

1960

# Mabel H. Wade v. Salt Lake City : Brief of Defendant and Respondent

Utah Supreme Court

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Moreton, Christensen & Christensen; Attorney for Defendant and Respondent;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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MABEL H. WADE,

*Plaintiff and Appellant,*

—vs.—

SALT LAKE CITY, a Municipal  
Corporation,

*Defendant and Respondent.*

FILED

MAY 19 1960

Clerk, Supreme Court, Utah

Case No.  
9219

BRIEF OF DEFENDANT AND RESPONDENT

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BRIEF OF DEFENDANT AND RESPONDENT

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STATEMENT OF THE ISSUE

Plaintiff brought this action against Salt Lake City to recover for personal injuries sustained by her while she was walking through the Administration Building at the Salt Lake City Airport No. 1. The defendant filed a motion to dismiss, and the district court granted the motion upon the grounds that the city operated the airport in its governmental capacity and therefore was not liable for any acts committed in the operation of the airport. Plaintiff appeals from the judgment of dismissal.

The sole question before the court is, "Does Salt Lake City operate its Airport No. 1 in its governmental capacity?"

## ARGUMENT

The motion to dismiss admits only such facts as are properly pleaded. See *Abbott vs. City of Des Moines*, 298 N.W. 649, where it is said in the Syllabus:

"1. A demurrer admits only such allegations of petition as are issuable, relevant, material, and well pleaded, and does not admit conclusions of law or fact of pleader, except when they necessarily result from facts set forth in petition, and neither inference nor expressions of opinion, nor pleader theories as to effect of facts are admitted.

"2. On demurrer to petition in action against city for destruction by fire of plaintiff's airplane in privately leased hangar of Municipal Airport, in so far as allegation that hangar, tower, and beacon light were operated in a proprietary capacity, and not for a governmental purpose, constituted a conclusion of law or fact of pleader as an inference, expression of opinion or statement of pleader theory, it was not admitted by demurrer unless it was supported and necessarily resulted from facts set forth in petition.

"3. In determining City's liability for destruction by fire of airplane in privately leased hangar of Municipal Airport, statutes relating to airports controlled."

Throughout the entire history of Utah, it has been the law of this state that cities are not liable in tort for acts committed while performing a governmental function:

Niblock vs. Salt Lake City, 100 Utah 573, 111 P.2d 800

Alder vs. Salt Lake City, 64 Utah 568, 231 Pac. 1102

Husband vs. Salt Lake City, 92 Utah 449, 69 P.2d 491

Davis vs. Provo City, 1 Utah 2d 244, 265 P.2d 415

Ramirez vs. Ogden City, 3 Utah 2d 102, 279 P.2d 463.

It always having been the law of this state, as illustrated by the above cited cases, the State Legislature could not have been mistaken when it enacted Section 2-2-4, U.C.A., 1953, which reads as follows:

“Any lands acquired, owned, leased, controlled or occupied by the state aeronautics commission or by such countries, municipalities or other political subdivision for the purpose or purposes enumerated in section 2-2-3, *shall and are declared to be acquired, owned, leased, controlled or occupied for public, governmental and municipal purposes.*” (Emphasis ours.)

The following listed cases have interpreted similar statutes to Sec. 2-2-3, U.C.A., 1953, and have decided that the section is conclusive that the city operates its airport in a governmental capacity.

Abbott vs. City of Des Moines, (Ia.), 298 N.W.  
649

Mayor, et al. of Savannah vs. Lyon's, (Ga.), 189  
S.E. 63

Van Gilder vs. City of Morgantown, (W. Va.),  
68 S.E.2d 746

Imperial Production Corp., et al., vs. City of  
Sweetwater, 210 F.2d 917.

The burden is on the plaintiff to prove that the operation of the public airport facilities is conducted in a proprietary and not in a governmental capacity. There must be *allegata* before *probata*.

Orlando vs. City of Brockton, (Mass. 1936), 3  
N.E.2d 794

Lemieux vs. City of St. Albans, 28 Atl. 2d 373  
Huffman vs. City of Columbus, (Ohio 1943), 51  
N.E.2d 410.

We call the court's attention to the following sections of the State Statutes of Utah, which clearly demonstrate that the Legislature had in mind authorizing cities to operate airports in governmental function for the benefit of the public generally and for the promotion of aeronautics and as supervising agent for the State of Utah, and clearly not within the proprietary capacity of the cities.

Section 2-1-1, (4), U.C.A., 1953:

“ ‘Airport’ means any area of land, water or both, which is used or is made available for the landing and takeoff (and) which provides facilities for the shelter, supply, and repair of aircraft and handling of passengers and cargo,  
\* \* \* ”

Section 2-1-15, U.C.A., 1953:

“It shall be the duty of the commission and *every* county and *municipal officer* charged with the enforcement of state and municipal laws *to enforce and assist in the enforcement of this act*. The commission is further authorized in the name of the state of Utah to enforce the provisions of this act by injunction in the district courts of this state. Other departments and political subdivisions of this state are authorized *to cooperate with the commission in the development of aeronautics within this state.*” (Emphasis ours.)

Section 2-2-1, U.C.A., 1953:

“The state aeronautics commission and the governing body of any county, city or town for and on behalf of the state of Utah, or county, city or town respectively, may accept contributions of money, or real or personal property for the purpose of establishing, developing, operating or maintaining airports or landing fields under the provisions of the Uniform Airports Act.”

Section 2-2-3, U.C.A., 1953:

“The *state*, through its state aeronautics commission, and *municipalities*, counties and other political subdivisions of this state *are authorized*

*separately or jointly*, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, *regulate* and *police* airports and landing fields for the use of aircraft, and by such municipalities, counties and other political subdivision, *either within or without their geographical limits*, and may use for such purpose or purposes any available property that is now or may at any time hereafter be owned or controlled by the state aeronautics commission or by such municipalities, or other political subdivisions, but no county shall exercise the authority conferred outside of its geographical limits except in an adjoining county and this only jointly with such adjoining county." (Emphasis ours.)

Section 2-2-7, (c), U.C.A., 1953:

"To lease for a term not exceeding *ten years* such airports or landing fields to private parties for operation, or to lease or assign for a term not exceeding ten years to private parties for operation space, area, improvements and equipment on such airports or landing fields; provided, *in each case in so doing the public is not deprived of its rightful, equal and uniform use thereof.*" (Emphasis ours.)

Section 2-2-8, U.C.A., 1953:

"The local public authorities having power to appropriate money within the counties, municipalities, or other public subdivisions of this state for the purpose of acquiring, establishing, developing, operating, maintaining, or controlling airports or landing fields under the provisions of this act, are authorized to appropriate and cause to be raised by taxation or otherwise in

such political subdivision money sufficient to carry out therein the provisions of this act, also to use for such purpose or purposes money derived from said airports or landing fields.”

Section 2-2-11, U.C.A., 1953:

“The state aeronautics commission, and counties, municipalities or other political subdivisions of this state acquiring, establishing, developing, operating, maintaining or controlling airports or landing fields without the geographical limits of such subdivisions, under the provisions of this act *are specifically granted the right to promulgate, amend, and enforce police regulations for such airports and landing fields.*” (Emphasis ours.)

Section 2-3-1, (1), U.C.A., 1953:

“‘Airport’ means any area of land or water which is used, or intended for use: for the landing and taking-off of aircraft, and any appurtenant areas which are used, or intended for use, for aircraft buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.”

Section 2-3-2, U.C.A., 1953:

“It is declared that the purpose of this act is *to further the public interest* and (in) aeronautical progress:

“by authorizing public agencies of this state to accept, channel, and disburse federal, state, and other funds for the planning, acquisition, construction, maintenance, operations, and *regulation of airports* and air navigation facilities;

“*by granting to a state agency such powers and imposing upon it such duties that the state*

may obtain the full benefit of financial assistance made available by the federal government under the Federal Airport Act, as well as assistance from other sources;

*“by providing authority that may be exercised by a public agency independently or jointly with other public agencies, thereby enabling two or more cities, towns, counties, and other political subdivisions jointly to establish, acquire, develop, and operate an airport or airports for their joint or common use.”* (Emphasis ours.)

Section 2-3-5, U.C.A., 1953:

“(1) The commission may, insofar as is reasonably possible, make available its engineering and other technicals services, with or without charge, to any public agency or person desiring them in connection with the planning, acquisition, construction, improvement, maintenance, or operation of airports or air navigation facilities.

*“(2) The commission may render financial assistance by grant or loan or both, to any public agency, in the planning, acquisition, construction, improvement, maintenance, or operation of an airport owned or controlled, or to be owned or controlled by such public agency, out of appropriations made by the legislature for such purposes. Such financial assistance may be furnished in connection with federal or other financial aid for the same purposes.*

“(3) In carrying out the provisions of this act the commission may use the facilities and services of other agencies of the state and of

the municipalities of the state to the utmost extent possible, and such *agencies* and *municipalities* are authorized and *directed* to make available their facilities and services.

“(4) All powers, privileges and authority granted to any public agency by this act may be exercised and enjoyed jointly with any public agency of this state, and jointly with any public agency of any other state or of the United States to the extent that the laws of such other state or of the United States permit such joint exercises on enjoyment.” (Emphasis ours.)

Section 2-3-6, U.C.A., 1953:

“If any public agency determines *that the public interest* and the interests of the public agency will be served by assisting any other public agency in exercising the powers and authority granted by this act, such public agency may furnish assistance by gift of real or personal property or money or lease or loan thereof with or without charge or interest. In appropriating such property or money and providing for such assistance by taxation, the issuance of bonds, or other means, the public agency may exercise all of its powers as though used for its own direct purposes as provided in this act.” (Emphasis ours.)

In addition to the foregoing statutes, we have this unique situation in Utah. The laws of the state of Utah provide for the levying and collecting of a tax to be paid to the State of Utah, and which tax must be distributed in accordance with the provisions of the

statute to the respective publicly owned airports, which section is 41-11-11, as amended by Session Laws of Utah, 1957, which reads as follows:

“Said excise tax shall be due and payable by the distributor on or before the twenty-fifth day of each month to the state tax commission for all sales made and for each and every gallon of motor fuel used during the preceding month. The state tax commission shall receipt the distributor therefor and shall pay the same to the state treasurer promptly as collected. Of the money so received the state treasurer shall place an amount equal to the amount received upon the sale or use of motor fuel used or manufactured for use in aircraft in a special fund to be known as the aeronautic fund *to be expended under the supervision of the state road commission or such other commission or public authority as may hereafter be created, having within its jurisdiction the supervision and regulation of aeronautics in this state, for the construction, improvement, operation and maintenance of publicly owned airports in this state and for the promotion of aeronautics in this state, and for the payment of the costs and expenses of said commission in administering the provisions of this act or other law conferring upon it the duty of regulating and supervising aeronautics in this state.* The amount to be expended on account of each such airport to be seventy-five per cent of that proportion of the tax allocated to the aeronautic fund as the amount of fuel delivered at such airport for use in aircraft bears to the total amount of fuel delivered at all such airports for such use. The remaining twenty-five per cent shall be expended as the commission, or other

designated authority may determine for the promotion, supervision and regulation of aeronautics and for construction, improvement and maintenance of airports in the state. \* \* \*” (Emphasis ours.)

The above quoted statute would be unconstitutional if it was determined that Salt Lake City was operating its airport in a proprietary capacity for the reason that Article XIII, Section 5, of the Constitution of Utah prohibits the Legislature from imposing a tax for any county, city, town or other municipal corporation. It is very obvious that the city of Salt Lake operates the Municipal Airport as an agency of the State of Utah, for the benefit of the public generally, and not for the benefit of Salt Lake City.

In open court during the argument on the motion to dismiss there was read from the budget of Salt Lake City, the following: “Total revenue received at Salt Lake City Airport No. 1, for the year 1959, was \$668,569.03.” Of this amount there was received from the State of Utah the sum of \$576,754.04, showing that most of the cost of operating Salt Lake City Municipal Airport No. 1, is provided from taxes, levied by the State of Utah, collected by the State of Utah, and expended by Salt Lake City under the supervision of the State Road Commission, or such other commission or public authority as may hereafter be granted, having within its jurisdiction the supervision and regulation of aeronautics in the State of Utah, which expenditures shall

be for the construction, improvement, operation and maintenance of public owned airports in this state, and for the promotion of aeronautics in this state.

It obviously was the intent of the State Legislature that cities once engaged in the supervision of a public airport should continue efforts for the benefit of the public, as, according to subdivision (c) of Section 2-27-7, U.C.A., 1953, it limits the right of a city to lease facilities at its airport, or the airport, for a term of years not exceeding ten, and that is provisional upon the lease being subject to the provisions that "the public is not deprived of its rightful, equal and uniform use thereof."

The question whether a municipal function is governmental or proprietary, is ordinarily determined in accordance with the public policy in the jurisdiction in which it arises. It is also generally recognized, that the public policy of the state is to be found in its Constitution and Statutes. See 11 Am. Jur., Constitutional Law, Sec. 139, where the author states:

"In order to ascertain the public policy of a state with respect to any matter, the acts of the legislative department should be looked to, because a Legislative Act, if constitutional declares in terms the policy of the state and is final so far as the courts are concerned."

This is in accordance with Utah law. See *Denver & R. G. W. Co. vs. Grand County*, 170 Pac. 74.

## CONCLUSION

The Utah law is unique in this, that it provides for the acquiring, operation and maintenance of municipal airports by taxes levied by the State of Utah for that purpose. Therefore, we submit that judgment of the trial court should be affirmed.

Respectfully submitted,

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