

1979

Utah State University of Agriculture and Applied Science, A Utah Body Politic and Corporate v. Bear Stearns & Co., A Corporation v. Phillip A. Bullen, Jay R. Bingham, O.C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W. B. Robins, Alva C. Snow, William R. Stockdale, Jane S. Tibbals, Glen L. Taggart, Dee A. Broadbent, L. Mark Neuberger, Donald A. Catron, John Does, the Industrial Council of Utah State University of Agriculture and Applied Science : Answering Brief of Certain Respondents: Bullen, Bingham, Hammond, Harris, Kumpfer, Olsen, Plowman,

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Robins, Snow, Stockdale, Tibbals, Taggart, Broadbent, and Neuberger

Utah Supreme Court

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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. Robert S. Campbell, Michael Heyrund, Lyle W. Hillyard, David R. Melton; Attorneys for certain Third-Party Defendants Darwin C. Hansen; Attorney for Third-Party Defendant Catron David L. Wilkinson; Attorney for Plaintiff Daniele M. Allred, Kathlene W. Lowe; Attorneys for Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STATE UNIVERSITY OF :
AGRICULTURE AND APPLIED SCIENCE, :
a Utah body politic and corporate, :

Plaintiff & Respondent, :

vs. :

BEAR STEARNS & CO., a corpora- :
tion, :

DOCKET NO. 16274
(Consolidated)

Defendant-Third Party :
Plaintiff & Petitioner, :

vs. :

PHILLIP A. BULLEN, JAY R. BINGHAM, :
O. C. HAMMOND, JAY DEE HARRIS, :
BEVERLY D. KUMPFER, SNELL OLSEN, :
REX G. PLOWMAN, W. B. ROBINS, ALVA :
C. SNOW, WILLIAM R. STOCKDALE, :
JANE S. TIBBALS, GLENN L. TAGGART, :
DEE A. BROADBENT, L. MARK :
NEUBERGER, DONALD A. CATRON, JOHN :
DOES, THE INSTITUTIONAL COUNCIL :
OF UTAH STATE UNIVERSITY OF AGRI- :
CULTURE AND APPLIED SCIENCE, :

Third-Party Defendants. :

ANSWERING BRIEF OF CERTAIN RESPONDENTS: BULLEN, BINGHAM,
HAMMOND, HARRIS, KUMPFER, OLSEN, PLOWMAN, ROBINS, SNOW,
STOCKDALE, TIBBALS, TAGGART, BROADBENT, AND NEUBERGER

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SEP 25 1979

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STATE UNIVERSITY OF :
AGRICULTURE AND APPLIED :
SCIENCE, a Utah body :
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Plaintiff and :
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vs. :

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a corporation, :

Defendant-Third Party :
Plaintiff & Petitioner.:

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PHILLIP A. BULLEN, JAY R. :
BINGHAM, O. C. HAMMOND, :
JAY DEE HARRIS, BEVERLY :
D. KUMPFER, SNELL OLSEN, :
REX G. PLOWMAN, W. B. ROBINS, :
ALVA C. SNOW, WILLIAM R. :

WAIVER OF FILING RESPONDENT'S
BRIEF OF THIRD PARTY DEFENDANT
DONALD A. CATRON, AND ADOPTION
BY REFERENCE, OF OTHER
RESPONDENT BRIEFS FILED BY
THIRD PARTY DEFENDANTS
IN LIEU THEREOF

DONALD A. CATRON, JOHN DOES, :
THE INSTITUTIONAL COUNCIL :
OF UTAH STATE UNIVERSITY OF :
AGRICULTURE AND APPLIED :
SCIENCE, :

(Consolidated)

Third-Party Defendants. :
:

UTAH STATE UNIVERSITY OF :
AGRICULTURE AND APPLIED :
SCIENCE, a Utah body :
politic and corporate, :

Plaintiff and :
Respondent, :

vs. :

SUTRO & CO., INCORPORATED, :

Defendant-Third Party :
Plaintiff & Petitioner, :

vs. :

PHILLIP A. BULLEN, et al., :

Third Party Defendants. :
:

UTAH STATE UNIVERSITY OF :
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politic and corporate, :

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Respondent, :

vs. :

BOSWORTH, SULLIVAN AND :
COMPANY, :

Defendant-Third party :
Plaintiff & Petitioner. :

vs. :

PHILLIP A. BULLEN, et al., :

Third Party Defendants. :

UTAH STATE UNIVERSITY OF :
AGRICULTURE AND APPLIED :
SCIENCE, a Utah body :
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MERRILL LYNCH, PIERCE, FENNER :
& SMITH, INC., a corporation, :

Defendant-Third Party :
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UTAH STATE UNIVERSITY OF :
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Plaintiff and :
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vs. :

HORNBLOWER & WEEKS-HEMPHILL, :
NOYES, INC., a corporation, :

Defendant-Third Party :
Plaintiff & Petitioner, :

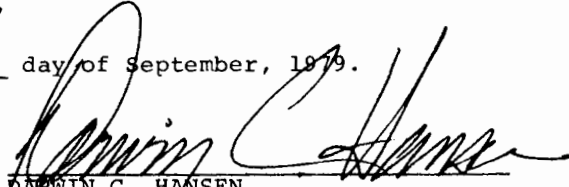
vs. :

PHILLIP A. BULLEN, et al., :

Third Party Defendants. :

Comes now DONALD A. CATRON, one of the Third-Party Defendants - Respondents, in the above entitled action, by and through his counsel of record, and respectfully waives the filing of a Respondent's Brief regarding the matter now on appeal in the above entitled Court, and in lieu thereof, adopts by reference the briefs filed by the other named Third-Party Defendants-Respondents in total, as though he had filed such a brief in his behalf.

DATED this 24 day of September, 1979.


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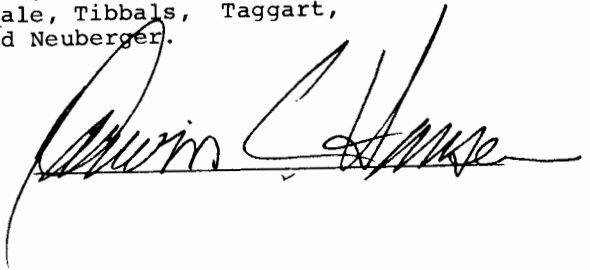
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On Appeal From the First Judicial District Court
In and For Cache County, Utah

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE NATURE OF THE CASE.....	1
(The Primary Action).....	1
(The Third Party Actions).....	2
DISPOSITION IN LOWER COURT.....	3
RELIEF SOUGHT ON APPEAL BY BROKERS.....	3
STATEMENT OF FACTS.....	4
ARGUMENT.....	6
I THE TRIAL COURT PROPERLY DISMISSED THE BROKERS' THIRD-PARTY COMPLAINTS ON THE GROUNDS THAT THESE INDIVIDUAL RESPONDENTS ARE ENTITLED TO OFFICIAL IMMUNITY.....	6
As Public Officials, These Respondents Are Entitled To Immunity For Acts Performed In Good Faith And Within The Scope Of Their Duties.....	6
Respondents Are Entitled To Immunity Even If They Inadvertently Exceeded Their Authority, Because They Were Acting In Good Faith And Within The Scope Of Their Duties.....	9
II THE TRIAL COURT PROPERLY FOUND THAT THE BROKERS' THIRD-PARTY COMPLAINTS DID NOT STATE CAUSES OF ACTION FOR INDEMNITY OR CONTRIBUTION.....	15
The Brokers Are Barred From Seeking Indemnity Because They Actively Participated In The Events Giving Rise To Liability.....	16
The Trial Court Properly Found That Respondents Cannot Be Held Individually Liable For Warranties Or Representations Made By The Institutional Council As A Whole.....	19

TABLE OF CONTENTS-Continued

	<u>Page</u>
The Brokers' Third-Party Complaints Did Not State A Cause Of Action For Contribution.....	21
III IF THIS COURT FINDS THAT THE UNIVERSITY IS NOT ENTITLED TO RECOVER FROM THE BROKERS IT SHOULD SUMMARILY AFFIRM DISMISSAL OF THE BROKERS' THIRD-PARTY COMPLAINTS.....	23
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<u>Anderson v. Granite School District</u> , 17 Ut.2d 405, 413 P.2d 597 (1966).....	7,8,11
<u>Barr v. Matteo</u> , 360 U.S. 575 (1959).....	7
<u>Bettilyon Construction Co. v. State Road Commission</u> , 20 Ut.2d 319, 437 P.2d 449 (1968).....	16
<u>Blonquist v. Summit County</u> , 25 Ut.2d 387, 483 P.2d 430 (1971).....	15
<u>Board of Education of Nebo School District v.</u> <u>Jeppson</u> , 74 Utah 576, 280 P. 1065 (1929).....	7,8,11,12,14
<u>Bradley v. Fisher</u> , 80 U.S. 335, 351-52 (1871).....	11
<u>Brunyer v. Salt Lake County</u> , 551 P.2d 521 (Utah 1976).....	21,23
<u>Bush Terminal Bldgs. v. Luckenback S.S. Co.</u> , 9 N.Y.2d 426, 174 N.E.2d 516, 214 N.Y.S.2d 428 (1961).....	17
<u>Cahill Brothers, Inc. v. Clementina Co.</u> , 208 Cal.App.2d 367, 25 Cal. Rptr. 301 (1962).....	17
<u>Chamberlain v. McCleary</u> , 217 F.Supp. 591 (E.D.Tenn. 1963).....	17
<u>Cole v. Tuttle</u> , 366 F.Supp. 1252 (N.D.Miss. 1973).....	12
<u>Connell v. Tooele City</u> , 572 P.2d 697 (Utah 1977).....	7,11,14
<u>Cornwall v. Larsen</u> , 571 P.2d 925 (Utah 1977).....	14
<u>First Equity Corp. of Florida v. Utah State</u> <u>University</u> , 544 P.2d 887 (Utah 1975).....	10,17
<u>Gildea v. Ellershaw</u> , 363 Mass. 800, 298 N.E.2d 847 (1973).....	12
<u>Gregoire v. Biddle</u> , 177 F.2d 579 (2d Cir. 1949).....	12
<u>Hardman v. Matthews</u> , 1 Ut.2d 110, 262 P.2d 748 (1953).....	22

TABLE OF AUTHORITIES-(Continued)

	<u>Page</u>
<u>Hjorth v. Whittenburg</u> , 121 Utah 324, 241 P.2d 907 (1952).....	7,12
<u>Hoggan v. Cahoon</u> , 26 Utah 444, 73 P. 512 (1903).....	18
<u>Lister v. Board of Regents of University Wisconsin System</u> , 72 Wis.2d 282, 240 N.W.2d 610 (1976).....	12,14
<u>Martelli v. Pollack</u> , 162 Cal.App.2d 655, 328 P.2d 795 (1958).....	12
<u>Miller v. City and County of San Francisco</u> , 187 Cal.App.2d 480, 9 Cal. Rptr. 767 (1960).....	12
<u>Mirin v. Justices of Supreme Court of Nevada</u> , 415 F.Supp. 1178 (D.Nev. 1976).....	5
<u>Pinal County v. Adams</u> , 13 Ariz.App. 571, 479 P.2d 718 (1971).....	16
<u>Rapp v. Salt Lake City</u> , 527 P.2d 651 (Utah 1974).....	5
<u>Rio Grande Gas Co. v. Strahmann Farms, Inc.</u> , 80 N.M. 432, 457 P.2d 364 (1969).....	17
<u>Roe v. Lundstrom</u> , 89 Utah 520, 57 P.2d 1128 (1931)....	15
<u>Schneider v. Suhrmann</u> , 8 Ut.2d 314, 327 P.2d 822 (1958).....	16
<u>Sheffield v. Turner</u> , 21 Ut.2d 314, 445 P.2d 367 (1968).....	7,12
<u>Smith v. Losee</u> , 485 F.2d 334 (10th Cir. 1973).....	7,11,12
<u>Southern Milling Co. v. U.S.</u> , 270 F.2d 80 (5th Cir. 1959).....	24
<u>Spalding v. Vilas</u> , 161 U.S. 483 (1896).....	11
<u>Standard Nut Margarine Co. v. Mellon</u> , 72 F.2d 557 (D.C.Cir. 1934).....	12
<u>Toronto v. McBride</u> , 29 U.C.Q.B. (1869).....	20

TABLE OF AUTHORITIES-(Continued)

	<u>Page</u>
<u>Trimble v. Exchange Bank of Kentucky, 23</u> Ky.L.Rep. 367, 62 S.W. 1027 (1901).....	18
<u>William F. Larrick v. Burt Chevrolet, Inc.,</u> 147 Colo. 133, 362 P.2d 1030 (1961).....	16
<u>Wray v. McMahon, 183 Miss. 592, 182 So.</u> 99, 100 (1938).....	12

Statutes

Utah Code Ann. Sec. 53-48-10 (5) (1970).....	8,9,14
Utah Code Ann. Sec. 53-48-20 (3) (1970).....	9,14
Utah Code Ann. Sec. 78-27-39 (1970).....	21

Other Authorities Cited

2 CCH New York Stock Exchange Guide, Paras. 2405, 2405.10.....	17
C.J.S. Vol. 67, "Officers", Secs. 125-127.....	11
4 McQuillen, <u>Municipal Corporations</u> , Secs. 12.208, 12.214.....	8,20
Prosser, <u>The Law of Torts</u> , Sec. 132 (4th Ed. 1971).....	8,11

IN THE SUPREME COURT OF THE STATE OF UTAH

ANSWERING BRIEF OF CERTAIN RESPONDENTS: BULLEN, BINGHAM,
HAMMOND, HARRIS, KUMPFER, OLSEN, PLOWMAN, ROBINS, SNOW,
STOCKDALE, TIBBALS, TAGGART, BROADBENT, AND NEUBERGER

STATEMENT OF THE NATURE OF THE CASE

(The Primary Actions)

The above-entitled actions, consolidated for appeal, were commenced by Plaintiff-Respondent Utah State University (hereinafter "the University") to recover losses sustained by it in connection with its purchase and sale of securities between September, 1970 and March, 1973. The University seeks to recover those losses and related expenses from the Defendant-Appellant Stockbrokers (hereinafter "the Brokers") which executed the stock transactions during that period on the University's behalf.^{1/} The University contends that it is entitled to recover those losses because the transactions were ultra vires.

^{1/} The Brokers in the captioned actions are (1) Bear Stearns & Co., (2) Sutro & Co., (3) Merrill Lynch, Pierce, Fenner & Smith, Inc., and (4) Bosworth, Sullivan & Co. The appeals in all four actions have been consolidated with the appeals in a fifth action involving Hornblower & Weeks-Hemphill, Noyes, Inc. by order of this Court dated March 20, 1979. The first three Brokers have filed a joint brief referred to hereinafter as the "Bear Stearns brief". Bosworth, Sullivan & Co. has filed a separate brief referred to hereinafter as the "Bosworth brief".

(The Third Party Actions)

The Brokers, in addition to their denial of liability to the University in the primary actions, filed third-party complaints. Those complaints were filed sometime after the University initiated the primary actions. Those third-party complaints named, among others, ^{2/}The Institutional Council as a State entity and also named individually the members of The Institutional Council ^{3/}together with the President of the University, the Vice President for Business Affairs and the Secretary of The Institutional Council. ^{4/}

This Brief is respectfully submitted on behalf of the individual Third-Party Defendants-Respondents Phillip A. Bullen, Jay R. Bingham, O. C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W. B. Robins, Alva C.

2/ Apart from the Respondents involved in these appeals, the Brokers' third-party complaints also asserted claims against the State, the Institutional Council, and two banks which had acted as transfer agents in the security transactions at issue. The Brokers' claims against the foregoing entities were dismissed by the trial court. The Brokers have apparently chosen not to appeal those rulings.

3/ Phillip A. Bullen, Jay R. Bingham, O. C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W. B. Robins, Alva C. Snow, William R. Stockdale, and Jane S. Tibbals were Institutional Council members during the period in question.

4/ The University Administrators were Glenn L. Taggart (President), Dee A. Broadbent (Vice President for Business Affairs) and L. Mark Neuberger (Secretary to the University's Institutional Council). The third-party complaints also named Donald A. Catron, another administrator who actually ran the investment program on a day-to-day basis, as a defendant. Mr. Catron is separately represented.

Snow, William R. Stockdale, Jane S. Tibbals, Glenn L. Taggart, Dee A. Broadbent, and L. Mark Neuberger in response to the Brokers' opening briefs.

DISPOSITION IN LOWER COURT

Subsequent to the filing of the third-party complaints, these individual Respondents successfully moved the trial court to dismiss the third-party action. The trial court ruled that as a matter of law the third-party complaints did not state causes of action against these individual Respondents. The court entered its Order dismissing the third-party complaints against these individual Respondents on March 21, 1978 and certified its ruling as final for the purposes of appeal on January 3, 1979.

The trial court also entered orders in the primary action between the University and the Brokers from which the Brokers are presently appealing and which are set out in the Brokers' briefs.^{5/} Those issues do not directly relate to these individual Respondents and are, accordingly, not addressed as separate points within this brief.

RELIEF SOUGHT ON APPEAL BY BROKERS

The Brokers seek reversal of the trial court's dismissal of the Brokers' third-party complaints.

5/ Bear Stearns brief, p. 1-2; Bosworth brief, p. 2.

STATEMENT OF FACTS

Each of these individual Respondents either sat on the Institutional Council or maintained an administrative position with the University during the period of the investment program at issue. The Council and Administrators were charged with the responsibility of the general and overall administration of the University. The responsibilities of these individuals were as varied as the University itself, ranging from curriculum and internal University affairs to the fiscal management of the University. These individuals, whether drawn from ranks of the community to serve the University or professional educators, were granted wide discretionary authority to manage a large university.

The involvement of these Respondents in this case arises from the attempt of the Brokers to shift ultimate legal responsibility for the University's alleged ultra vires investment program onto the individuals who administered the University. The individuals were brought into the cases long after the cases were filed and these individuals were dismissed from the cases substantially before the trial court fixed liability to the Brokers. The position of these individuals with respect to the Statement of Facts is limited by the procedural posture and history of their entry into the case and the granting of their Motions to Dismiss.

The Brokers have laid out an elaborate and lengthy Statement of Facts based on a record which either antedates

the entry of these individual Respondents or postdates their dismissal from the actions. These individual Respondents need not quarrel with the Statements of Facts made by the Brokers, save for two notable exceptions,^{6/} because it is the factual allegations of the third-party complaints which are controlling on a motion to dismiss rather than the comprehensive texts in the Brokers' briefs. In that regard, four factual propositions emerge as the central predicates of the Brokers' claims against these individual Respondents:

1. The Brokers alleged that these Respondents approved one or more resolutions which represented that the University had authority to purchase and sell securities. The resolutions designated Donald Catron as one of the individuals who was empowered to direct purchases and sales of securities on the University's behalf. The resolutions also provided that they would remain in effect until revoked in writing.

2. The Brokers further alleged that these Respondents ratified Catron's actions by reviewing periodic reports prepared by Catron which described the transactions he had entered into on the University's behalf. .

^{6/} In the Bear Stearns brief (p. 64) the Brokers incorrectly contend that the Court must also treat as true the following allegations: (1) that Respondents exceeded their statutory authority in authorizing or ratifying the securities transactions in issue and (2) allegations that Respondents' actions gave rise to an express or implied agreement to indemnify the Brokers against liability arising out of the transactions in question. Those allegations, however, are conclusions of law which are not admitted for purposes of a motion to dismiss. E.g. Rapp v. Salt Lake City, 527 P.2d 651 (Utah 1974); Mirin v. Justices of the Nevada Supreme Court, 415 F.Supp. 1178, 1181 (D.Nev. 1976) (construing identical federal rule). Even if true, however, those allegations would not be sufficient to state a cause of action against Respondents, for the reasons set forth in the following portion of this brief.

3. The Brokers further alleged that they relied upon the foregoing actions by these Respondents in executing the securities transactions in question on the University's behalf.

4. Apart from the foregoing claims, three of the Brokers have also alleged that Catron's authority to purchase securities on behalf of the University was revoked on December 4, 1972, but that Respondents failed to so advise the Brokers until March, 1973.

Solely for purposes of this appeal, the factual allegations of the Brokers' third-party complaints will be treated as substantially true. Additionally, however, the pleadings of the Brokers and, indeed, the discovery conducted in the cases at large, are devoid of the allegation, suggestion or nuance that these Respondents acted in bad faith. Rather, the record is clear that these individual Respondents at all times acted in good faith with the best interests of the University in mind and acted pursuant to and within the duties and responsibilities for the management of the University's fiscal affairs with which they were charged.

ARGUMENT

I

THE TRIAL COURT PROPERLY DISMISSED THE
BROKERS' THIRD-PARTY COMPLAINTS ON THE
GROUNDS THAT THESE INDIVIDUAL RESPONDENTS
ARE ENTITLED TO OFFICIAL IMMUNITY

As Public Officials, These
Respondents Are Entitled To
Immunity For Acts Performed
In Good Faith And Within
The Scope Of Their Duties

Public officials, both in Utah and elsewhere, have long enjoyed a qualified immunity from suits growing out of the

performance of their duties. E.g. Board of Education of Nebo School District v. Jeppson, 74 Utah 576, 280 P. 1069 (1929); Barr v. Matteo, 360 U.S. 575 (1959). Such immunity has been deemed necessary to insure that public officials are free to exercise their duties unencumbered by the fear of damage suits growing out of the performance of those duties -- suits which consume time and energy better devoted to public service and which deter competent individuals from assuming the responsibilities of public office. Anderson v. Granite School District, 17 Ut.2d 405, 413 P.2d 597 (1966); Smith v. Losee, 485 F.2d 334, 340-41 (10th Cir, 1973).

To be sure, the scope of immunity to which particular officials are entitled varies depending upon the nature of the official's responsibilities. Barr v. Matteo, supra; Connell v. Tooele City, 572 P.2d 697 (Utah 1977). Public employees whose duties are purely ministerial need little protection. However, officials such as Respondents who are charged with a wide range of duties and responsibilities which require the exercise of judgment and discretion, must be and are accorded a relatively broad form of immunity. Smith v. Losee, 485 F.2d 334, 343-44 (10th Cir. 1973).

This Court has, accordingly, recognized the need for such protection and has repeatedly extended immunity to officials charged with discretionary duties. Sheffield v. Turner, 21 Ut.2d 314, 445 P.2d 367 (1968); Hjorth v. Whittenburg,

121 Utah 324, 241 P.2d 907 (1952). So long as such officials have acted in good faith and within the scope of the matters committed to their supervision or control they have been accorded immunity. Anderson v. Granite School District, supra, at Ut.2d 407, P.2d 599; Board of Education of Nebo School District v. Jeppson, supra; Prosser, The Law of Torts, Sec. 132, pp. 988-991 (4th Ed. 1971); 4 McQuillen, Municipal Corporations, Sec. 12.208. As this Court has succinctly stated:

. . . it is the settled policy of the law that when a public official acts in good faith, believing what he does to be within the scope of his authority and in the line of his duty, he is not liable for damages even if he makes a mistake in the exercise of his judgment. Anderson, supra, at Ut.2d 407, P.2d 599.

In these related actions, Respondents' immunity fully justified dismissal of the Brokers' third-party complaints. The Brokers' complaints sought to hold Respondents personally liable for actions which Respondents took in supervising the University's financial affairs. Yet those complaints utterly failed to allege facts sufficient to impose personal liability on Respondents. The Brokers could not and did not allege that Respondents had ever acted in bad faith. Nor could the Brokers allege that Respondents had acted outside the scope of their duties, for the responsibility of overseeing investment of the University's funds is one of the many duties imposed upon Respondents by statute. Utah Code Ann. Secs. 53-48-10(5);

In short, the Brokers' third-party complaints did not allege facts which would justify stripping Respondents of their immunity for actions which they took in a good faith effort to carry out their duties. Respondents respectfully submit, therefore, that the trial court properly dismissed the Brokers' third-party complaints.

Respondents Are Entitled To Immunity
Even If They Inadvertently Exceeded
Their Authority, Because They Were
Acting In Good Faith And Within The
Scope Of Their Duties

The Brokers concede that the courts of the State of Utah have recognized and applied the common law principles of governmental immunity. The Brokers have also implicitly conceded that the scope of that protection turns on the issue of whether the duties of the official are discretionary or ministerial. Indeed, the Brokers have all but ceded the proposition that these individual Respondents were charged with discretionary as opposed to ministerial duties. The Brokers urge only that the immunity is denied these Respondents

7/ Utah Code Ann. Sec. 53-48-10(5) (1970) provides, in relevant part, that each university may handle its own financial affairs under the general supervision of the Board of Higher Education, which has delegated such duties to the Institutional Council.

Utah Code Ann. Sec. 53-48-20(3) (1970) provides, in relevant part, that an institution may retain, accumulate, invest, commit and expend funds received for research programs authorized by the Board.

because "they exceeded their authority" by authorizing investments which were later determined to be ultra vires.^{8/}

The Brokers' apparent contention that public officials may be held personally liable whenever they exceed their authority seriously misconstrues the limits of the immunity doctrine. The flaw in the Brokers' argument is its failure to acknowledge that an official may unwittingly exceed his authority but at the same time his actions may be within the scope of his duties. Were the law as the Brokers would have it, the distinctions drawn by the courts between discretionary and ministerial acts would be pyrrhic and meaningless.^{9/}

The scope of an official's immunity is dependent upon the nature of the officials responsibilities. Officials such as Respondents, whose duties require the exercise of judgment and discretion, enjoy a broader form of immunity than those officials and employees whose duties are ministerial

8/ Bear Stearns brief, pp. 70-73; Bosworth brief, pp. 38-40. This Court determined that such transactions were ultra vires in 1975. First Equity Corp. of Florida v. Utah State University, 544 P.2d 887, 891 (Utah 1975).

9/ Implicit in the Brokers' argument is the premise that any time an official exceeds his authority he acts outside the scope of his duties and thereby loses immunity. Under that premise, any wrongful act is outside the scope of the official's duties and thereby is an excess of authority. Were that the law, the doctrine of official immunity would be utterly meaningless because the commission of wrongful acts would presumably be outside the scope of an official's duties.

in nature. Connell v. Tooele City, surpa; Board of Education of Nebo School District v. Jeppson, supra; Smith v. Losee, supra; Prosser, The Law of Torts, Sec. 132, pp. 988-989 (4th Ed. 1971). Courts do not permit officials who are charged with discretionary responsibilities to be held liable simply because they have inadvertently "exceeded their authority". Instead, as the Supreme Court long ago noted, "A distinction must be . . . observed between excess of jurisdiction and the clear absence of all jurisdiction." Bradley v. Fisher, 80 U.S. 335, 351-52 (1871); Spalding v. Vilas, 161 U.S. 483, 498 (1896); C.J.S. "Officers" Sections 125-127. Only in the latter case -- i.e., when officials have acted totally outside the scope of the matters committed to their control and supervision -- may they be held personally liable.

Thus, it is well established that officials cannot be held personally liable so long as they act in good faith and within the scope of the matters committed to their supervision, even though they may "exceed their authority" through an error in judgment. For instance, in Anderson v. Granite School District, supra, several landowners attempted to hold the individual members of a school board personally liable for official acts taken in connection with the acquisition of property for a new school, a matter within the scope of the board members' duties. Despite allegations in the landowners' complaint that the school board members had exceeded their authority, this Court upheld dismissal of that complaint.

Numerous decisions, both in Utah and elsewhere, reflect the same principle.^{10/} A good example of the application of that principle to facts resembling those here is Lister v. Board of Regents of University of Wisconsin System, 72 Wis.2d 282, 240

10/ E.g., Sheffield v. Turner, 21 Ut.2d 314, 445 P.2d 367, 369 (1968) (prison warden could not be held personally liable for negligent supervision so long as he was acting in good faith and within the scope of his duties); Hjorth v. Whittenburg, 121 Utah 324, 241 P.2d 907, 909 (1952) (members of Road Commission could not be held personally liable for damages arising "out of the faithful and honest performance of their duties"); Board of Education of Nebo School District v. Jeppson, 74 Utah 576, 280 P. 1065 (1920) (county treasurer could not be held liable for erroneous decision made in good faith); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973) (university officials in Utah charged with broad duties could not be held personally liable for official acts unless malice was shown); Standard Nut Margarine Co. v. Mellon, 72 F.2d 557, 559 (D.C. Cir. 1934) (Tax Commissioner could not be held personally liable for erroneous construction and application of statute, as it was a matter committed to his control and supervision); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) ("What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him"); Cole v. Tuttle, 366 F.Supp. 1252, 1254 (N.D. Miss. 1973) (prison board officials could not be held individually liable for alleged negligence by Board in administering prison); Miller v. City and County of San Francisco, 187 Cal. App.2d 480, 483, 9 Cal. Rptr. 767 (1960) (city officials misrepresented to plaintiff that city would take action which the officials had no power to authorize; held: no liability because officials were acting within scope of their employment); Martelli v. Pollack, 162 Cal.App.2d 655, 328 P.2d 795 (1958) (city officials could not be held personally liable for entering into ultra vires contract, even though "they may have labored under some misapprehension as to the scope of their powers"); Gildea v. Ellershaw, 363 Mass. 800, 298 N.E.2d 847 (1973) (city officials who followed erroneous procedure in removing city manager could not be held personally liable for errors in exercise of judgment and discretion); Wray v. McMahon, 183 Miss. 592, 182 So. 99, 100 (1938) (city officials could not be held personally liable for negligence or error in appointing police officers); Lister v. Board of Regents of University of Wisconsin System, 72 Wis.2d 282, 240, N.W.2d 610, 621-22 (1976) (university officials could not be held personally liable for damages arising from their allegedly erroneous interpretation of statute and acts in excess of statutory authority).

N.W.2d 610 (1976). There, as here, the plaintiff sought to hold university officials personally liable, claiming that the officials had exceeded their statutory authority. In affirming dismissal of that complaint, the Wisconsin Supreme Court stated:

The general rule is that a public officer is not personally liable to one injured as a result of an act performed within the scope of his official authority and in the line of his official duty . . .

* * *

The complaint in this action contains allegations that [the defendant] misconstrued or misapplied sec. 36.16, Stats., thereby exceeding his authority and power under that statute. It is clear that the protection afforded by the principle of civil immunity attaches only to the consequence of official conduct and does not extend to an officer's actions as a private citizen. However, for the purpose of imposing liability for damages, a distinction must be made between those acts which constitute a mistake of judgment within the officer's lawful authority and those which are completely outside that authority. [The defendant's] conduct in this case clearly falls within the former category and, therefore, within the scope of the immunity. [footnotes omitted] 240 N.W.2d at 622.

In the cases presently before the Court, the Brokers sought to hold Respondents personally liable for discretionary acts which were performed in good faith and were within the scope of the matters committed to Respondents' supervision

and control.^{11/} As noted above, Respondents are responsible under the statutes of this State for overseeing the University's financial affairs. Utah Code Ann., (1970) Secs. 53-48-10(5); 53-48-20(3). The acts for which the Brokers seek to hold Respondents liable fall squarely within the scope of the foregoing duties; as such, Respondents are entitled to immunity.

The cases cited in the Brokers' briefs do not compel the contrary. The primary case upon which the Brokers rely simply illustrates that the immunity enjoyed by public employees who are performing purely ministerial duties is narrower than that for public officials who are performing discretionary duties. Cornwall v. Larsen, 571 P.2d 925, 927 (Utah 1977).

^{11/} There is no question that Respondents were performing discretionary acts when they authorized or ratified the investment of University funds. At the prompting of the Governor and State Auditor, Respondents determined that idle University funds could be best employed by investing them. Such a decision undoubtedly required the exercise of judgment on the part of these Respondents. See Connell v. Tooele City, 572 P.2d 697, 699 (Utah 1977); Board of Education of Nebo School District v. Jeppson, 74 Utah 576, 280 P. 1065, 1069 (1929); Lister v. Board of Regents of Univ. Wis. System, 72 Wis.2d 282, 240 N.W.2d 610, 621-22 (1976).

The Brokers have suggested that the failure to notify them of the alleged revocation of Catron's authority in December, 1972 involved a ministerial act; however, as one of the Brokers has explicitly noted, there was considerable confusion about Catron's instructions after December, 1972 (Bosworth brief, p. 8). In deciding whether notice to the Brokers was necessary, Respondents were obviously called upon to exercise their judgment. See cases cited above.

The other cases cited by the Brokers are equally inapposite.

So long as the officials are pursuing their duties in good faith, they are entitled to immunity. Clearly the scope of the duties of these individual Respondents is the management of the University's funds. While the investments may have been ultra vires the management of those funds nonetheless was within the scope of their duties. It is that distinction that the Brokers fail to see.

In summary, the Brokers' third-party complaints could not and did not allege as a matter of law that Respondents had acted in bad faith or totally beyond the scope of their duties. In the absence of such allegations, there is no basis for stripping the individual Respondents of their immunity, as the trial court properly recognized.

II

THE TRIAL COURT PROPERLY FOUND THAT THE BROKERS' THIRD-PARTY COMPLAINTS DID NOT STATE CAUSES OF ACTION FOR INDEMNITY OR CONTRIBUTION

While the Brokers have characterized and placed different labels on their theories of recovery, in fact they seek indemnity

12/ In only two of the other decisions cited by the Brokers were public officials actually held liable. The first of those decisions, Blonquist v. Summit County, 25 Ut.2d 387, 483 P.2d 430 (1971), is inapplicable because like the Cornwall case, it "... involved a ministerial function only", 25 Ut.2d at 390, 483 P.2d at 432. The other decision simply held that officials could be held liable if they acted "... entirely outside the scope of their official duties" (Emphasis added). Roe v. Lundstrom, 89 Utah 520, 527, 57 P.2d 1128, 1131 (1936). Neither decision warrants holding Respondents liable in this case.

from these Respondents or partial contribution and no other remedy. The Brokers' claims, regardless of the characterization, are insufficient to state a cause of action against these Respondents even if they were not public officials for the reasons set out below.

The Brokers Are Barred From
Seeking Indemnity Because They
Actively Participated In The
Events Giving Rise To Liability

Even if Respondents were not public officials entitled to the benefit of official immunity, the Brokers' third-party complaints would not be sufficient to state a cause of action for indemnity. The Brokers would be barred from seeking indemnity, because they played an active and essential role in the transactions giving rise to liability -- buying and selling securities, extending credit, and receiving commissions. In light of their active participation, the Brokers could not and cannot shift all liability in connection with those transactions to Respondents.

It is well established that no right to indemnity exists where a person has actively participated in the events giving rise to liability. Bettilyon Construction Co. v. State Road Commission, 20 Ut.2d 319, 437 P.2d 449, 450 (1968); Schneider v. Suhrmann, 8 Ut.2d 35, 327 P.2d 822, 826 (1958); Pinal County v. Adams, 13 Ariz. App. 571, 479 P.2d 718 (1971); William F. Larrick v. Burt Chevrolet, Inc., 147 Colo. 133,

362 P.2d 1030 (1961); Bush Terminal Bldgs. v. Luckenbach S.S. Co., 9 N.Y.2d 426, 174 N.E.2d 516, 214 N.Y.S.2d 428 (1961). A right to indemnity will be granted only where an individual is held vicariously liable for the wrongful acts of another or where there is so great a difference between the culpability of two tortfeasors that one of them should be forced to bear the entire loss. Cahill Brothers, Inc. v. Clementina Co., 208 Cal.App.2d 367, 25 Cal. Rptr. 301 (1962); Rio Grande Gas Co. v. Strahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969). See also Chamberlain v. McCleary, 217 F.Supp. 591, 597 (E.D. Tenn. 1963).

Here the facts do not justify shifting the Brokers' liability to these Respondents. If the Brokers are held liable to the University, it will presumably be because they had a duty to determine for themselves whether the University had authority to enter into the transactions in question.^{13/} Yet, if Brokers have failed to fulfill that duty, they may not seek indemnity from these Respondents. Even if these Respondents were charged with a similar duty, as the Brokers have

^{13/} See First Equity Corp. of Florida v. Utah State University, 544 P.2d at 892.

See further Rule 405 of the New York Stock Exchange imposing a similar duty upon the Brokers. 2 CCH New York State Exchange Guide, Paras. 2405, 2405.10.

vigorously contended, the Brokers and Respondents would be no more than joint tortfeasors. Under those circumstances, no action for indemnity would lie, even under the cases cited by the Brokers.^{14/}

A finding that the Brokers have stated a cause of action against these individuals for indemnity, contribution or warranty together with the holding that the Brokers are liable to the University would indeed be anomalous. To so hold would be to find that the Brokers were essentially free from fault. If the Brokers are free from fault the implication must bode ill for the University's primary claim against the Brokers.

There is simply no great difference in the culpability (or lack of culpability) of the Brokers and Respondents such as is necessary to justify an indemnity action. The fact that the Brokers' knowledge of the limits of the University's powers is merely constructive knowledge does not justify shifting

14/ For example, in Hoggan v. Cahoon, 26 Utah 444, 73 P. 512, 514 (1903), the Court noted ". . . 'It is only where a person knows or must be presumed to know that his act was unlawful, that the law will refuse to aid him in seeking an indemnity or contribution. . . .' We admit the rule that the law will not endorse contribution nor indemnity between wrongdoers. But that rule does not apply to any case where the act of the agent was not manifestly illegal in itself and was done bona fide in the execution of his agency and without knowledge (either actual or implied by law) that it was illegal. . . . [Citations omitted; Emphasis added].

In these cases the Brokers' constructive knowledge would bar an action for indemnity. See further Trimble v. Exchange Bank of Kentucky, 23 Ky. L. Rep. 367, 62 S.W. 1027 (1901).

liability for those transactions to Respondents -- for Respondents' "knowledge" would also be constructive. Nor does the fact that Respondents passed resolutions authorizing the opening of accounts with the Brokers justify holding the Respondents personally liable. The Brokers are sophisticated investment houses. They had access to the statutes of this State and to attorneys who could interpret those statutes for them.

In short, the Brokers played an active and essential role in the transactions giving rise to liability. As such, they are barred from shifting all responsibility for these transactions to Respondents.

The Trial Court Properly Found
That Respondents Cannot Be Held
Individually Liable For Warranties
Or Representations Made By The
Institutional Council As A Whole

In their briefs, the Brokers argue that their third-party complaints state a cause of action for misrepresentation or breach of warranty. They contend that resolutions passed by the Institutional Council, authorizing the opening of accounts with the Brokers, incorrectly represented that the University had authority to invest in common stocks.^{15/}

It matters not whether the Brokers' characterization of the Council's resolutions is correct. Even if the resolutions constituted representations or warranties, they were

^{15/} Bear Stearns brief, pp. 66-68; Bosworth brief, pp. 36-37.

representations or warranties made by the Institutional Council as a whole and not by the individual members of the Council. If the Brokers have a cause of action for misrepresentation or breach of warranty, it is a claim against the Institutional Council, not against these individual Respondents.^{16/}

The foregoing principle has been recognized in similar cases where attempts have been made to hold public officials personally liable on ultra vires contracts which they had entered into on behalf of public entities. In a majority of jurisdictions which have considered the issue, it is held that a public official can not be held personally liable on such a contract. Those decisions have been summarized by a noted commentator as follows:

Ordinarily when an officer or public agent contracts in good faith with parties having knowledge of the extent of his authority or who have equal means of knowledge, especially where the authority of the officer is prescribed by law, he will not become individually responsible unless the intent to incur liability is clearly expressed, although it should be found that, through ignorance of the law, he may have exceeded his authority.

4 McQuillen, Municipal Corporations, Section 12.214.^{17/}

^{16/} It should be noted that the Brokers asserted such a claim against the Institutional Council in the lower court. The trial court dismissed that claim and the Brokers have apparently chosen not to appeal from that ruling.

^{17/} In addition to the decisions cited by McQuillen see Toronto v. McBride, 29 U.C.Q.B. 13 (1869).

Here, any warranty or representation was made by the Council as a whole, not by the individual Respondents. If the Brokers have a claim for misrepresentation or breach of warranty, it is a claim against the Council. It cannot reasonably be contended that Respondents made any representations or warranties in their individual capacities for which they could be held personally liable.

The Brokers' Third-Party
Complaints Did Not State A Cause
Of Action For Contribution

In the alternative to their claims for indemnity, the Brokers' third-party complaints attempted to state a cause of action for contribution, on the theory that the Brokers and Respondents were joint tortfeasors. However, the Brokers failed to recognize that there is no right to contribution between joint tortfeasors in Utah for acts committed prior to May 8, 1973, the effective date of the Utah Contribution Statute.^{18/} Brunyer v. Salt Lake County, 551 P.2d 521 (1976).

In Brunyer, this Court held that the Utah statute governing contribution between joint tortfeasors has no retroactive effect. Affirming the dismissal of a third-party complaint, the Court stated:

The contribution statute established a primary right and duty which was not in

^{18/} Utah Code Ann., (1970) Sec. 78-27-39.

existence at the time the injuries in this case arose, and the statute not being retroactive by its terms did not create a right on behalf of the third-party plaintiffs. 551 P.2d at 522.

In the cases now before the Court, all the acts on which the Brokers base their claim for contribution occurred between September, 1970 and March 20, 1973. As such, the Brokers' claims for contribution failed to state a cause of action and were properly dismissed.

In their briefs, the Brokers have contended that under Utah common law they were entitled to maintain a cause of action for contribution.^{19/} In support of that contention the Brokers rely upon dicta in several cases which actually dealt with principles of indemnity.^{20/} However, in cases where this Court has actually dealt with the right to contribution it has expressly held that no right to contribution existed among joint tortfeasors under the common law of this State. For instance, in Hardman v. Matthews, 1 Ut.2d 110, 262 P.2d 748 (Utah 1953), this Court upheld the dismissal of a third-party complaint seeking contribution, stating:

. . . contribution cannot be had between joint or concurring tort-feasors in a case like this, unless sanctioned by statute, there being none such in Utah.
262 P.2d at 749.

^{19/} Bear Stearns brief, p. 68.

^{20/} Bear Stearns brief, p. 69; Bosworth brief pp. 36-37.

In Brunyerv. Salt Lake County, supra, this Court again observed, in dismissing a claim for contribution, that:

The contribution statute established a primary right and duty which was not in existence at the time the injuries in this case arose. 551 P.2d at 522.

Accordingly, Respondents respectfully submit that the trial court did not err in dismissing the Brokers' claims for contribution.

III

IF THIS COURT FINDS THAT THE
UNIVERSITY IS NOT ENTITLED TO RECOVER
FROM THE BROKERS IT SHOULD SUMMARILY
AFFIRM DISMISSAL OF THE BROKERS'
THIRD-PARTY COMPLAINTS

These Respondents respectfully submit that the Brokers' third-party complaints failed to state a cause of action and were properly dismissed for the reasons set forth above; however, it should also be noted that there are other issues presently pending before this Court, the resolution of which could make a decision on the sufficiency of the Brokers' third-party complaints unnecessary.

In their briefs, the Brokers have argued, among other things, that the University's complaint in the primary action failed to state a cause of action.^{21/} The Brokers contend that (a) the securities transactions in question were not ultra

21/ Bear Stearns brief, pp. 31-61; Bosworth brief, pp. 9-34.

vires and (b) that the University should not be permitted to maintain these actions even if the transactions were ultra vires. The Brokers have advanced substantial arguments in support of both positions. If this Court agrees that the University's complaint in the primary action failed to state a cause of action, then Respondents submit that this Court may summarily affirm dismissal of the Brokers' third-party complaints without reaching the issues discussed in the foregoing sections of this brief.

The Brokers cannot maintain an action over if they are not held liable in the first instance. Under Rule 14 of the Utah Rules of Civil Procedure, a defendant--third-party plaintiff may only maintain a claim against a party ". . . who is or may be liable to him for all or part of the plaintiff's claim against him." If the Brokers are not liable to the University, i.e., the plaintiff, they have no basis for maintaining a third-party claim against these Respondents under Rule 14. E.g. Southern Milling Co. v. U.S., 270 F.2d 80, 84 (5th Cir. 1959) (construing identical provision of federal Rule 14). ("If there had been no recovery against

the appellant-defendant there could have been no liability on the third-party claim.")^{22/}

Respondents respectfully submit, therefore, that if the University's complaints against the Brokers fall, the Brokers third-party complaints against Respondents must also fall.

CONCLUSION

The Brokers have strenuously argued in the trial court and argue now that it is unfair to permit the University to hold them liable in the primary action. Indeed, it can be said that the result is harsh and unjust. That harshness will not be lessened by shifting liability from the Brokers to these individual Third-Party Defendants who were striving to carry out their official duties in good faith nor does the harshness alter the fact that the Brokers' third-party


^{22/} It has been suggested in one of the Brokers' briefs that this Court must rule on the sufficiency of the third-party complaints even if the Court concludes that the University's complaint failed to state a cause of action, because the Brokers have included their attorneys fees among the sums for which they claim indemnity (Bear Stearns brief, p. 62). That contention is erroneous. The Brokers' attorneys fees do not constitute a portion of the plaintiffs' claims for which indemnity could properly be sought under Rule 14. Nor have the Brokers alleged any facts which even suggest that Respondents agreed to indemnify them against liability arising in connection with these transactions.

complaints fail to state a cause of action against these individuals running headlong into their official immunity and the fault of the Brokers themselves.

Accordingly, for the reasons set forth above, Respondents submit that the trial court did not err in dismissing the Brokers' third-party complaints against these individuals and that this Court should affirm the trial court's decision.

Respectfully submitted,


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Answering Brief of Certain Respondents: Bullen, Bingham, Hammond, Harris, Kumpfer, Olsen, Plowman, Robins, Snow, Stockdale, Tibbals, Taggart, Broadbent, and Neuberger was mailed this 14th day of September, 1979, to each of the following:

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A handwritten signature in black ink, appearing to read 'D. C. Hansen', written over a horizontal line. The signature is stylized with a large, sweeping 'H' and a long, curved tail.