

2002

Wills v. Heber Valley Historic Railroad Authority : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DONALD T. WILLS AND RITA
WILLS,

Plaintiffs/Appellees,

vs.

HEBER VALLEY HISTORIC
RAILROAD AUTHORITY

Defendant/Appellant

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Sup Ct. No. 20020170SC

Trial Court No. 010500542

BRIEF OF APPELLEES DONALD T. WILLS AND RITA WILLS

INTERLOCUTORY APPEAL FROM AN ORDER DENYING DISMISSAL IN THE
FOURTH JUDICIAL DISTRICT COURT IN AND FOR WASATCH COUNTY,
STATE OF UTAH,
HONORABLE DONALD J. EYRE

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INTRODUCTION

This matter is before the Court on interlocutory appeal. This is a personal injury action commenced by plaintiffs, who were severely injured in a collision when defendant's engine pulled in front of them without sounding a statutorily required warning. The district court correctly denied defendant's Motion to Dismiss on the basis that plaintiffs strictly complied with the Governmental Immunity Act in delivering a notice of claim to the attorney general prior to filing suit. The trial court therefore properly determined as a matter of fact and law that it had jurisdiction over the case.

JURISDICTION

Plaintiffs agree that the Court has jurisdiction as set forth in defendant's brief. (Brief of Appellant at iii).

STATEMENT OF THE ISSUES

Plaintiffs are dissatisfied with the statement of the issues contained in the Brief of Appellant. The issues and the standard of review in this case are incorrectly stated. The correct issues are:

1. Did the trial court properly find as a matter of fact that the attorney general has an office in the Heber M. Wells Building thus rendering service of the notice of claim on him there proper?

Standard of Review:

Where a factual determination underpins a decision on a motion to dismiss, the appellate court will accept the factual determination unless it is clearly erroneous.

Thompson v. County of Franklin, 15 F.3d 245, 249 (2nd Cir. 1994); *M.D. Physicians and Assocs. v. State Board of Insurance*, 957 F.2d 178, 181 (5th Cir. 1992); *See, Griffith v. Griffith*, 985 P.2d 255, 258 (Utah 1999) (standard of review for factual determinations underlying rulings on motions is clearly erroneous standard.) Plaintiffs agree that a trial court's conclusions of law are reviewed for correctness.

2. Is a claim against the Heber Valley Railroad Authority exempt from the Governmental Immunity Act notice requirement because by statute such a claim is not based on liability of the State or a political subdivision?

Standard of Review:

This Court determines interpretation of language in statutes under a correctness standard and makes its own legal conclusions. *State v. Brooks*, 908 P.2d 856, 858-59 (Utah 1995).

STATUTES OF CENTRAL IMPORTANCE

In addition to the statute cited in the Brief of Appellee, the following statutes are also of central importance:

Utah Code Annotated Section 68-3-8.5 reads in relevant part.

(1) As used in this section:

(b) "Report" means a report, claim, tax return, statement or other document:

(2) (a) A report or payment required or authorized to be filed or made to the state of Utah, or to any political subdivision of Utah, that is transmitted through the United States mail is considered to be filed or made and received by the state or political subdivisions on the date shown on the post office cancellation mark stamped upon the envelope or other appropriate wrapper containing it.

Utah Code Annotated Section 65-30-2 provides in relevant part:

(1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.

...

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.

Utah Code Annotated Section 9-3-307 provides:

(1) An obligation or liability of the [Heber Valley Railroad] authority does not constitute a debt or liability of this state or of any of its political subdivisions nor does any obligation or liability constitute the loaning of credit of the state or of any of its political subdivisions nor may any obligation or liability of the authority be payable from funds other than those of the authority. All obligations of the

authority shall contain a statement to the effect that the authority is obligated to pay them solely from the revenues or other funds of the authority and that this state or its political subdivisions are not obligated to pay them and that neither the faith and credit nor the taxing power of this state or any of its political subdivisions is pledged to the payment of them.

(2) All expenses incurred in carrying out this part shall be payable solely from funds of the authority provided under this part, and nothing in this part may be construed to authorize the authority to incur indebtedness or liability on behalf of or payable by this state or any of its political subdivisions.

STATEMENT OF THE CASE

On June 19, 2001, plaintiffs mailed a notice of claim addressed as follows:

Attorney General
State of Utah
160 East 300 South, Fifth Floor
Salt Lake City, Utah 84114-0873

(R. 24). The claim was denied about seventy-five days later (R. 43). Plaintiffs filed their complaint on November 30, 2001 (R. 1).

Defendant moved to dismiss plaintiffs' complaint on the ground that the attorney general was not properly noticed (R. 29). The "factual" basis for its motion was solely the unsworn averment of counsel in her memorandum of points and authorities that the attorney general's office is located at the State Capitol and not where the notice of claim was mailed, the Heber Wells Building at 160 East 300 South, Fifth Floor, Salt Lake

City which counsel stated is only a division office (R. 19 & fn.1). Mailing was a proper form of service. (Utah Code Ann. § 68-3-8.5.)

Plaintiffs responded with admissible documentary evidence including official letterhead for “Mark L. Shurtleff, Attorney General” with an address of 160 East 300 South, Fifth Floor, Salt Lake City, Utah (R. 46-47). His predecessor, Jan Graham, had official letterhead listing “Jan Graham, Attorney General,” at the same address, 160 East 300 South, Fifth Floor, Salt Lake City, Utah (R. 48). Counsel received letters under this letterhead which contains no State Capitol address (R. 46-48). The letterhead made no reference to the Heber Wells Building being merely a division office (R. 46-48).

The Utah Attorney General’s official web page at the Utah State Government Home Page lists him as having two offices, one at the Utah State Capitol and one at the Heber M. Wells Building (R. 36-37). The “general office numbers” are listed on the web page (R. 37). The very first office number listed, 366-0300, rings to the Heber Wells Office Building and the receptionist answering the line says, “Attorney General’s Office” (R. 32).

The directory in the lobby of the Heber Wells Building lists the “Attorney General’s Office.” (R. 44, 71.) It does not say anything about a division or any other satellite office; it refers only to the Attorney General in the singular (R. 44, 71). (The cover page of defendant’s opening brief also lists the Heber Wells Building as Mr. Shurtleff’s address.)

After hearing argument on defendant's motion, the trial court found in accordance with plaintiffs' pleadings and exhibits that the evidence conclusively established that the attorney general has an office in the Heber Wells Building even though he also has one in the State Capitol (R. 73. See also R. 31-37; 43-48). Plaintiffs therefore strictly complied with the Utah Governmental Immunity Act notice requirements (*id.*).¹ Based on these facts, the trial court denied the Motion to Dismiss (*id.*).

This Court granted plaintiffs' Petition for Interlocutory Appeal on April 17, 2002. Plaintiffs filed a Motion for Summary Disposition on which this Court by order dated May 14, 2002 deferred its decision pending plenary briefing.

STATEMENT OF RELEVANT FACTS

Plaintiffs agree that the facts relevant to the issues are the procedural facts stated above.

¹ There is no foundation in the record for the defendant's statement that the trial court determined 1) the case would not be dismissed on a technicality; and 2) because the statute does not name the attorney general specifically, sending a notice of claim to a division within the Attorney General's Office constitutes compliance with the Immunity Act. (Brief of Appellees at v.) In fact, defendant fails to cite to the record in making this statement. (*Id.*) Accordingly, defendant's statement of the case in this regard is improper and wrong.

SUMMARY OF ARGUMENT

Defendant never disputed plaintiffs' documentary and other evidence demonstrating that the attorney general in official documents lists his office at the Heber Wells Building at 160 East 300 South. In fact, defendant presented no evidence contrary to these facts. Defendant merely made an averment in its motion to dismiss pleading that the attorney general's office is at the State Capitol Building and not in the Heber Wells Building. Accordingly, the trial court's finding that the attorney general had an office at the Heber Wells Building and plaintiffs strictly complied with the Immunity Act is a factual finding supported by substantial if not exclusive evidence which finding should not be disturbed on appeal.

Assuming for the sake of argument that there was not strict compliance, the attorney general held himself out in official documents as having an office at the Heber Wells Building. This representation would place this case squarely within the rule estopping governmental entities from presenting a jurisdictional defense of improper notice of a claim.

Finally, again assuming for the sake of argument that there was not strict compliance, the organic statute creating the Heber Valley Historic Railroad Authority states that claims made against the authority are not claims against the State. Defendant is therefore exempt from the Governmental Immunity Act notice provisions. Defendant is precluded from incurring liability on behalf of the State of Utah.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY FOUND PLAINTIFF'S NOTICE STRICTLY COMPLIED WITH THE GOVERNMENTAL IMMUNITY ACT.

A. The Trial Court's Unopposed Factual Finding That the Attorney General Has an Office in the Heber Wells Building Was Not Clearly Erroneous and Should Not Be Disturbed on Appeal.

As noted above, the trial court found plaintiffs strictly complied with the Governmental Immunity Act notice requirements (see Statement of the Case, *ante*, at 5-6.) The court correctly determined plaintiffs met the strict compliance standard enunciated in, *e.g.*, *Brown v. Transit Authority*, 2002 UT 15 ¶ 4, 40 P.3d 638 and *Greene v. Utah Transit Authority*, 2001 UT 109, ¶ 12, 37 P.3d. 1156. (*See also*, *Thimmes v. Utah State University*, 2001 UT App. 93, ¶ 7, 22 P.3d. 257. See R. 73; R. 31-37; 43-48.)

The trial court based its finding on undisputed facts that the attorney general has an office in the Heber Wells building and can be served there. Since this finding was not clearly erroneous, it should not be disturbed on appeal. (*Department of Human Services ex rel. Parker v. Irizarry*, 945 P.2d 676, 678 (Utah 1997).) “[W]hile in reviewing a mixed finding of fact and law appellate ‘courts are free to make an independent determination of the trial court’s conclusions,’ . . . the trial court’s factual finding shall not be set aside on appeal unless clearly erroneous.” *Id.* citing *State v. Tyler*,

850 P.2d 1250, 1253 (Utah 1993) (quoting *State v. Templin*, 805 P.2d 182, 186 (Utah 1990)).

The district court found and the record establishes without contradiction that the attorney general unambiguously identified his Heber Wells offices as his offices, not as some branch office, on his letterhead, on his official web page and on his sign (R. 36-37, 44, 46-47, 71). In fact, the Brief of Appellant does the same thing on its cover page. Plaintiffs therefore strictly complied with the notice provisions of the Utah Governmental Immunity Act by sending a claim to where the evidence showed the attorney general had an office -- the Heber Wells Building address.

Defendant presented no facts in opposition to this finding but merely made an unsupported statement in its memorandum that the attorney general had offices in the Capitol. (R. 19 & fn. 1.) Plaintiffs are aware of no statutes or regulations designating the State Capitol as the attorney general's only office. Given the overwhelming evidence supporting jurisdiction, the trial court's decision that it had power to hear the case was not clearly erroneous. The court therefore correctly concluded that plaintiffs strictly complied with the notice provisions of Utah Code Annotated, § 63-30-11.²

² The terms "attorney general" in the statute are not capitalized. This raises an interesting issue of whether the legislature intended that a notice of claim be directed to "the Attorney General" as a person or merely to the attorney general as a state agency or office. The Utah Constitution in designating the "Attorney General" uses initial capital letters to describe the person holding the office. Utah Const. Art. VII, sections 16 and 18. As a matter of style, titles of persons are capitalized (GPO Style Manual, Section 3.36, a Uniform System of Citation, 16th Edition, Section 6.2 "Capitalization." (Also known as

B. Even If There Were Not Strict Compliance with the Notice Provision (And There Was) Defendant Is Estopped from Denying Proper Notice Because of Specific, Official Representations That He Has an Office in the Heber Wells Building.

Assuming for the sake of argument that there was not strict compliance with the Immunity Act, defendant is estopped from raising the issue. This Court recently affirmed that even though the Immunity Act requires strict compliance, a governmental entity can be estopped from asserting insufficiency of notice of claim as a jurisdictional defense where its statements “mislead plaintiffs into filing a notice of claim incorrectly.” (*Wheeler v. McPherson*, 2002 UT 16 ¶¶ 17-18, 40 P.3d. 632.) The government can be estopped when there are “very specific written representations by authorized government entities.” *Anderson v. Public Service Commission*, 839 P.2d 822, 827 (Utah 1992). This exception to the general rule against estopping governmental entities applies ‘where it is plain that the ends of justice so require.’” (*Eldredge v. Utah State Retirement Board*, 795 P.2d. 671, 675 (Utah Ct. App. 1990) (quoting *Utah State University v. Stro & Co.*, 646 P.2d, 715, 720 (Utah 1982))). See *Thimmes*, *supra* at ¶ 8.)

In this case, the explicit written representations of the attorney general in publications to the public at large and in specific correspondence on his letterhead (and in his brief in this case) all showed the Heber Wells Building as his address. These

the “Bluebook.”) The lack of capitalization in the statute thus indicates that as long as the notice is directed to an attorney general office rather than to the sitting Attorney General, it is valid. However, that need not be decided in this case because the notice was directed and delivered to the “Attorney General.”

documents certainly satisfy the elements of estoppel as a matter of law. It would be reasonable for anyone to rely upon his written definitions of where his address is. The plain ends of justice would require estoppel because if plaintiffs' claims were dismissed they would have no remedy for their injuries.

II.

DEFENDANT HAD NO STANDING TO MOVE TO DISMISS THE MOTION BECAUSE PLAINTIFFS' CLAIM WAS NOT A CLAIM AGAINST THE STATE OF UTAH WITHIN THE MEANING OF THE IMMUNITY ACT.³

Again assuming *arguendo* that there was not strict compliance with the Immunity Act's notice requirement, defendant is not entitled to a jurisdictional defense. The Immunity Act applies only to claims against a "governmental entity" meaning "the state and its political subdivisions." (Utah Code Ann. § 63-30-2(1)-(3).) Defendant Heber Valley Historic Railroad Authority's enabling act, on the other hand, contains a section which prohibits defendant from incurring liability on behalf of or payable by the State of Utah or any of its political subdivisions.

The statute in question which provides in relevant part:

(1) An obligation or *liability of the authority does not constitute a debt or liability of this state or of any of its political subdivisions*. . . nor may any obligation or liability of the authority be payable from funds other than those of the authority.

³The trial court did not reach this argument because it denied the motion to dismiss on factual grounds.

(2) All expenses incurred in carrying out this part shall be payable solely from funds of the authority provided under this part, and nothing in this part may be construed to authorize the authority to incur indebtedness or *liability on behalf of or payable by this state or any of its political subdivisions*.

Utah Code Annotated § 9-3-307 (emphasis added).

There is no authority construing this statute. However, when given its plain meaning (*Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984)), the statute makes the Governmental Immunity Act inapplicable in this case since claims against the Heber Valley Railroad Authority cannot be for “liability on behalf of or payable by this state or any its political subdivisions.” (Utah Code Ann. § 9-3-307(2).) Thus, a claim against defendant is not an “action for damages” against a “governmental entity” within the meaning of the Immunity Act under Utah Code Ann. § 63-30-2(1). This is because “governmental entity” means “the state and its political subdivisions” (*id.*) and the Heber Valley Railroad’s liability “does not constitute a debt or liability of this state or of any of its political subdivisions.” (Utah Code Ann. §9-3-307(1).) Defendant’s motion to dismiss is therefore unsustainable. Defendant is not be immune from suit but is liable for its obligations from its own assets as if a private entity.

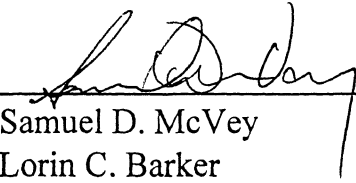
CONCLUSION

Based on the undisputed facts, on statute and on case law, this Court should summarily dismiss the appeal having deferred ruling on plaintiff’s Motion for Summary

Disposition. If plenary review is warranted, the Court should affirm the order of the district court denying the motion to dismiss and award costs to plaintiffs.

DATED this 11 day of July, 2002.

KIRTON & McCONKIE

A handwritten signature in dark ink, appearing to read "Samuel D. McVey", is written over a horizontal line.

Samuel D. McVey

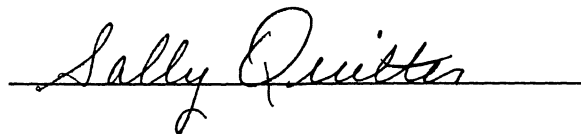
Lorin C. Barker

Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2002, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEES DONALD T. WILLS AND RITA WILLS** to be mailed through United States mail, postage prepaid, to the following:

Sandra Steinvoort
Nancy Kemp
Mark Shurtleff
Utah Attorney General
160 East 300 South, Fifth Floor
Salt Lake City, Utah 84114-0873



632031.1