

2015

Sean Kendall, Appellant, v Brett Olsen, Lt. Brian Purvis, Joseph Allen Everett, Tom Edmundson, George S. Pregman and Salt Lake City Corporation, Appellees

Utah Supreme Court

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Recommended Citation

Reply Brief, *Kendall v Olsen et al*, No. 20150927 (Utah Supreme Court, 2015).
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IN THE SUPREME COURT OF THE STATE OF UTAH

SEAN KENDALL,

Appellant,

v.

BRETT OLSEN, LT. BRIAN PURVIS,
JOSEPH ALLEN EVERETT, TOM
EDMUNDSON, GEORGE S. PREGMAN,
AND SALT LAKE CITY CORPORATION,

Appellees.

Appellate Case No. 20150927-SC

REPLY SUPPLEMENTAL BRIEF OF APPELLANT SEAN KENDALL

**Appeal From the Third Judicial District Court, Salt Lake County,
Before the Honorable Heather Brereton and the Honorable William Barrett**

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ARGUMENT

I. ZAMORA IS CLEARLY ERRONEOUS PRECEDENT FOR THE PROPOSITION THAT THE BOND AND UNDERTAKING STATUTES ARE CONSTITUTIONAL.

Zamora v. Draper, 635 P.2d 78 (Utah 1981), should be overruled because:

(a) *Zamora* upheld a statute that (1) treated plaintiffs suing police officers differently than *all* other plaintiffs and (2) treated police officer defendants differently than *all* other defendants, without any showing that the discrimination—severely obstructing, if not entirely preventing, access to the courts—met the applicable strict scrutiny test, nor the intermediate scrutiny test, nor even the wholly inapplicable rational basis test;

(b) *Zamora* ignored the absence of a due process hearing prior to the deprivation of property required by the bond statute; and

(c) *Zamora* erroneously scrutinized the bond statute under the minimal standard of rational basis when a higher level of scrutiny was required because the statute severely burdens, if not entirely obstructs, the right of access to the courts. That right has been held in cases involving claims under the United States Constitution to be a “fundamental right,” requiring “strict scrutiny,” and has been held by the Utah Supreme Court to be an “important” right, requiring “heightened scrutiny,” in cases analyzed under the Uniform Operation of Laws Clause of the Utah Constitution.

A. Plaintiffs Wrongfully Injured by Police Officers Are Constitutionally Protected Against the Extremely Burdensome, If Not Entirely Insurmountable, Barriers Caused by the Bond and Undertaking Statutes.

The stated purpose in *Zamora* for creating a class distinction among tortfeasors is protecting police officers “against frivolous and/or vexatious lawsuits.” 635 P.2d at 81.¹ The requirement of a bond, however, does not meet strict or intermediate scrutiny, nor does it even meet minimal scrutiny, because neither the State nor Appellees have provided *any* support for the notion that more frivolous or vexatious lawsuits are filed against police officer defendants than against other defendants. *See Psych. Assocs. v. Siegel*, 610 So. 2d 419, 425 (Fl. 1992); *Detraz v. Fontana*, 416 So. 2d 1291, 1296 (La. 1982) (“It is argued that the bond requirement is a justifiable means to deter frivolous suits instituted against public officials for harassment. No support for the suggestion that suits are brought against public officials for harassment with greater frequency than suits against other defendants has been presented in brief or in argument. . . . No reasonable justification for this disparate treatment has been supplied.”).

Appellees argue “[t]he conclusion the Court reached in *Zamora* is correct because the bond statute does not eliminate a legal remedy.” Suppl. Br. of Appellees at 3–4.

¹ Appellees argue Kendall’s claims relating to the killing of his dog are the type of “frivolous” claims intended to be deterred by the Bond Statute, pointing to the recent decision in the Federal District Court holding that the individual defendants are entitled to qualified immunity. Suppl. Br. of Appellees at 10, n.14. That decision is being appealed, in part, because it did not apply the binding Fourth Amendment test. No decision has yet been reached on Kendall’s state claims, including claims under the Utah Constitution. Utah law, similarly to the controlling federal rule, requires that, for a warrantless search conducted under the guise of the emergency aid doctrine, there must be a nexus between the place to be searched and the emergency. *See, e.g., Salt Lake City v. Davidson*, 2000 UT App 12, ¶ 35, 994 P.2d 1283 (“When a search is performed in an emergency situation, the area searched must have a close connection to the emergency. Specifically, there must be a nexus between the emergency situation and the area or place to be searched.” (citations omitted)).

Puzzlingly, Appellees state that “[a] necessary pre-requisite to every open courts challenge is that the statute at issue abrogate a legal remedy.” Suppl. Br. of Appellees, 3. However, the bond statute *did* abrogate a remedy when it imposed tremendous, if not impossible-to-satisfy, burdens on prospective plaintiffs seeking a remedy against law enforcement officers. Also, and most fundamentally, the Open Courts Clause protects more than Appellees admit. The Open Courts Clause “imposes a substantive limitation on the legislature's ability to eliminate *or unduly restrict* causes of action seeking relief for injury to ‘person, property, or reputation.’ ” *Day v. State ex rel. Utah Dep't of Pub. Safety*, 1999 UT 46, ¶ 37, 980 P.2d 1171, 1184 (emphasis added) (quoting *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985)); *see also Jeffs v. Stubbs*, 970 P.2d 1234, 1250 (Utah 1998) (“While this clause may not guarantee any specific remedy, it certainly guarantees access to the courts.”); *Jensen v. State Tax Comm'n*, 835 P.2d 965, 969 (Utah 1992) (stating if a statute “precludes *reasonable access* to judicial review, it violates the open courts provision and is unconstitutional as applied.” (emphasis added)); *Burgandy v. State, Dep't of Human Servs.*, 1999 UT App 208, ¶ 18, 983 P.2d 586 (finding no violation of Open Courts Clause where statute “does not *deny, restrict, chill, burden, or impose conditions upon* appellant's right and ability to access the courts” (emphasis added)).

Before filing his complaint on the merits, Kendall faced extremely oppressive, costly, time-wasting, and wholly unreasonable burdens. Those burdens are not faced by *any* plaintiffs other than those who allege they are victims of police officer wrongdoing. Having no guidance as to how a plaintiff can procedurally meet the requirements of the Bond Statute, Kendall first filed a complaint for declaratory judgment challenging the

constitutionality of the Bond and Undertaking Statutes and asked, in the alternative, for the court to determine the bond and undertaking amounts and to find that Kendall was unable to provide the bond or undertaking. Kendall did not know whether he would be required to post a bond or undertaking until nearly nine months² later, after costly legal research, drafting of pleadings, motions, and memoranda, and an extensive evidentiary hearing. To this day, there has been no determination by the trial court, as required by the Bond Statute, of the amount of officers' future costs and attorneys' fees, in relation to which amount Kendall's impecuniosity or non-impecuniosity must be measured.³ Just like Kendall, other plaintiffs⁴ have faced these Herculean, if not impossible, challenges⁵ to obtain access to

² The Complaint for Declaratory Judgment was filed on January 26, 2015. R. 1–19. Kendall was determined to be impecunious on September 21, 2015, R. 592–600, after a lengthy and complicated evidentiary hearing on September 15, 2015. R. 621–792.

³ If Kendall's appeal to the Tenth Circuit is successful, then he will again be before the Federal District Court, subject to DUCivR 67-1(c), which provides "[t]he court may review, fix, and adjust the amount of the required undertaking or bond as provided by law." The ability of the court to change the amount of the bond, *after* the complaint has been filed is at direct odds with the requirement of the Bond Statute that the bond must be filed *before* the complaint in an amount that "*shall* cover all estimated costs and attorney fees the officer may be expected to incur in defending the action[.]" Utah Code § 78B-3-104.

⁴ Many victims have suffered the dismissal of their claims for failure to comply with the Bond and Undertaking Statutes. *See George v. Beaver County*, 2017 WL 782287 (D. Utah Feb. 28, 2017) (dismissing state law claims without prejudice for failure to post bond required by Utah Code § 78B-3-104); *Craig v. Provo City*, 2016 UT 40, --- P.3d --- (holding that claim dismissed without prejudice for failure to file undertaking required by Utah Code § 63G-7-601(2) cannot be revived by invoking the saving provision of Utah Code § 78B-2-111); *Swasey v. West Valley City*, 2015 WL 500870 (D. Utah Feb. 5, 2015) (dismissing state law claims without prejudice for failure to file undertaking); Br. of Appellant at 35 (citing other cases in which claims have been dismissed for failure or inability to meet the draconian requirements of the bond and/or undertaking statutes).

⁵ The Utah Federal Court has, through DUCivR 67-1(c) completely disregarded the requirement of the Bond Statute that the "bond *shall* cover all estimated costs and attorney fees the officer may be expected to incur in defending the action[.]" (Emphasis added.) The local rules of practice for the Utah federal court do not have the authority to unilaterally

the courts for a consideration of their claims under state law and the Utah Constitution.⁶

Further, *Zamora* gave no consideration to the deterrent effects of the Bond Statute on non-impecunious prospective plaintiffs, who face a tremendous price of admission to the courts in violation of the Open Courts Clause. 635 P.2d 78 at 80–81. Appellees misstate Appellant’s argument as only concerning “financial risks.”⁷ Prospective plaintiffs subject to the Bond Statute face not only *risk*, but concrete *losses*. As held in *Beaudreau*:

If [a plaintiff] . . . secures his undertaking from a corporate surety . . . he will at least be deprived of his nonrefundable premium; if he deposits money in court in lieu of an undertaking, he will be deprived of its use during the pendency of the action. If the plaintiff [refuses to comply with an undertaking requirement] and incurs dismissal of his action, he will also have suffered a ‘taking’ of his property, since his claim against a public entity or public employee . . . is a ‘property interest’ within the meaning of the due process clause.”

Beaudreau v. Superior Court, 535 P.2d 713, 717–18 (Cal. 1975).

Those losses and the immense procedural obstacles to, if not impossibility of, compliance with the bond requirement⁸ are diametrically the opposite of “reasonable access” to the courts for victims of police officer tortfeasors.

change the requirements of the Bond Statute, leaving plaintiffs following DUCivR 67-1(c) in fear of dismissal for failure to comply with the statute. Therefore, to avoid the risk of dismissal, plaintiffs must obtain a determination by the court, *before filing a complaint*, of the bond amount or refrain from bringing claims under the laws or constitution of the State of Utah.

⁶ Many potential plaintiffs give up their state claims because of the daunting, often prohibitive, costs and procedural barriers. Br. of Appellant at 15–17.

⁷ Suppl. Br. of Appellees, 6–7 (“[T]he Court may disregard the claim that the bond statute is unconstitutional on its face because it discourages people that are not impecunious from bringing claims because of the financial risks involved.”)

⁸ See Suppl. Br. of Appellant, 5–7, 9–11.

B. The Bond Statute in *Zamora* Did Not, and the Bond and Undertaking Statutes at Issue Here Do Not, Allow for a Pre-Deprivation Due Process Hearing to Determine the Merits of the Prospective Action and the Reasonableness of the Amount of the Bond or Undertaking.

Zamora does not address whether the bond statute comports with due process and is therefore not entitled to *stare decisis* on that claim.⁹ Because the bond requirement constitutes a taking, victims of police officer tortfeasors are entitled to a hearing inquiring into the merits of the claim and the amount of the bond, which hearing is not allowed under the bond statute.¹⁰

Under the fundamental notions of due process. . . , the taking to which a plaintiff is subjected under the above [cost undertaking] statutes must be preceded by a hearing in the particular case in order to determine whether the statutory purpose is promoted by the imposition of the undertaking requirement. As these statutes are purportedly designed to protect public entities and public employees against the cost of defending frivolous lawsuits, a due process hearing would necessarily inquire into the merit of the plaintiff's action as well as into the reasonableness of the amount of the undertaking in the light of the defendant's probable expenses.

Beaudreau, 535 P.2d at 720. *See also Gonzales v. Fox*, 68 Cal. App. 3d Supp. 16, 18–19 (Cal. App. 1977); *Detraz*, 416 So. 2d at 1297.

Appellees misleadingly attempt to distinguish *Detraz* and *Siegel* because they “concern bond statutes that, unlike Utah’s statute, do not concern a reciprocal attorney fee provisions [sic] and do not include provisions that allow a court to set the amount of the

⁹ Suppl. Br. of Appellees, 8. (“The *Zamora* decision does not contain any specific discussion of whether the bond statute violates due process because the plaintiff did not challenge the statute on those grounds.”).

¹⁰ Requiring a limited class of plaintiffs to engage in such a hearing on the merits of their claims may, in itself, be grounds for a substantial equal protection challenge.

bond commensurate with the party's ability to pay." Br. of Appellees at 31.¹¹ According to Appellees, "[t]he courts in those cases found those facts important in reaching the conclusion that the statutes at issue violated substantive due process." *Id.*

First, contrary to Appellees' characterization, *Detraz* stated that "[a]s in this case, decisional law allowed the plaintiff an opportunity to qualify to proceed in forma pauperis."¹² 416 So. 2d at 1296 (emphasis added). *Detraz* also stated "the court held that a bond for attorney's fees could not be imposed on an indigent." *Id.* at 1294. Never does *Detraz* indicate its holding depended on either a lack of a reciprocal attorney fee provision or a lack of flexibility given to courts to reduce the bond amount for some plaintiffs.

Second, in *Siegel*, it was not the holding of the case, but simply the opinion of only one justice, that relied on there being no flexibility to reduce the bond amount to find the statutes unconstitutional. 610 So. 2d at 426 (Grimes, J., concurring in result only). The lack of reciprocity in the attorneys' fee provision was merely considered to be an *additional* constitutional infirmity of the statutes. *Id.* at 425 ("[T]he bond requirement is also unreasonable because the statutes lack reciprocity[.]"). *Siegel* primarily addressed the lack

¹¹ Appellees do not provide supplemental briefing with respect to Due Process, but refer to their Appellee Brief. Suppl. Br. of Appellees at 9. Appellants therefore respond to the argument raised in the Appellee Brief as it relates to the issue uniquely before this Court, *i.e.*, whether *Zamora* and its unreasoning progeny should be overruled.

¹² *Detraz* makes no citation to any case or statute for the proposition, but appears to be referring to LSA-C.C.P. Art. 5181 ("[A]n individual who is unable to pay the costs of court because of his poverty and lack of means may prosecute or defend a judicial proceeding in any trial or appellate court without paying the costs in advance or as they accrue or furnishing security therefor.").

of a reasonable relationship between the legislative purpose of deterring frivolous suits and the bond requirement that was imposed without regard to the frivolousness of the suit.

Under the bond requirement statutes, all plaintiffs, *regardless of the merits of their claims*, must post a bond before proceeding with their action. This requirement will not necessarily discourage frivolous lawsuits of the rich, but only those lawsuits where the plaintiff is too poor to post the bond. Thus, the effect of the bond requirement is to discourage lawsuits based on the plaintiff's financial ability rather the merits of the claim. Further, under the bond requirement, a plaintiff with a complex meritorious case would have to post a larger bond than a plaintiff with a simple but frivolous case. Thus, as Judge Anstead stated, “[t]his kind of provision may net some sharks, but only at the price of also netting a substantial number of innocent fish.”

Siegel, 610 So. 2d at 425 (citations omitted).

C. Because the Bond Statute Impinged on the Fundamental Right of Access to the Courts, *Zamora* Erred by Reviewing the Statute Under the Rational Basis Standard.

Appellees attempt to foreclose Appellant Kendall’s argument that heightened scrutiny applies to a due process analysis because Appellant’s Brief argued only that the challenged statutes do not meet the standard under a rational basis test. Suppl. Br. of Appellees at 9, n.13; Br. of Appellees at 28, n.13. First, however, the level of scrutiny to be applied is not a distinct issue raised for the first time in the reply. Second, Appellees were on notice and were in no way prejudiced by the omission in the opening brief. *See* Br. of Appellees at 28, n.13. Third, the opening brief argued access to the courts is a fundamental right,¹³ which determines that due process will be analyzed under strict scrutiny. Fourth, the Court should decide the constitutional challenges on the merits, applying the correct standard of review regardless of any perceived defect in the way a

¹³ *See, e.g.*, Br. of Appellant at 29–30.

party initially briefed the standard of review, particularly after that defect was candidly conceded and counsel notified opposing counsel well before Brief of Appellees was filed so there could be no claim of prejudice.

For federal claims, access to the courts is a fundamental right.¹⁴ A statute that impinges on access to the courts triggers strict scrutiny under equal protection¹⁵ and substantive due process challenges.¹⁶

For claims brought under the Utah Constitution, “[a]s a majority of the Utah Supreme Court noted, ‘this court has consistently rejected the presumption of constitutionality of statutes challenged under the remedies clause of article I, section 11.’” *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, 67 P.3d 436 (Durham, C.J., dissenting) (writing for a majority of the Court). Statutes that implicate access to the courts are reviewed under heightened scrutiny in uniform operation of law challenges.¹⁷ Statutes that

¹⁴ See, e.g., *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1427–28 (8th Cir. 1986); *Nordgren v. Milliken*, 762 F.2d 851, 853 (10th Cir. 1985) (“The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution.” (quoting *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir.1983))).

¹⁵ *KT & G Corp v. Attorney Gen. of State of Okla.*, 535 F.3d 1114, 1137 (10th Cir. 2008) (“When a classification . . . involves a fundamental right, we will apply strict scrutiny. To survive strict scrutiny, the government must show that its classification is narrowly tailored to achieve a compelling government interest.” (citation omitted)).

¹⁶ *Jones v. Jones*, 2015 UT 84, ¶¶ 26–27, 359 P.3d 603, 609 (“When the court has recognized a due process right it deems ‘fundamental,’ it consistently has applied a standard of strict scrutiny to the protection of such a right. The strict scrutiny standard is a stiff one. Under this standard, a fundamental right is protected except in the limited circumstance in which an infringement of it is shown to be ‘narrowly tailored’ to protect a ‘compelling governmental interest.’ ” (footnotes and citations omitted)).

¹⁷ *Tindley v. Salt Lake City Sch. Dist.*, 2005 UT 30, ¶ 28, 116 P.3d 295 (“When evaluating a challenge under the uniform operation of laws provision we review statutory classifications that implicate rights protected by the open courts clause under ‘heightened

implicate fundamental rights are reviewed under strict scrutiny in due process challenges.¹⁸

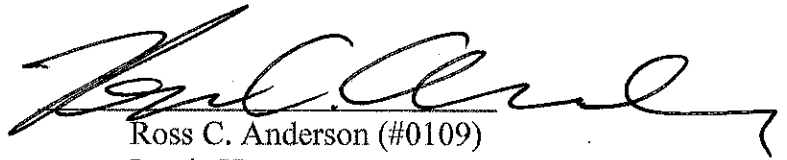
CONCLUSION

Zamora and its progeny that, without further analysis, blindly followed *Zamora*, should be recognized as the oppressive tools they have become for legislative abuse and immense obstacles, and often insurmountable blockades, to the pursuit of justice through the courts for those who have been harmed as a result of violations of state law by police officers. One category of plaintiffs suffering the discriminatory barriers of the Bond and Undertaking Statutes should no longer, as a practical matter, be left with only federal legal protections, while being deprived of the protections provided by the Utah Constitution, as well as the purported, yet—because of the Bond and Undertaking Statutes—often meaningless, protections under state statutory and common law.

scrutiny.’ ” (citations omitted)); *Judd v. Drezga*, 2004 UT 91, ¶ 19, 103 P.3d 135 (“Sustaining legislation against an article I, section 24 challenge alleging that one's rights under the Open Courts Clause are constitutionally discriminated against requires the court to find that the challenged legislation ‘(1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal.’ (citation omitted)).

¹⁸ *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 72, 250 P.3d 465 (“A statute that infringes upon [a] ‘fundamental’ right is subject to heightened scrutiny and is unconstitutional unless it (1) furthers a compelling state interest and (2) ‘the means adopted are narrowly tailored to achieve the basic statutory purpose.’ ” (citation omitted)). To the extent *Judd*, 2004 UT 91, ¶ 30, 103 P.3d 135, holds that the rational basis test should be used in a substantive due process case implicating Article I, section 11 because the rights implicated there were not “fundamental,” that conclusion is at odds with federal constitutional analysis and provides far less protection for the right of access to the courts under the Utah Constitution.

Dated this 13th day of March, 2017:

A handwritten signature in black ink, appearing to read "Ross C. Anderson", written over a horizontal line.

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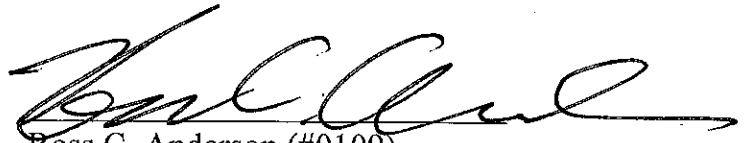
I, Ross C. Anderson, certify that on March 13, 2017, an original of this Reply Supplemental Brief of Appellant Sean Kendall and ten bound copies were filed with the Clerk of the Utah Supreme Court and two copies were served upon each of the following by U.S. Mail:

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