

1991

Jacqueline Funk v. Utah State Tax Commission : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT
LINES

IN THE SUPREME COURT OF
THE STATE OF UTAH

JACQUELINE D. FUNK	/	
Plaintiff-Appellant	/	Case No. 910196
v.	/	
UTAH STATE TAX COMMISSION	/	Category No. 16
Defendant-Appellee	/	

BRIEF OF APPELLANT

Appeal from a final order of the Second Judicial District Court, the Honorable David E. Roth presiding, entered April 1, 1991 granting defendant's motion to dismiss for failure to state a claim.

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SEP 6 1991

CLERK SUPREME COURT
UTAH

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IN THE SUPREME COURT OF
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UTAH STATE TAX COMMISSION	/	Category No. 16
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BRIEF OF APPELLANT

JURISDICTION OF THE SUPREME COURT

This is an appeal from a final order of the district court granting defendant's motion to dismiss under Rule 12(b)(6) for failure to state a claim. Jurisdiction is proper pursuant to Utah Code Ann. §78-2-2 (j).

NATURE OF THE PROCEEDINGS

Funk filed her class action complaint on November 29, 1990, seeking injunctive and declaratory relief from the Tax Commission's practice of releasing state tax refunds to judgment creditors pursuant to a writ of garnishment. Clerk's Notation of Record, at 1 (hereinafter "NR"). On January 24, 1991, the Tax Commission filed a motion to dismiss based upon four grounds:

(1) Lack of jurisdiction for failure to exhaust administrative remedies;

(2) Failure to state a claim upon which relief could be granted;

(3) Failure to join an indispensable party; and

(4) Failure to allege compliance with the Utah Governmental Immunity Act. NR 24.

Plaintiff responded to the motion and a hearing was held before the Honorable David E. Roth on March 6, 1991. NR 89. Judge Roth found that the Tax Commission was authorized by statute to honor the garnishments and that plaintiff's complaint had failed to state a claim upon which relief could be granted. NR 90. Defendant's motion to dismiss for failure to state a claim was granted. The order was entered April 1, 1991 and a notice of appeal filed April 4, 1991. NR 93.

STATEMENT OF THE ISSUES

(1) Whether the Tax Commission is authorized by statute to permit garnishment of a taxpayer's tax refund.

(2) Whether the Tax Commission by acquiescing to garnishment of a tax refund violated plaintiff's rights under federal and state law limiting the amount of earnings subject to garnishment.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

(a) Utah Code Ann. §78-27-15;

(b) Utah Code Ann. §78-27-16;

(c) Utah Code Ann. §63-30-6;

(d) Utah Rules of Civil Procedure 64D(d)(viii);

(e) 15 U.S.C. §1673(a).

STANDARD OF REVIEW

In reviewing a judgment entered upon the grant of a Rule 12(b)(6) motion to dismiss a complaint for failing to state a claim, the appellate court is both "obliged to construe the complaint in the light most favorable to the plaintiff and to indulge all reasonable inferences in its favor." Arrow Industries v. Zions First National Bank, 767 P.2d 935,936 (Utah 1988). Dismissal is appropriate only where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claims asserted. Freegard v. First West National Bank, 738 P.2d 614,616 (Utah 1987). The trial court's interpretation of the statute presents a question of law. Asay v. Watkins, 751 P.2d 1135,1136 (Utah 1988). The appellate court accords conclusions of law no particular deference, but reviews them for correctness. Scharf v. BMG Corp, 700 P.2d 1068, 1070 (Utah 1985).

STATEMENT OF THE CASE

a. Nature of the Case

This is an appeal from the granting of a motion to dismiss. Plaintiff sought declaratory and injunctive relief, seeking to have the Tax Commission's practice of honoring garnishments of state tax refunds declared in violation of state law. NR 1-2,8. She sought an injunction from any further garnishments of future tax refunds. NR 8. The Tax Commission filed a motion to dismiss on the grounds, among other things, that she had failed to state a claim upon which

relief could be granted. NR 24. This motion was granted by the district court. NR 89.

b. Course of Proceedings

Funk filed her complaint on November 29, 1990. NR 1. The Tax Commission filed a motion to dismiss on January 24, 1991 which was granted on March 6, 1991. NR 89. An order was entered on April 1, 1991 and a notice of appeal filed on April 4, 1991. NR 90,93.

c. Disposition of the Trial Court

The district court granted defendant's motion to dismiss on the basis that plaintiff had failed to state a claim upon which relief could be granted. The order was entered April 1, 1991.

d. Relevant Facts

Funk began this action with the filing of a verified complaint. Defendant has not contested the facts as alleged. During 1989, Funk was employed and had sufficient earnings to require the filing of a state income tax return. NR 5. The amounts withheld from Funk's earnings during 1989 resulted in an overpayment of state taxes in the amount of \$75.30. NR 5. Funk filed a timely state income tax return for the 1989 tax year and requested a refund of \$75.30. NR 5. Also during 1989, Funk was the defendant in litigation brought in the case of First Security Bank of Utah v. Jacqueline D. Funk, Civil No. 893002970CV (Weber County Cir. Ct., Ogden Department) which resulted in the entry of judgment against her in the amount of approximately \$1800.00. NR 5. On or about February 21, 1990, a writ of garnishment was issued by the deputy clerk of the Weber County Circuit Court directing the

Utah State Tax Commission as garnishee to attach Funk's state tax refund in the amount of \$75.30. NR 5. Despite Funk's protests, the State Tax Commission paid over to the judgment holder all of her state tax refund. NR 5-6. Funk also had earnings during the 1990 tax year from which state taxes were withheld. NR 5. At no time was Funk ever employed by the state of Utah or any of its subdivisions.

SUMMARY OF THE ARGUMENT

The primary issue in this case is whether the Tax Commission may disregard the doctrine of sovereign immunity and allow garnishment of state tax refunds. Funk asserts that the Tax Commission overstepped the bounds of its authority by becoming involved in private debt collection proceedings. Funk will show in the following pages that the state of Utah and its subdivisions cannot be subjected to garnishment proceedings, unless sovereign immunity is clearly and unequivocally waived by the state legislature. The statute at issue, Utah Code Ann. §78-27-15, does not clearly and unequivocally waive sovereign immunity so as to allow a judgment holder to proceed against a sovereign state.

By acquiescing to garnishment of tax refunds, the Tax Commission permits creditors to circumvent restrictions on garnishment expressed in the Consumer Credit Protection Act and Rule 64D. The overpaid taxes never reached Funk and should have been treated as disposable earnings not subject to garnishment.

ARGUMENT

POINT I

THE TAX COMMISSION IS BARRED FROM HONORING WRITS OF GARNISHMENT, SINCE THE UTAH LEGISLATURE HAS NOT CLEARLY AND UNEQUIVOCALLY WAIVED SOVEREIGN IMMUNITY IN THIS AREA.

It has been universally established that states enjoy a general preservation of governmental immunity, and any exceptions must be clearly established by the legislature. Epting v. State, 546 P.2d 242,244 (Utah 1976). Only the state legislature can waive sovereign immunity and an attempt by a state subdivision to do so is without legal effect. Bailey Service & Supply Corp. v. State Road Comm, 533 P.2d 882,883 (Utah 1975). Although a state's sovereign immunity from suit is grounded in the common law, the Utah legislature has spelled out its preservation of general immunity in the Utah Governmental Immunity Act, Utah Code Ann. §63-30-1. In introductory language, the legislature made clear that:

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities. Utah Code Ann. §63-30-3
(1)

The language shows that the Utah legislature intended to preserve the state's sovereign immunity, except in those limited areas where it has undertaken to permit legal action.

A legal proceeding to subject a state to garnishment faces the same sovereign immunity obstacle as does any other lawsuit. Although as a general rule a garnishment proceeding is ancillary to the original action between the creditor and debtor, when the statutory proceeding of garnishment is invoked against a sovereign, it is treated as a direct proceeding against the sovereign and within its ambit of immunity. North Sea Products, Ltd. v. Clipper Seafoods Co., 595 P.2d 938,940 (Wash. 1979). Since garnishment did not exist at common law, it is considered a "creature of statute" and is governed by the terms of the statute establishing it. Weir v. Galbraith, 376 P.2d 396 (Ariz. 1962). Therefore, anyone seeking to serve a writ of garnishment on the state of Utah must confront the question of sovereign immunity and must show specific authorization for the proceeding. State of Arizona v. Allred, 425 P.2d 572,573 (Ariz. 1967). The Governmental Immunity Act was intended to be strictly applied to preserve sovereign immunity and any waiver must be "clearly expressed therein." Holt v. Utah State Road Comm., 511 P.2d 1286 (Utah 1973).

The Tax Commission relies on Utah Code Ann. §78-27-15 as justification for its acquiescence to a writ of garnishment; this reliance does not withstand careful scrutiny. The statute, including the caption, provides as follows:

78-27-15. Salaries of public officers subject to garnishment.

The state of Utah, any county, city, town, district, board of education or other subdivision of the state, and any officer, board or institution, having in its possession or under its control any credits or other

personal property of, or owing any debt to, the defendant in any action, whether as salary or wages, as a public official or employee, or otherwise, shall be subject to attachment, garnishment and execution under such rights, remedies and procedure as are or may be made applicable to attachment, garnishment and execution, respectively, in other cases, except as in the next section [Section 78-27-16) provided. Utah Code Ann. §78-27-15 (1953).¹

This enactment by the Utah legislature, the Tax Commission asserts, is a specific and unequivocal waiver of sovereign immunity to all garnishment actions resulting from judgment being entered against any Utah defendant. Funk maintains that the statute is specific in its language, waiving sovereign immunity only as to public officers.

It is an accepted rule of statutory interpretation that a court must first look at the plain language of the statute to determine whether its meaning can be ascertained. Berube v. Fashion Centre, Ltd., 771 P.2d 1033,1038 (Utah 1989). A reading of the statute shows that it is, first of all, directed at the state of Utah or any of its subdivisions. It waives sovereign immunity as to any credits or other personal property under the control of the state owed to certain defendants. The key question

¹ The cross referenced section provides as follows:

78-27-16 Service of process.

The process shall be served only upon the auditor of the legal subdivision garnished, and, in case there is no auditor, then on the clerk of the county, city, town, district, board of education, or other subdivisions of the state, or board of institution, and the answer of such auditor or clerk shall be final and conclusive.

then arises: as to which defendants in an action did the legislature intend to waive sovereign immunity? Funk submits that the phrase "defendant in any action...." is modified by the phrase "as a public official or employee, or otherwise...." Thus, Funk concludes that the statute waives sovereign immunity from garnishment only when the defendant is associated with the state of Utah as a public official, employee or in some similarly related capacity. The Utah Tax Commission relies solely on the word "otherwise", arguing that by the use of this word, the Utah legislature intended to waive sovereign immunity not only as to public officers but as to all Utah citizens who become judgment debtors.

If the meaning of the statute is not clear from its plain language, then the court is justified in looking to legislative history, or other rules of interpretation, to determine a statute's meaning. Osualo v. Aetna Life and Cas., 608 P.2d 242 (Utah 1980). There is no legislative history pertaining to this particular section of the Utah Code. A review of case law annotated under the section shows that it appeared in the compiled laws as early as 1907. Tribune Reporter Printing Co. v. Homer, 169 P.170 (Utah 1917). No history in the form of committee reports or statements by legislators was kept by the legislature at that time.

A review of the early case law interpreting the law of garnishment in this area does, however, lend support to Funk's position, for it shows that the Court has consistently held that the objective of the legislature was to limit the exposure of

public entities to garnishment proceedings so as to promote a public policy of not becoming involved in litigation between private individuals. The earliest case discovered involved an attempted garnishment of an Ogden teacher's \$190.00 salary due him from the Board of Education. Chamberlin v. Watters, 37 P. 566 (Utah 1894). The Court reviewed a general garnishment statute found at section 3455 of the 1888 compiled laws permitting garnishment of a "person or corporation" and concluded that the legislature did not intend to include "public corporations" within the ambit of entities subject to garnishment. In rejecting garnishment of the teacher's salary, the Court observed:

Such proceedings would not only engage such public corporation in much vexatious and expensive litigation, but would also occupy the time of its servants and officials in the management of affairs wholly foreign to the object of its creation, to the neglect of corporate duties. The interests of the public would thus become subservient to those of the private individual, and the money in the public treasury would be consumed at the bar of the courts in controversies between debtors and creditors, in which the public would have not the slightest interest... While such a proceeding, doubtless, would be desirable on the part of the creditor, to enforce his claim against the officer or servant of the corporation, yet we are of the opinion that public policy will not allow the corporation to be thus hampered in the administration of its affairs. Id., at 566.

In Tribune Reporter Printing, the Court had under consideration whether the unearned salary of a public officer could be assigned and garnished. It reviewed section 3113x of the Compiled Laws of 1907 which contained the same language as now appears in the

statute at issue in this appeal, Utah Code Ann. §78-27-15. After noting the general law prohibiting garnishment against public officers, the Court observed:

[T]his statute changes the general law above referred to as far as garnishments, attachments, and executions are concerned, and renders the public compensation of public officers subject to such proceedings... Id., at 171.

Throughout its consideration of the assignment question, the Court repeatedly refers to the statute as "changing the general law relating to garnishments, etc., of the compensation of public officers...." Id., at 171. Nowhere is there any suggestion that the Court considered the statute as authorizing garnishment against all Utah citizens. The Court noted the maxim, "Expressio unius est exclusio alterius" in rejecting the argument that by amending the law relating to garnishments, the legislature also intended to allow assignment. The maxim applies with even greater force in this case. To permit garnishment of Funk's state tax refund will reverse the policy articulated by the Court and increase the involvement of the state in equally vexatious and expensive litigation, a result not intended by the legislature.

A closely analogous case involving an attempt to garnish a tax refund held by the Internal Revenue Service adds further support to Funk's position. In Brockelman v. Brockelman, 478 F.Supp. 141 (D.Kan. 1979), the United States government maintained that garnishment was barred by sovereign immunity. The federal court agreed, restating the generally accepted rule that "a sovereign is immune from suit except as it consents to be sued." Id., at 142.

The court then set out a long list of cases wherein garnishment against the United States was rejected. The federal court made clear that even though the government may have subjected itself to garnishment proceedings for the enforcement of child support or alimony payments, 42 U.S.C. §659, this did not represent a general waiver of immunity. It held:

The mere fact that sovereign immunity has been removed in this one limited area does not reflect a broader intent to remove sovereign immunity in areas not specifically provided for. Id., at 143.

The court observed that IRS was not holding the refund money as an agent of the taxpayer. Instead, the money held by IRS remained the money of the United States until it was paid over to the person entitled to it.

By analogy, the federal case is strongly persuasive in this proceeding. The state of Utah is equally immune from garnishment, unless the legislature has specifically provided otherwise. The fact that the legislature has specifically addressed the issue of crediting overpaid taxes in Utah Code Ann. §59-10-529 shows that it knew how to legislate in this area, if it chose to do so. Had it wished to subject tax overpayments to creditor's legal process, the legislature would have done so specifically.² The

² An example of how a statute permitting garnishment of a state in all cases can be found in the Washington State Code:

State and municipal corporations subject to garnishment - Service of writ

The state of Washington, all counties, cities, towns, school districts and other municipal

legislature's enactment of a statute in 1907 permitting garnishment of public officers cannot be read as an expression of intent to waive sovereign immunity in all cases. Funk's tax refund remained the money of the state and was not subject to garnishment until paid over to her.

Perhaps the best state court decision on point is State of Arizona v. Allred, 425 P.2d 572 (Ariz. 1967). See also Morgan v. Schmid, 244 A.2d 824 (Conn. 1965); Millstone Point Co. v. Rutka, 244 A.2d 829 (Conn. 1986); and G & J Investments Corp. v. Florida Dept. of Health and Rehab. Services, 429 S.2d 391 (Fl. App. 3 Dist. 1983). In Allred, a state-regulated race track was indebted to plaintiff and had also posted a bond with the Arizona State Racing Commission. The plaintiff brought suit, obtained a judgment and eventually filed a writ of garnishment against the state of Arizona. After initially agreeing to honor the garnishment, Arizona reversed itself and resisted the garnishment. On appeal, the Arizona Supreme Court held that the state of Arizona was not subject to garnishment, "except as to the wages owed to its employees and officials." The Court reviewed an Arizona garnishment statute allowing garnishment of wages owed to its employees and officials. The statute, which is similar to Utah Code Ann. §78-27-15, provides:

corporations shall be subject to garnishment after judgment has been entered in the principal action, but not before, in the superior and district courts, in the same manner and with the same effect, as provided in the case of other garnishees. \RSW §6-27-040.

§12-1601. Salaries subject to garnishment.

The salaries of officers, deputies, clerks and employees of the state or its political subdivisions shall be subject to garnishment as provided in this article, and such garnishment shall not be construed as against public policy.

The Arizona court reiterated the rule that since the remedy of garnishment did not exist at common law, the state could not be made a garnishee without legislative sanction. Like the Utah Supreme Court, the Arizona Court applied the expressio unius est exclusio alterius maxim in reaching its decision. In other words, since the Arizona legislature had specifically provided for garnishment of wages owing to state employees, it had thereby excluded garnishment in other situations involving ordinary citizens. The same reasoning is directly applicable in this case.

In addition to the legal maxim applied in Allred, several other rules of statutory interpretation deserve consideration. One accepted rule is expressed in the phrase, "ejusdem generis," meaning that a general word preceded by specific words must be interpreted as applying to persons of the same general class. In this case, the Tax Commission relies on the general word "otherwise" in arguing that Funk's tax return was subject to garnishment. However, the general word "otherwise" is preceded by the specific words "public official" and "employee". Applying the rule of ejusdem generis, it follows that "otherwise" must be interpreted in a way that is consistent with the preceding specific words. It refers, therefore, to other designations of persons who

are employed by the state and does not mean Utah citizens in general.

Another rule of statutory interpretation says that if there is ambiguity about a statute's meaning, resort may be had to the heading as an aid to interpretation. Ware v. Idaho Tax Commission, 567 P.2d 423 (Id. 1977); cf. Great Salt Lake Authority v. Island Ranching, 414 P.2d 963, 965, reh'g. 421 P.2d 504 (1966) (When clarity of statute is lacking, it is permissible to look to the title of statute to shed light on and clarify meaning). Here, the heading is clear in its declaration: "Salaries of Public Officers Subject to Garnishment".

The Arizona decision goes on to set out some very good reasons for limiting garnishment proceedings against the state. The facts of the case themselves point out the difficulty of administering garnishment actions, when tax overpayments may rightfully belong to the state. Responding to a writ of garnishment is not only an improper expenditure of state tax dollars, it also involves the state in the administrative task of determining whether the refund may be obligated to some other debt. The Utah statute lists a number of debts to which a state tax overpayment must first be applied, including outstanding tax debts, fines or restitution to a victim of crime, child support and bail. Utah Code Ann. §59-10-529 (1990). Should a child support obligation be delinquent but not yet posted by ORS, the state could violate the statute by honoring a garnishment of this type. The state, by honoring such garnishments, may well violate the civil rights of a taxpayer who

has filed jointly with the taxpayer subject to garnishment. Plaintiff's second claim under the Consumer Credit Protection Act ("CCPA"), 15 U.S.C. §1673(a), raises the serious possibility that the state of Utah may be violating a debtor's rights by allowing creditors to garnish tax refunds without observing the limitations imposed by federal law. As the case of G&J Inc. v. HRS indicates, the Tax Commission's interpretation would subject even the state's Medicaid office to claims for money owing to a nursing home.

Other than §78-27-15, the Tax Commission identified no authority in the Utah statutes where the legislature has expressly and unequivocally authorized garnishment of the state. Although Section 63-30-6 waives immunity for actions to recover property, it cannot be read as a waiver by the Utah legislature of immunity from garnishment, especially when read in connection with section 63-30-22 which expressly prohibits garnishment against the governmental entity.³ Moreover, Holt v. Utah State Rd. Comm., 511 P.2d 1286 (Ut. 1973), which construed section 63-30-6, held that the Act must be strictly construed to preserve sovereign immunity.

It cannot be inferred from legislation authorizing a state to be sued ex contractu, that it may also be sued in garnishment proceedings. G & J Inv. v. HRS, 429 S.2d at 392. There is a significant difference between a state being sued as a defendant on a contract and being sued as a garnishee. The number of cases in which the state may be the defendant in a contract action is necessarily limited, but the number of claims to which it may

³ See appendix for text of statutes.

become subject as a garnishee is as vast as the number of taxpayers with overpaid taxes who may become judgment debtors. The Court should apply the same principle in this case and find that the Tax Commission is operating unlawfully in honoring garnishments in cases wherein the defendant is not a public officer.

POINT II

THE TAX COMMISSION VIOLATED FUNK'S RIGHTS UNDER THE CONSUMER CREDIT PROTECTION ACT AND UTAH RULE 64D BY HONORING THE GARNISHMENT

At issue in the second claim is whether the Tax Commission violated Funk's rights under state and federal law limiting the amount of earnings that may be garnished. Specifically, Funk asserted in her complaint that the Tax Commission's actions were contrary to Rule 64D(d)(viii) and 15 U.S.C. §1673 (a), which limit the amount of disposable earnings subject to garnishment.⁴ The federal law expressed in the Consumer Credit Protection Act (CCPA) was intended to prevent creditors from forcing a debtor into bankruptcy by the use of harsh garnishment procedures. In re Kokoszka, 94 S.Ct. 2431, 417 U.S. 642, 41 L.Ed.2d 374 (1974), reh'g. denied, 95 S.Ct. 160, 419 U.S. 886, 42 L.Ed.2d 131 (1974). Congress intended by the CCPA to maximize the protection available to a debtor. Hodgson v. Christopher, 365 F.Supp. 583 (D.C.N.D. 1973). Therefore, if a debtor's disposable earnings fall below the statutory minimum, no part of the salary may be garnished.

⁴ See appendix for full text of statutes.

There is little available case law considering whether a state tax refund is subject to the CCPA. The issue did arise in Kokoszka, supra, wherein the United States Supreme Court ruled that, for purposes of the Bankruptcy Act, a tax refund was not subject to the garnishment restrictions of the federal statute. At first glance Kokoszka may appear to be controlling in this appeal, but a closer examination reveals several points which distinguish it. First of all, Kokoszka analyzed the issue within the context of the Bankruptcy Act, with the Court noting that the definition of "property" has been construed most generously when analyzed under that federal law. Kokoszka, 417 U.S. at 646. The Court held that Congress had not enacted the CCPA with the intent of altering the clear purpose of the Bankruptcy Act which is to assemble a debtor's assets for benefit of his creditors. While acknowledging the important CCPA purpose of preventing creditors from driving debtors into bankruptcy, the Court reasoned that to define "disposable earnings" to include a tax refund that had reached the trustee's hands would "alter the delicate balance of a debtor's protections and obligations during the bankruptcy proceeding." Kokoszka, 417 U.S. at 651.

The facts here are significantly different. In this appeal, it is not a bankruptcy trustee that is seeking to retain possession of a tax refund pursuant to the federal bankruptcy statute. Rather, it is a private creditor proceeding according to a state garnishment statute. Unlike the tax refund in Kokoszka, the tax refund in this case has never been in Funk's hands. It remained

as money of the Tax Commission. Therefore, this Court should not be bound by the Kokoszka decision which considered a related issue in a distinguishable context.

The tax refund in this case is disposable earnings, since it had its source in wages and by definition is not subject to any reduction for taxes. Nothing is required by law to be withheld from the tax refund. The fact that the disposable earnings were not paid out on a weekly basis, but rather accumulated as overpaid taxes at the Tax Commission, is not dispositive of the issue. The Tax Commission works in close conjunction with the employer in withholding taxes, unlike the situation where the property, traceable to wages, has left the taxing authority and been placed with a bank or bankruptcy trustee. Here, the withheld taxes are so closely connected with the employer as to remain wages for purposes of the CCPA.

The source of the funds for the state tax refund is within the meaning of the term "earnings" as defined in 15 U.S.C. §1672 (a). There is no good policy reason for holding that the refund lost its character as "earnings" once it reached the Tax Commission's hands. Furthermore, since the entire refund qualifies as "disposable earnings" it comes within the statute. It would be unfair and a punishment of the wage earner who, through no fault of her own, has a portion of her wages set aside through income tax withholding to later deny her the protection of the federal CCPA. An unscrupulous creditor could then circumvent the CCPA by simply waiting until the wages reached the hands of the Tax Commission and then executing

on them by garnishment. Not only would this practice frustrate the CCPA, but it would frustrate an objective of the Utah Tax Code which is to encourage taxpayers to err on the side of over-withholding. A well informed taxpayer, aware that a tax refund could be subject to garnishment, would likely minimize her deductions in order to reduce or eliminate the possibility of tax overpayment. The CCPA is remedial in nature and, therefore, any exceptions to its coverage should be strictly construed. In re Cedor, 337 F.Supp. 1103 (D.C. Cal. 1972), affd. 470 F.2d 996 (1972), cert. denied 93 S.Ct. 2148, 411 U.S. 973, 36 L.Ed. 2d 697 (1973).

In Hodgson v. Christopher, supra, a federal court enjoined an attempt by a creditor to circumvent the CCPA. The creditor argued in Hodgson that once a judgment debtor's paycheck had been issued it became personal property, thereby losing its identity as "earnings" for purposes of the CCPA. The North Dakota court, in rejecting this argument, observed:

Regardless of whether the debtor-employee's wages remain accrued but unpaid, or have been reduced to a payroll check, whenever they remain in the possession of the employer, they are "withheld" within the context of the Act. Not only is this in keeping with the spirit of the CCPA, but it is logical. Clearly, if wages have not been turned over to the employee, they are being withheld by the employer. Any distinction to be drawn is in form only, and does not change the nature of the wages.

In this case, Funk's wages had not been turned over to her. Although they were not being held by the employer, they were in the hands of the Tax Commission and could not be released to her until

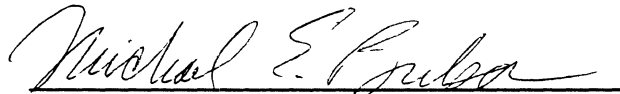
her tax return was filed. A portion of her wages in the form of overpaid taxes was being "withheld" at the time the garnishment was issued. As the Hodgson court further noted, to adopt the argued for theory would permit a sheriff to wait until an employer had issued his payroll checks and then execute upon them, thereby avoiding the restrictions of the CCPA. Noting that the Act must be construed "in the light of common sense consistent with its expressed purpose and intent...." the court held the defendants' approach was prohibited.

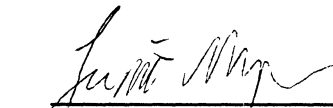
Common sense tells us that the purpose of the CCPA, to protect debtors from harsh garnishment procedures, would also be thwarted, if creditors are permitted to garnish tax refunds held by the Tax Commission. The fact that Funk's wages remained in the hands of the Commission is an important one, distinguishing this case from Kokoszka. The Court may find properly that the garnishment scheme acquiesced to by the Tax Commission violates Funk's federal rights under the CCPA and her state rights under Rule 64D.

CONCLUSION

Funk has shown that the garnishment of her state tax refund was done in violation of the law, since the Utah legislature has never clearly and unequivocally authorized such a proceeding. Sovereign immunity precludes the garnishment of state tax refunds. The Tax Commission's acquiescence permits a creditor to circumvent federal and state laws designed to protect debtors such as Funk. The Court should reverse the lower court decision and reinstate Funk's action.

Respectfully submitted this 4th day of September, 1991.


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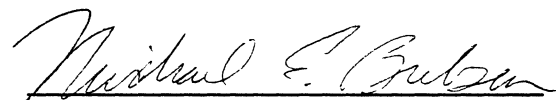

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of Sept.,
1991, I served copies of the above **BRIEF OF APPELLANT** by First-
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APPENDIX

63-30-6. Waiver of immunity as to actions involving property.

Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

1965

Utah Code Annot. 563-30-6

63-30-22. Exemplary or punitive damages prohibited — Governmental entity exempt from execution, attachment, or garnishment.

(1) (a) No judgment may be rendered against the governmental entity for exemplary or punitive damages.

(b) The state shall pay any judgment or portion of any judgment entered against a state employee in the employee's personal capacity even if the judgment is for or includes exemplary or punitive damages if the state would be required to pay the judgment under Section 63-30-36 or 63-30-37.

(2) Execution, attachment, or garnishment may not issue against a governmental entity.

1991

Utah Code Annot. 563-30-22

§ 1672. Definitions

For the purposes of this subchapter:

(a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

(Pub.L. 90-321, Title III, § 302, May 29, 1968, 82 Stat. 163.)

15 U.S.C. §1672

§ 1673. Restriction on garnishment

Maximum allowable garnishment

(a) Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable, whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

15 U.S.C. §1673

(vi) A writ of garnishment attaching earnings for personal services shall attach only that portion of the defendant's accrued and unpaid disposable earnings hereinafter specified. The writ shall so advise the garnishee and shall direct the garnishee to withhold from the defendant's accrued disposable earnings only the amount attached pursuant to the writ. Earnings for personal services shall be deemed to accrue on the last day of the period in which they were earned or to which they relate. If the writ is served before or on the date the defendant's earnings accrue and before the same have been paid to the defendant, the writ shall be deemed to have been served at the time the periodic earnings accrued;

(vii) "Earnings" or "earnings from personal services" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program. "Disposable earnings" means that part of a defendant's earnings remaining after the deduction of all amounts required by law to be withheld. For purposes of a garnishment to enforce payment of a judgment arising out of a failure to support dependent children, earnings also include, in addition to those items listed above, periodic payments pursuant to insurance policies of any type, including unemployment compensation, insurance benefit payments, and all gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital assets or as otherwise modified or adopted by law for the support of dependent children

(viii) The maximum portion of the aggregate disposable earnings of defendant (if an individual) becoming due the defendant which is subject to garnishment is the lesser of

(A) Twenty-five per centum of defendant's disposable earnings (fifty per centum for a garnishment to enforce payment of a judgment arising out of failure to support dependent children) computed for the pay period for which the earnings accrued, or

(B) The amount by which the defendant's aggregate disposable earnings computed for the pay period for which the earnings accrued exceeds the number of weeks in the period multiplied by thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act in effect at the time the earnings are payable

(ix) Unless otherwise ordered by the Court, the garnishee shall treat the defendant's earnings becoming due from the garnishee as the defendant's entire aggregate earnings for the purpose of computing the sum attached by the garnishment.