1982

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 : Petition For Rehearing

Utah Supreme Court

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,

Defendants and Respondents.

Case No. 17333

PETITION FOR REHEARING

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Case No. 17333

PETITION FOR REHEARING

Robert S. Nielson and Ila Dean Nielson, appellants, petition the above-entitled court pursuant to Rule 76(e), Utah Rules of Civil Procedure, for a rehearing of the above-entitled case and allege that the court erred in its opinion (per Justice Howe) filed herein on March 16, 1982, in the particulars hereinafter set forth.

ARGUMENT

POINT I.

THE GROUNDS UPON WHICH THE COURT UPHELD THE SUMMARY JUDGMENT WERE NOT RAISED IN THE DISTRICT COURT OR ON APPEAL.

In its opinion, the court discusses several alleged deficiencies in the plaintiffs' complaint and decides that the

complaint fails to state a cause of action on grounds other than the absence of "state action." The court notes that the plaintiffs did not allege the following facts:

1. That the plaintiffs were owners of any stock in Central Waterworks,

2. That the successful applicants did not own a share for each connection granted them,

3. That shares were available to be sold, and

4. That shares in Central Waterworks were sold to others, but not the plaintiffs.

None of the foregoing issues were raised in the District Court or on appeal.

It is elementary that issues not raised in the district court should not be considered by this court upon appeal. Shayne v. Stanley & Sons, Inc., 605 P.2d 775 (Utah 1980); Mortenson v. Financial Growth, Inc., 456 P.2d 181 (Utah 1969). The requirement that issues must be raised in the district court permits the litigants to cure alleged defects by amending their pleadings. This rule also ensures that the issues, if appealed, will be framed by the record in the district court, including affidavits which may have been submitted by the parties. Perhaps more importantly, the court should not consider issues which, in addition to not having been argued below, have been neither briefed nor argued in the Supreme Court. Resolution of an appeal based upon issues

not argued denies the parties the right to be heard and increases the chance of error by the court.

By way of clarification, it should be noted that the plaintiffs' references in their complaint to "connections" necessarily encompassed the sale or transfer of shares of stock of Central Waterworks. Each share of stock in Central Waterworks entitles the owner to one connection. The appellate brief of Respondent Central Waterworks states, "The sale of stock guarantees a water hookup and water service." (Central's brief at 7). This fact is also supported in the record by the affidavit of H. Conrad Hansen and Exhibits thereto. (R. p. 49-70). Thus, the complaint's references to "connections" envisioned the accompanying sale of stock and this is clearly what the parties assumed. To the extent that any ambiguity exists, the matter could have been disposed of by amendment in the district court (had the issue been raised), an avenue not open to the appellants at this time.

Construing the plaintiffs' complaint in light of the foregoing discussion, it is clear that the complaint alleges that subsequent applicants did not own a share for each connection granted them. Instead, the subsequent applicants were sold shares and connections, after the time Central

Waterworks represented to plaintiffs that it had insufficie water. Moreover, the allegation that connections were subse quently sold to others indicates that at the time plaintiffs applied for connections, shares in the corporation were available to be sold. It is interesting to note that neithe defendant raised or offered proof that the 250 share limit had been reached by Central Waterworks.

Since the sale of "connections" and shares are the same thing, plaintiffs' complaint alleges that shares were sold t others, but not to them. In fact, that is the basis of plaintiffs' complaint, i.e., that they were discriminated against in the sale of shares of the corporation. Finally, the court notes that the plaintiffs did not allege that they were owners of any stock in Central Waterworks. In fact, Robert Nielson, one of the plaintiffs, was an incorporator of Central Waterworks. (R. p. 70). In addition, the issue was not raised in the District Court or on appeal. Most important, however, the allegation is irrelevant to the cause of action stated by the plaintiffs. What the plaintiffs seek is a declaration that Central Waterworks is, for the purposes of this suit, an arm of the State of Utah and, as such, must deal with the plaintiffs in accordance with the constitutions of the State of Utah and the United States. What the plain-

tiffs seek is the transfer of stock ("connections"). If the plaintiffs already had sufficient stock to entitle them to eighteen connections, they would not have filed this action.

The court's opinion illustrates why issues generally are not considered for the first time on appeal or sua sponte by an appellate court. Undoubtedly, the parties have assumed, throughout the pendency of this litigation, that "connections" meant shares of stock in the corporation. That is why Central Waterworks memorandum in support of its motion for summary judgment argued that the plaintiffs were trying to force the sale of shares in a private corporation. (R. p. 72-75). All parties realized that the word "connections" was the functional equivalent of shares in Central Waterworks. For the court to interject its own confusion, sua sponte, and uphold the summary judgment on that basis, is error requiring a rehearing of the matter.

POINT II

THE COURT ERRED IN HOLDING THAT IT NEED NOT DECIDE THE STATE ACTION ISSUE.

In its opinion, the court holds that it need not decide whether there was any "state action" in the denial of water connections to the plaintiffs, since the summary judgment was properly granted because of other reasons. As previously

discussed, most of the "other reasons" were raised neither in the district court nor on appeal. The sole argument raised below and on appeal which the court considers is the defendants' contention that Central Waterworks is a private corporation, not a public utility. It is undisputed that at the present time Central Waterworks limits is service to its stockholders. However, the court's holding that the state action issue need not be addressed because the corporation limits its service to its stockholders in fact decides the state action issue, without a written opinion containing the court's reasons, as required by Rule 76(a) of the Utah Rules of Civil Procedure.

While Central Waterworks is a "private" corporation, it is private only in the sense that it holds no state or federal charter. In fact, the State of Utah owns all of the assets of Central Waterworks, subject to a repurchase agreement. The plaintiffs' argument, more fully discussed in previous briefs, is that the State of Utah has become so intertwined with Central Waterworks that the acts of Central Waterworks are the acts of the State. The court's holding that it need not decide whether state action is present because Central Waterworks is a "private" corporation is erroneous and ignores a long line of United States Supreme

Court decisions which hold that state action can be found in the acts of seemingly private entities.

In Burton v. Wilmington Parking Authority, 365 U.S. 715, 6 L.Ed.2d 45, 81 S.Ct. 856 (1961), the Court found state action where a restaurant located in a state-owned parking garage practiced racial discrimination. Applying the Utah Supreme Court's analysis in the instant matter, the United States Supreme Court would have held that it need not face the state action issue because the restaurant was privately owned and could serve whoever it wanted. Had the United States Supreme Court adopted similar reasoning in Marsh v. Alabama, 326 U.S. 501, 9 L.Ed. 265, 66 S.Ct. 275 (1946) (company town case), it would have held that a person could be punished for trespassing on the premises of a company owned town, simply because the town was owned by a private corporation. Other cases support the plaintiffs' argument that state action can indeed be found in the acts of seemingly private individuals or entities. See e.g., Janusaitis v. Middlebury Volunteer Fire Department, 607 F.2d 17 (2d Cir. 1979); and Holodnack v. Avco Corporation, 514 F.2d 285 (2d Cir. 1975).

The plaintiffs do not claim that Central Waterworks is a public utility, but maintain that Central is a nominally

private corporation whose interests and assets are inextricably intertwined with the State of Utah. This court ignores the issue by holding, sub silentio, that Central Waterworks is a private corporation and therefore immune from constitutional constraints, regardless of its relationship with the State of Utah. The logical extension of the court's analysis, or lack thereof, is that all "private" corporations are immune from constitutional considerations of due process and equal protection, regardless of the extent or character of the state's involvement. Thus, in Burton v. Wilmington Parking Authority, supra, the Parking Authority could have leased commercial space to a restaurant practicing racial discrimination simply because the restaurant was "private." The court's opinion in this matter ignores a multitude of facts indicating the presence of a symbiotic relationship between Central Waterworks and the State of Utah, and thus state action.

CONCLUSION

The decision of this court is based upon the resolution of issues not raised in the district court or upon appeal. Such action by the court amounts to a denial of the plaintiffs' right to be heard. Moreover, the court's refusal to deal with the issue squarely presented, i.e., state action, is error, justifying a rehearing of the matter.

Dated this 5th day of April, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed two (2) copies of the foregoing Petition for Rehearing to: Tex R. Olsen, Esq., Olsen and Chamberlain, 76 South Main, Richfield, Utah 84701, and Dallin W. Jensen, Esq., and Michael M. Quealy, Esq., 1636 West North Temple, Salt Lake City, Utah 84116, postage prepaid, on this 5th day of April, 1982.

Bryce D. Panzer