

1981

Robert S. Nielson And Ila Dean Nielson v. Central Waterworks Company, A Utah Corporation, And The State of Utah, By And Through Its Division of Water Resources : Reply Brief of Appellants

Utah Supreme Court

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Recommended Citation

Reply Brief, *Nielson v. Central Waterworks*, No. 17333 (Utah Supreme Court, 1981).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

- - - - -

ROBERT S. NIELSON and ILA DEAN
NIELSON,

Plaintiffs and
Appellants,

vs.

CENTRAL WATERWORKS COMPANY,
a Utah corporation, and the
STATE OF UTAH, by and through
its Division of Water
Resources,

Case No. 17333

Defendants and
Respondents.

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REPLY BRIEF OF APPELLANTS

An Appeal from the Judgment of the Sixth
Judicial Court of Sevier County, The
Honorable Don V. Tibbs, Judge

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FILED

MAR 20 1981

Clk. Supreme Court, Utah

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STATEMENT OF FACTS	2
ARGUMENT	3
POINT I	
THE COMPLAINT ALLEGES SUFFICIENT FACTS TO SUPPORT A FINDING THAT CENTRAL WATERWORKS' DENIAL OF APPELLANTS' APPLICATION WAS ARBITRARY, DISCRIMINATORY AND CAPRICIOUS	3
POINT II	
CENTRAL WATERWORKS' DENIAL OF WATER CONNECTIONS TO APPELLANTS CONSTITUTES STATE ACTION	4
CONCLUSION	7

CASES CITED

<u>Burton v. Wilmington Parking Authority</u> , 365 U.S. 715, 6 L.Ed.2d 45, 81 S.Ct. 856 (1961).	5,6
<u>Garkane Power Company v. Public Service Commission</u> , 98 Utah 466, 100 P.2d 571 (1940)	4
<u>Holodnak v. Avco Corporation</u> , 514 F.2d 285 (2d Cir. 1975)	5,6
<u>Janusaitis v. Middlebury Volunteer Fire Department</u> , 607 F.2d 17 (2d Cir. 1979)	6

Smith v. YMCA of Montgomery, 316 F.Supp.
 899 (M.D. Ala. 1970), relief modified,
 462 F.2d 634 (5th Cir. 1972) 7

State v. Nelson, 65 Utah 457, 238 P. 237
 (1925) 4

STATUTES CITED

Utah Code Annotated, §73-10-1, et seq. (1953) 1

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REPLY BRIEF OF APPELLANTS

INTRODUCTION

The nature of this case and the disposition in the lower court are thoroughly discussed in Appellants' initial brief. For convenience, references to Central Waterworks Company's Brief will be shown as ("Central's Brief"), and the State of Utah's Brief as ("State's Brief").

STATEMENT OF FACTS

Central Waterworks, in its brief, alleges that the Appellants' Statement of Facts is not supported by the record before the Court. (Central's Brief at 2). However, it must be noted that the Respondents admitted, for the purposes of their motions for summary judgment, the truth of the facts alleged in Plaintiffs' complaint. The first sentence of Central Waterworks' Memorandum in Support of its Motion for Summary Judgment stated, "For the purpose of this motion the facts herein recited are those alleged in the complaint of plaintiffs and as specifically set forth in the affidavit of H. Conrad Hansen, president of the Central Waterworks Company." (R.p. 71). The State of Utah joined in and adopted Central's memorandum and likewise admitted the truth of Plaintiffs' allegations for purposes of the motion for summary judgment. (R.p. 78).

The affidavit of H. Conrad Hansen does not controvert the material facts alleged in Plaintiffs' complaint. (R.p. 49-51). Since the facts supporting Plaintiffs' complaint were not controverted and were admitted by the Respondents, it was not necessary to submit opposing affidavits under Rule 56(e) of the Utah Rules of Civil Procedure. Thus, Appellants' Statement of Facts is adequately supported by the record before the court.

ARGUMENT

POINT I.

THE COMPLAINT ALLEGES SUFFICIENT FACTS TO SUPPORT A FINDING THAT CENTRAL WATERWORKS' DENIAL OF APPELLANTS' APPLICATION WAS ARBITRARY, DISCRIMINATORY, AND CAPRICIOUS.

In its brief, Central Waterworks alleges that the record does not support Appellants' allegation that Central Waterworks' denial of Appellants' application for water was arbitrary and discriminatory. (Central's Brief at 8). As previously noted, the Respondents admitted, for purposes of the motions for summary judgment, the truth of the allegations of Appellants' complaint. Consequently, the allegations of that complaint must be looked to in order to determine if a cause of action has been stated.

Essentially, the Appellants set forth facts demonstrating that Central Waterworks' policies regarding the sale of water hook-ups were arbitrarily and discriminatorily applied with respect to the Appellants. Furthermore, the facts alleged in the complaint support a finding that Central Waterworks violated its so-called "policies" in granting water connections to other applicants. (R.p. 1-5).

POINT II.

CENTRAL WATERWORKS' DENIAL OF WATER
CONNECTIONS TO APPELLANTS CONSTITUTES
STATE ACTION.

The briefs of both Respondents argue that Central Waterworks is not a public utility and, therefore, is not subject to constitutional restraints. (Central's Brief at 4-8; State's Brief at 14). The cases cited by Respondents and the reasoning contained therein is not applicable to the case at hand. For example, in Garkane Power Company v. Public Service Commission, 98 Utah 466, 100 P.2d 571 (Utah 1940), the question was whether Garkane was a "public utility" as that term was used in the Public Service Commission statute. The test applied in Garkane was whether the company's service was performed for, or the commodity delivered to, the public generally. Id. at 572. The same issue was raised and decided in State v. Nelson, 65 Utah 457, 238 P. 237 (1925). Once again, the issue was whether an entity was subject to the regulatory powers of the Public Service Commission.

Contrariwise, in the instant case the issue is whether the Appellants' Constitutional rights were violated. The threshold issue encountered is whether the denial of water connections to the Appellants constitutes state action. The Garkane Power and Nelson cases are not dispositive of

the issues raised in this case. Furthermore, those cases predate the contemporary United States Supreme Court cases on the issue of state action.

The test to determine the presence or absence of state action is quite different from that used to determine whether a company is subject to regulation by the Public Service Commission. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 6 L.Ed.2d 45, 50, 81 S. Ct. 856 (1961). In the instant case, state action arises from the "symbiotic relationship" between the State and Central Waterworks; moreover, Central Waterworks is performing a traditionally governmental function.

The state seeks to distinguish the case of Burton v. Wilmington Parking Authority, supra, on factual grounds. (State's Brief at 12). Initially, it must be noted that there is no basis for using a less exacting standard of "state action" where racial discrimination is asserted. A different test is not contained in the Constitution, nor should one be implied. In Holodnak v. AVCO Corp., 514 F.2d 285 (2d Cir. 1975), the court "upheld a free speech claim under the state action rubric of a 'symbiotic relationship' thereby going beyond racial discrimination alone in our application

of Burton." Janusaitis v. Middlebury Volunteer Fire Department, 607 F.2d 17, 23 (2d Cir. 1979). In Janusaitis, supra, the Second Circuit also found state action in the dismissal of a volunteer fireman even though no racial discrimination was alleged. In short, while there is some authority for the notion that state action will be found more easily in cases of racial discrimination, there is no basis for such a distinction in the Fourteenth Amendment and the distinction is not drawn in Burton, Holodnak, or Janusaitis.

The State also seeks to distinguish Burton and Holodnak on the ground that the waterworks system is being sold to Central Waterworks on a conditional sales contract. (State's Brief at 12). Nevertheless, all the facts of this matter indicate a continuing relationship between the State of Utah and Central Waterworks, dating as far back as 1952. (R.p. 52-54). The facts further indicate that Central Waterworks pays no interest on its sales contract. (R.p. 50, 53). As a result, Central will end up paying for a mere fraction of the actual expense of constructing the waterworks system. By and large, the expense is being borne by the State of Utah.

The facts alleged in Appellants' complaint and the relationship between Central Waterworks and the State of Utah, as more fully set forth in the State's brief, clearly demon-

strate the presence of a "symbiotic relationship" between Central Waterworks and the State. (State's Brief at 2-3). The Department of Water Resources has used Central Waterworks and other similar companies to comply with its statutory directive of promoting efficient use of available water resources. Utah Code Ann. §73-10-1, et seq. (1953). Under such circumstances, the Respondents' goals and purposes are inextricably intertwined. Moreover, the Department of Water Resources is effectively delegating its "public function" to promote efficient use of the State's water. Cf. Smith v. YMCA of Montgomery, 316 F. Supp. 899, 907 (M.D. Ala. 1970), relief modified, 462 F.2d 634 (5th Cir. 1972) (state action was found where the Montgomery Park and Recreation Board delegated its statutory responsibility for recreation programs to the YMCA). Despite its allegedly private nature, Central Waterworks is a creature dependent upon the State for its assets, if not its very existence.

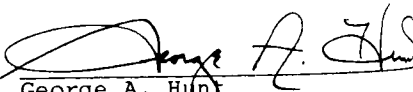
CONCLUSION


The facts as alleged in Appellants' complaint, and as set forth in Appellants' initial brief, indicate a special relationship between Central Waterworks and the State of Utah. This special relationship rises to the level of a joint venture, with each entity deriving benefits from the efforts of both. In addition, Central Waterworks is but a

tool of the Department of Water Resources for fulfilling its statutory duty. Under such circumstances, the denial of water connections to the Appellants is state action. Finally, since the Respondents accepted the allegations of Plaintiffs' complaint as truthful for purposes of their motions for summary judgment, the facts before the court support a finding that the denial of water connections was arbitrary and capricious in violation of the Equal Protection Clause of the Fourteenth Amendment.

In view of the fact that the Appellants have stated a cause of action upon which relief may be granted, the judgments of the lower court should be reversed and the matter remanded to the district court.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed two (2) copies of the foregoing Reply Brief of Appellants to: Tex R. Olsen, Esq.,

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