. Mills would have subjected the bank to a \$1,000,000 exposure it would not otherwise have risked. Mr. Mills knew his agency did not have a license to act as a surety and he knew the company did not have the required capital to act as a surety. He knew the company, in fact, did not have enough money to meet one-twentieth of the obligation he had guaranteed.

It is true, as the Court pointed out, that Mr. Mills was pressed by a friendship obligation. It is also true he was

pressed by a motivation to continue a satisfactory financial relationship with Mr. Bradshaw and his institution. Mr. Mills balanced these needs against the exposure to the bank. He decided that conflict in his own favor.

The Insurance Commissioner decided the integrity of the insurance industry cannot tolerate a broker-agent who resolves such conflict in his favor. Such a broker-agent should not be allowed to deal in this industry that "requires that all persons be actuated by good faith, abstain from deception and practice honesty and equity in all insurance matters."

The Insurance Commissioner has the responsibility of regulating the insurance industry in the State. If he is to properly regulate the industry, he must be able to take such stern measures as he deems appropriate to maintain the integrity of the insurance business. The public good requires that the public be able to deal with insurance brokers in complete confidence.

If pawning a \$1,000,000 phony bond off as a surety bond is not sufficient cause to revoke a license, it is difficult to believe a license should ever be revoked. To conclude that the actions of Mr. Mills do not warrant the revocation of his licenses is an abuse of the discretion of the Trial Court and his Order should be reversed and the Order of the Commissioner revoking the licenses of Mr. Mills should be sustained.

Respectfully submitted this 21st day of July, 1976.

A handwritten signature in cursive script that reads "William G. Gibbs". The signature is written in dark ink and includes a long horizontal flourish extending to the right.

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