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In the Supreme Court of the State of Utah

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CLIFTON BURR, ET AL.,
Plaintiffs and Appellants,

vs.

RALPH E. CHILDS,
Defendant and Respondent.

CASE NO. 8059

RESPONDENT'S BRIEF

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In the Supreme Court of the State of Utah

CLIFTON BURR, ET AL., Plaintiffs and Appellants, vs. RALPH E. CHILDS, Defendant and Respondent.	CASE NO. 8059

RESPONDENT'S BRIEF

STATEMENT OF CASE

For the reason that we are unable to agree with appellants' "Statement of Facts" (A. Br. 1-3) we prefer to make our own statement as to what is involved in this appeal.

The plaintiffs have appealed from an order of the Fourth District Court granting defendant's motion to dismiss their complaint (R. 14-15). Defendant's motion (R. 10) is made upon the ground "That the complaint fails to state a claim upon which relief can be granted." The complaint is

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brought by the eight plaintiffs named therein against the defendant Ralph E. Child for failure to pay them wages while employed on public works as required by Chapter 12 of Title 34, U. C. A., 1953, and, after showing defendant's residence, contains the following allegations:

That the plaintiffs were employed by the defendant on the Union High School between October 22, 1949, and December 2, 1950 (Par. II).

That defendant was awarded a contract for the construction of the Union High School at Roosevelt, and at that time the minimum wage law was in force: 49-11-3, U. C. A., 1943, now 34-12-3, U. C A., 1953 (Par. III).

On information and belief that the Industrial Commission on September 22, 1949, issued a list of rates of pay prevailing in "each type of craft" throughout Utah pursuant to Title 49-11, a copy of which is referred to and incorporated as Exhibit "A"; also another such list was issued pursuant to the same law on July 15, 1950, and same is referred to and incorporated as Exhibit "B" (Par. IV).

That when the contract was awarded to defendant, 49-11-8, U. C. A., 1943, now 34-12-8, U. C. A., 1953, was in force providing pay rate for all labor in excess of 40 hours per week on public works (Par. V).

That defendant wilfully violated 49-11-3 and 49-11-8, U. C. A., 1943, now 34-12-3 and 34-12-8, U. C. A., 1953, in that he failed to "pay to individuals employed on the construction of the Union High School" the prevailing wage and for overtime (Par. VI).

That plaintiffs and agents have demanded that the defendant comply with the Utah Statutes and defendant has failed to do so (Par. VII).

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Defendant's motion attacked the sufficiency of the foregoing allegations to constitute a cause of action under the statutes referred to. At the hearing both sides were represented and respective counsel fully argued this issue. The court took the matter under advisement and after considering the same for more than a month held the complaint insufficient. An order of dismissal was finally entered by the court on June 5, 1953 (R. 14), which recites what happened to defendant's motion from the time it was heard until the said order was entered. The plaintiffs now appeal from that order.

THE ISSUE

The sole issue raised by the court's action on the defendant's motion is: Does plaintiffs' complaint state a claim upon which relief can be granted? It is true that the court also based its action on grounds of lack of jurisdiction, but that point was not raised by defendant's motion nor was it relied on at the hearing, except inferentially. In any event, the court's order should be affirmed on this appeal if either no legal claim was stated, or the court lacked jurisdiction of the cause. Of course, the court had no jurisdiction because of plaintiffs' failure to allege facts which invoked it. However, we shall rely on the above mentioned sole issue raised by our motion. We contend that the complaint fails to state a cause of action. We shall present and discuss the matter in the following two propositions:

1. The issue raised and discussed by appellants in their brief is not before this Court on this appeal.

2. The allegations of plaintiffs' complaint fail to state a cause of action against the defendant under the statutes relied upon by plaintiffs.

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ARGUMENT

1. THE ISSUE RAISED AND DISCUSSED BY APPELLANTS IN THEIR BRIEF IS NOT BEFORE THIS COURT ON THIS APPEAL.

Counsel for plaintiffs seem to have misconceived the issue involved on this appeal when they say (A. Br. 3) "The only question here involved is whether the court's finding of no jurisdiction is correct." We are not here concerned, as further contended by plaintiffs, with the "authority of an employee to sue" nor with the "three different theories" under which he might possibly do so. We concede that an employee may sue under Chapter 12 of Title 34, U. C. A., 1953, in an appropriate situation and if he alleges facts in his complaint that bring him under the statute. But our claim here is that plaintiffs have not done so.

Plaintiffs' argument and cases on the "three theories" giving plaintiffs the right to sue are interesting but completely irrelevant to the issues here presented. At no place in their complaint do plaintiffs attack Chapter 12 of Title 34, U. C. A., 1953, as unconstitutional and void. On the contrary, they base their right to the prevailing wage and overtime pay on several sections of that law. But in their brief (A. Br. 4-8) they attack one section of the law (34-12-5) as having no effect, without first having raised the question by an appropriate allegation in their complaint. They say that the case of Logan City vs. Industrial Commission of Utah, 85 U. 131, 38 P.2d 769, renders that action ineffective because it held that the Industrial Commission was without jurisdiction of such an action as plaintiffs have brought in the instant case. Their complaint filed in the court below and defendant's motion to dismiss same raise no issue

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of the plaintiffs' right to sue. The said Chapter 12 of Title 34 gives the plaintiffs that right and provides a remedy as well as a tribunal for its enforcement. If counsel believe the remedy provided by this law was inadequate and ineffective to protect the rights of the plaintiffs in the premises they were at liberty to attack it in their complaint. This they failed to do. Such an issue, therefore, is not before this Court on this appeal. We are here and now concerned only with the question: Did plaintiffs allege sufficient facts in their complaint to invoke the jurisdiction of the court below, and to show that their statutory rights have been invaded or destroyed? This brings us to the discussion of our second proposition.

2. THE ALLEGATIONS OF PLAINTIFFS' COMPLAINT FAIL TO STATE A CAUSE OF ACTION AGAINST THE DEFENDANT UNDER THE STATUTES RELIED UPON BY PLAINTIFFS.

As shown by their complaint, the plaintiffs' rights are purely statutory. They are based upon a law originally entitled "Minimum Wage on Public Works," which became effective June 26, 1933, and when plaintiffs' complaint was filed was 49-11-2 to 49-11-10, U. C. A., 1943, and which is now 34-12-2 to 34-12-10, U. C. A., 1953.

If plaintiffs are entitled to recover because of a denial of rights given them by this act, they must allege in their complaint facts that bring them within the law. In the case of Hamilton v. Salt Lake City (1940) 99 U. 362, 106 P.2d 1028, it was held that:

> "Where a right is purely statutory and is granted upon conditions, one who seeks to enforce the right must by allegation and proof bring himself within the

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conditions. Johnson v. City of Glendale, 12 Cal. App. 2d 389, 55 P2d 580." P2d. report at p. 1030.

It is our position that the necessary allegations were not made by plaintiffs in their complaint to entitle them to recover under the said act. Wherein have plaintiffs failed to bring themselves by allegations within the conditions prescribed by the law?

Section 34-12-2 provides that:

> "not less than the prevailing hourly wage rate for work of similar character in the locality where performed . . . shall be paid to laborers, workmen and mechanics employed by or on behalf of State of Utah . . . or any . . . district . . . engaged in construction of public works. (Also the same as to holidays and overtime.) Laborers, workmen, and mechanics employed by contractors and sub-contractors in the execution of contracts for public works with a . . . district . . . shall be deemed to be employed on public works."

The foregoing section sets up conditions upon which rights are predicated and persons aggrieved must allege facts which meet these conditions. The plaintiffs' complaint fails to allege any fact concerning the capacity in which they were employed by the defendant, or for what wages. There is no averment as to whether they are "laborers", or "workmen", or "mechanics". It is submitted plaintiffs must allege that they are in one or the other of these classifications if they are to have any rights under the law.

Section 34-12-3 provides that the:

> "Public body awarding the contract for public work on behalf of any . . . district . . . shall ascertain from the Industrial Commission . . . gen-

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> eral prevailing rates of wages per hour for each type of craft . . . needed to execute . . . the contract in the locality. In the call for bids . . . and in the contract itself the public body shall publish and set forth schedules showing the rate . . . per hour for each . . . craft . . . prevailing in said locality . . . also as to holidays and overtime . . . and it shall be mandatory on the contractor . . . or subcontractor . . .to pay not less than the said specified rate to all laborers, workmen, and mechanics employed by them in the execution of the contract."

Here again plaintiffs' complaint does not make allegations which meet these conditions. They fail to allege that the public body contracting with the defendant ascertained from the Industrial Commission the general prevailing rate of wages per hour for each type of craft in the locality and inserted same in the call for bids and in the contract awarded on the project. Indeed, there is no allegation that the plaintiffs are within the classification of "carpenters, journeymen, journeymen handling creosote material, millwrights" set forth in Exhibits "A" and "B" referred to in paragraph IV of plaintiffs' complaint.

Section 34-12-4 provides that the public body awarding the contract shall cause stipulations to be inserted in it:

> "requiring the contractor . . . to pay the said prevailing rates . . . to laborers, workmen, and mechanics and upon failure or refusal to do so they shall be required to forfeit $10.00 per day to the Industrial Commission as a penalty for each time . . . the laborer, workmen, or mechanic . . . is paid less than the prevailing wage."

There is no allegation in the plaintiffs' complaint that the stipulation required by this section was inserted in the

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contract by the school district; nor that the defendant failed or refused to comply with the same; nor that forfeiture was not declared by the district and that the penalty was not paid to the Industrial Commission; nor what interest the plaintiffs have in the penalty fund; all of which plaintiffs must allege to meet the conditions laid down by this section, which allegations are vital to the statement of a cause of action under this act.

Section 34-12-5 provides that the public body awarding the contract has the duty of taking cognizance of complaints and violations of the act in the course of the execution of the contract. When in their opinion there have been violations of the act the said public body shall make a written report of same to the Industrial Commission, who shall, on notice to the contractor, and after hearing, determine if the violations were committed; and if it so finds the Industrial Commission shall make an order authorizing the public body to withhold the amount of the penalties from the contract price. The public body is to promptly pay to the Industrial Commission the amount of the penalty so withheld. From this amount the laborers, workmen, and mechanics are to receive the difference between the prevailing rates they were entitled to and the amount they actually were paid. The balance is to be retained by the Industrial Commission and placed in a fund to enforce this act, the same to be paid to the State Treasurer, who shall be its custodian, and shall be paid out on vouchers signed by a member and secretary of the Industrial Commission.

Again the plaintiffs failed to allege in their complaint that in the instant case the school district reported violations to the Industrial Commission; they further failed to allege that the Industrial Commission gave notice to the

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defendant contractor of a hearing with respect to such violations; nor do they allege that the Industrial Commission made any written order requiring the penalties to be paid by the defendant contractor; all of which conditions were required to be alleged by them if plaintiffs are to bring themselves under the provisions of this act.

Section 34-12-8 provides that:

> "Forty hours shall constitute the working week, on all works and undertakings carried on by the state, county, or municipal governments, or . . . officers thereof. Any . . . contractor . . . who shall require or contract with any person to work upon such works . . . longer than forty hours in one week, shall pay such employees at a rate of not less than one and one-half times the regular rate at which he is employed."

Here again the plaintiffs fail to allege in this complaint that the defendant is bound to pay them overtime under this section. Indeed on the face of their complaint it appears that the public body with whom defendant contracted was a school district and the above overtime section applies only to "state, county, or municipal governments". So that the plaintiffs' complaint shows positively that they do not come under this section, which makes no provision for school district contracts.

Again, we reiterate that the plaintiffs have failed to allege here in their complaint that they did not receive the prevailing wage or that they worked more than forty hours per week for which they were not paid. The nearest they came to it is in paragraph VI of their complaint, where they allege that the defendant failed "to pay those individuals employed on the construction of the Union High School" the

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prevailing wage and overtime. Who those "individuals employed" were, they do not say. Neither do they say that plaintiffs were among them.

The failure of the plaintiffs to meet the conditions laid down in the foregoing sections of the act by appropriate allegations in their complaint so as to bring themselves within the provisions of the law compels the conclusion that their complaint does not state a claim upon which relief can be granted them against the defendant in this action.

CONCLUSION

The plaintiffs' right being purely statutory, and they having failed to allege themselves to be within the conditions of the act on which they rely, it follows that their complaint does not state a legal claim for relief. We submit that the order of the lower court dismissing the complaint should be affirmed.

Respectfully submitted,

GEORGE S. BALLIF,
Attorney for Respondent

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