

2001

Joseph L. Mills v. C. N. Ottosen : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

14496P

IN THE SUPREME COURT
OF THE STATE OF UTAH

JOSEPH L. MILLS,

Plaintiff-Respondent

vs.

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

Defendants-Appellants

Case No. 14496

BRIEF OF PLAINTIFF-RESPONDENT

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

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& McCARTHY
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BRIEF OF PLAINTIFF-RESPONDENT

NATURE OF THE CASE

This action involves the review of an Order of the Commissioner of Insurance suspending certain insurance licenses issued to plaintiff.

DISPOSITION IN LOWER COURT

Plaintiff initiated this action to review an administrative Order of the Commissioner of Insurance suspending an insurance agent's and broker's license. On appeal to the District Court, the case was heard de novo pursuant to §31-4-9

U.C.A. 1953. Upon hearing the evidence, the Court issued its Decision and Order directing that plaintiff's licenses be reinstated.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment of the Trial Court. Respondent seeks an order affirming that judgment.

STATEMENT OF FACTS

The appellants' Statement of Facts is correct but incomplete. We shall restate the facts of the case to include uncontroverted evidence deemed to be pertinent to the Trial Court's decision.

The transaction out of which the alleged violation arose was one in which Mr. Mills was requested by one Larry Bradshaw to secure a contractor's performance bond on a construction project. Mr. Mills had done business with Mr. Bradshaw for a period of approximately 10 years. (R. 35.) The project in question was known as the Garden Square Project, a shopping center owned by one H. Shirl Wright and Commercial Enterprises, Inc. Wright and Commercial as owners had entered into a general construction contract with Riddco Company as

general contractor by the terms of which the latter agreed to construct the shopping center on a cost plus basis. (Exhibit 1-D.) The construction money was provided by Valley Mortgage Company. Although the general contract did not require the contractor to provide a performance bond, the lender required such a bond as a condition to the interim financing. (R. 43.) Upon execution of the construction contract, Mr. Bradshaw, acting for the general contractor, Riddco, contacted Mr. Mills and asked that he obtain a corporate surety performance bond. (R. 45.) Financial statements on Riddco were provided for Mr. Mills' use in securing the bond. Mr. Mills attempted to place this bond with several insurance companies (St. Paul Fire & Marine Insurance Company, Fidelity and Deposit Company of Maryland and Fireman's Fund). None of these companies would accept the risk because the project owner, Shirl Wright, was also a stockholder and principal of the contractor, Riddco. (R. 73, 74.) In the interim, while Mills was attempting to secure the performance bond of a corporate surety, Valley Mortgage disbursed two monthly construction draws but informed the contractor that it would make no further disbursement until a bond had been secured. (R. 45.) Bradshaw called Mills in September of 1975 and became angry with Mills because the latter had been unable to secure a bond. (R. 46.) Neither

Bradshaw nor Mills considered that there was any significant risk for a surety because of the common identity of the owner and contractor and the fact that it was a cost-plus job. (R. 44, 76.) It was at this time that Mr. Mills as an accommodation to Mr. Bradshaw agreed to sign the bond himself as surety if the lending institution was willing to accept his signature. (R. 47, 75.) Mills fully understood that he would be liable on the bond although he did not consider that there was any appreciable risk (R. 76) and Bradshaw knew that there were no resources behind the signature of Mills as surety except for his personal resources. (R. 47.) No one has ever claimed that any one was misled into believing that an insurance company was on the risk as surety. (See R. 47, 56.) It was simply a question of whether the bank was willing to accept Mills' personal guarantee of the obligation. The bank received the bond and was aware from the outset that Mills or his personal company (Mills, Gundry & Associates) was the surety on the obligation and that no insurance company was obligated by the bond. (R. 56.) The bank was unwilling to accept the personal bond of Mills and that bond was, therefore, rejected. Neither the bank nor the contractor were ever able to secure a bond and the bank later waived its requirement for a performance bond. (R. 57.)

Mills testified that the signing of the bond was an extraordinary transaction for him; that he was not in the business of signing bonds; that he agreed to provide the bond with the understanding that the bank would accept his personal guarantee; that he agreed to perform this service as an accommodation and without any remuneration to him and that he did not bill and was never paid any sum of money or other consideration for his accommodation. (R. 78, 79.)

The matter came before the Insurance Commission when a representative of the bank delivered the bond to the Insurance Commissioner. As a result of that, an investigation was undertaken and the Insurance Commissioner concluded that there had been a violation of the insurance laws and that Mr. Mills' licenses as an insurance agent should be suspended. An Order to that effect was entered October 28, 1975. The case was duly appealed to the District Court.

At the time of the Suspension Order Mr. Mills was 49 years of age and had been engaged in the insurance business for over 20 years. (R. 71.) Mr. Mills was married with four children. He was doing business through a small company owned by two families, Mills-Gundry & Associates, Inc. The Insurance Commissioner forwarded notice of the Suspension Order to the various companies which Mr. Mills represented and

these companies suspended their licenses with Mills and "told him to get out of business". (R. 80.) Mr. Mills was thereby forced to negotiate the sale of his share of the insurance business to his partner, Mr. Gundry. He estimates that the forced sale of his interest in the business brought about an economic loss of \$100,000.00. (R. 81.) To his further injury he was out of business overnight and forced into another occupation in order to earn a livelihood. His income was abruptly reduced from approximately \$2,000.00 per month to less than \$1,000.00 per month. (R. 80-81.) In addition to the economic loss, the suspension of his professional licenses brought public embarrassment and humiliation particularly in light of civic and church positions which he held at the time of the Order. (R. 82.)

The findings of the Trial Court indicate some doubt in the mind of the Court as to whether there had been a violation of the Insurance Code. The Court made no specific finding or conclusion either that there was or was not a violation. (R. 15-16.) There was a specific finding, however, that even assuming a violation, the continued suspension of the licenses would be disproportionate to any offense that might have occurred and the Court directed reinstatement of these licenses.

ARGUMENT

POINT I

PLAINTIFF DID NOT VIOLATE THE INSURANCE CODE

Plaintiff's counsel has some difficulty in determining from the arguments advanced at the District Court hearing and in the appellants' brief exactly what violations of the Insurance Code are claimed to have occurred in this case. Various sections of the Code are quoted in appellants' Statement of the Law (Pages 5-7, Appellants' Brief) but appellants' argument does not relate the facts of the case to the abstract statements of law which are quoted. The Commission's Suspension Order of October 28, 1975, refers only to §§31-17-50(b)(h)(i) and 31-27-6, U.C.A. 1953. (R. 4-5.) These sections are discussed in the following pages of this brief.

Appellants' argument generally proceeds upon the statements that Mills was guilty of "pawning a \$1,000,000.00 phony bond...as a surety bond" and that he violated some duty (not defined by appellants) which was owed to the lending institution in resolving a "conflict in his favor" by executing the bond, thereby creating an "exposure to the bank". (Page 8, Appellants' Brief.)

We find no violation of any provisions of the Insurance

Code in the transaction here involved. The performance bond executed by Mr. Mills is just as enforceable by the obligee as it would have been had a corporate surety executed the obligation. This was not a "phony" bond. Mr. Mills' guarantee as a surety was certainly not as valuable a guarantee as that of a qualified insurer but everyone understood that the obligation did not require any insurance company to respond and was backed only by the resources of Mills (and/or his personal company). The signing of the bond was expressly predicated upon the assumption that it should have no effect unless the bank was willing to accept Mills as surety. (R. 47, 75.) The bank was not misled. They knew that Mills (or his company) was the only obligor and were never led to believe that there was any insurance carrier behind the obligation. (R. 56.)

We find no provision in the Insurance Code which makes it unlawful for an individual to become an obligor on a surety-type obligation. As the Court knows, it is common practice for individuals not qualified as insurers to execute bonds as sureties (i.e., attachment and garnishment bonds, etc.). As might be expected, the proscription of the Insurance Code is that no person may engage as an "insurer" without compliance with the requirements of the insurance laws. (§31-5-2, U.C.A. 1953.) An "insurer" is defined as follows (§31-1-10, U.C.A., 1953):

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

There is no argument nor is there any evidence in this case that Mills has engaged "in the business of entering into contracts of insurance." His signing of the bond in this instance was without any expectation of compensation and was an isolated and extraordinary occurrence which was not a part of his ordinary business. The term "business" is generally considered to be an activity, occupation or employment regularly engaged in as a livelihood or for profit [see Cases Collected 5A Words & Phrases, Pages 596, et seq.] These elements are not present in this transaction any more than they would have been had a doctor or lawyer executed the bond under the same circumstances.

In answer to the appellants' argument that some duty was owed to the bank and that the bank was unreasonably subjected to a risk, we simply respond that there is no evidence whatever of any deception or attempt to deceive on the part of Mills. Mills stated from the outset that the bank must be willing to accept his personal guarantee. (R. 47, 75.) The witness from the bank testified that he was not misled and that he knew there was no insurance company on the bond. (R. 56.)

The Commissioner's Suspension Order of October 28, 1976, cites §§31-17-50(b)(h)(i) and 31-27-6 as the sections of the Code allegedly violated by Mr. Mills. Section 31-27-6, U.C.A. 1953, provides:

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

Although this statute is cited, no argument is made that the facts of the transaction are pertinent to the citation.

Neither the name "Joseph L. Mills" nor "Mills, Gundry & Associates" deceptively infers that the user "is an insurer". The Commissioner of Insurance has heretofore licensed "Joseph L. Mills" as an agent and has licensed "Mills, Gundry & Associates" as a broker without any exception to the use of those names.

Section 31-17-50(b)(h) and (i), U.C.A. 1953 provides that the Commissioner may suspend or revoke licenses if the licensee willfully violates any provision of the Insurance Code (Sub-Section (b)) or "has shown himself..."incompetent or untrustworthy, a source of injury and loss to the public" (Sub-Section (h)) or deals with insurance outside the scope of his licenses (Sub-Section (i)). As heretofore noted, there was no violation of the Insurance Code. The conduct of the plaintiff in this instance was certainly not evidence of "incompetency," did not disclose that he was "untrustworthy" and did

not show that there was any "injury and loss to the public". In signing the performance bond, he did only what he had a right to do and there was no element of bad faith, concealment, non-disclosure or attempt to deceive. Finally, there was no "dealing" [selling] of any type of insurance outside the scope of the licenses. In signing the bond, Mills was not acting as a commissioned salesman of insurance.

We see no evidence in the transaction of any violation of the provisions of the Insurance Code or of any conduct on the part of Mr. Mills which justifies the suspension of his insurance licenses.

POINT II

ASSUMING ARGUENDO THAT PLAINTIFF VIOLATED THE INSURANCE CODE, THE CIRCUMSTANCES OF THE CASE ARE SUCH AS TO WARRANT THE TRIAL COURT'S EXERCISE OF DISCRETION TO REINSTATE THE PLAINTIFF'S LICENSES.

Even assuming that Mr. Mills was found to be "guilty of violation of the law", the District Court is granted discretion to require reinstatement of the agent's and broker's licenses "if it deems the suspension or revocation too severe a penalty under the facts as found." (§31-4-14, U.C.A. 1953.) That is exactly what the Court did in this instance. Mills acted in good faith and with a desire to accommodate a friend

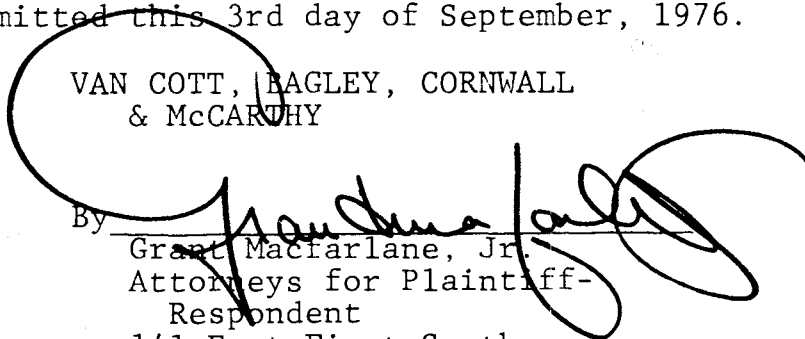
and client and without profit to himself. The extreme to which the Commissioner went in this case is illustrated in part by the fact that he suspended the licenses for a period of 18 months (R. 4-5) even though he only had statutory authority to suspend for 12 months. (§31-17-51, U.C.A. 1953.) The Suspension Order had the effect of destroying a professional reputation and a business built over a period of more than 20 years. The fact that the Commissioner challenges the Court's discretion to grant relief under these circumstances is evidence of his totally unreasonable attitude toward Mr. Mills and his inability to view the situation with objectivity and basic fairness. The statutory discretion of the Court was properly exercised.

CONCLUSION

It is respectfully submitted that there was no violation of the Insurance Code and that even assuming a violation, the facts fully warrant the District Court's finding that continued suspension of the licenses was "too severe a penalty". The judgment of the District Court should be affirmed.

Respectfully submitted this 3rd day of September, 1976.

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