2017

Labor Commission Plaintiff-Appellant, v. Derek Price, Defendant-Appellee : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

LABOR COMMISSION *Plaintiff-Appellant*, v. DEREK PRICE, *Defendant-Appellee*.	No. 20170734-CA

LABOR COMMISSION'S REPLY BRIEF AS APPELLANT AND RESPONSE BRIEF AS CROSS-APPELLEE

Appeal from the Final Order of the Third Judicial District Court in and for Salt Lake County, Honorable Su J. Chon
No. 126918635

Mark D. Tolman
Jessica P. Wilde
JONES, WALDO, HOLBROOK & McDONOUGH, P.C.
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

Counsel for Defendant-Appellee

Brent A. Burnett (4003)
Assistant Solicitor General
Sean D. Reyes (7969)
Utah Attorney General
P.O. Box 140858
Salt Lake City, Utah 84114-0858
Telephone: 801-366-0533
brentburnett@agutah.gov

Counsel for Plaintiff-Appellant

LIST OF ALL PARTIES

Utah State Labor Commission Brent A. Burnett (4003)	Plaintiff/Appellant
Derek Price Mark D. Tolman (10793) Jessica P. Wilde (11801)	Defendant/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES - Continued

STATUTES and RULES

LABOR COMMISSION'S REPLY BRIEF

ARGUMENT

I. The District Court was without jurisdiction to consider Derek Price's untimely challenge to the Labor Commission's Order.

Mr. Price did not file a timely petition for judicial review from the final agency action in this matter. Utah Code § 63G-4-401(3)(a). He does not challenge this fact in his response brief. He does not challenge that "[t]he timeliness of the . . . petition . . . is a question of jurisdictional significance." *Living Rivers v. U.S. Oil Sands, Inc.*, 2014 UT 25, ¶ 18, 344 P.3d 568.

Instead, Mr. Price claims that his failure to file a timely petition for judicial review does not matter for two reasons: first, he says he's only defending against a civil enforcement proceeding under Utah Code § 63G-4-501(3); and second, he says he has the right to seek judicial review without exhausting all available administrative remedies in limited circumstances under Utah Code § 63G-4-401(2)(b).

Mr. Price's first argument fails because this is not a civil enforcement proceeding. This is a garnishment proceeding. Section 63G-4-501 was not meant to be a catchall provision applying to all possible administrative and judicial proceedings. This is shown by section 63G-4-501(1)(a) that explains that civil enforcement proceedings are in "addition to other remedies provided by law." One such other remedy is a Rule 64 garnishment

proceeding. Indeed, section 501(2)(c) states that an civil enforcement action cannot request, nor can the court grant, "any monetary payment apart from taxable costs." Mr. Price could not use this garnishment proceeding to challenge those prior decisions; he could only challenge the garnishment itself. Utah Rules of Civil Procedure 64D does not authorize a challenge to the underlying judgment, only to matters related to the garnishment. This Court has already held that district courts lack "subject matter jurisdiction to consider a collateral attack on an underlying judgment in the context of the garnishment proceedings." *Utah State Tax Comm'n v. Echols*, 2006 UT App 19, *1 (per curiam).

Even if this was a civil enforcement proceeding, Mr. Price's argument was rejected by the Supreme Court. In *Career Service Review Board v. Utah Department of Corrections*, 942 P.2d 933, 939-40 (Utah 1997), the Court applied res judicata and collateral estoppel to prevent the Department of Corrections from collaterally attacking the Board's administrative orders in a civil enforcement action brought by the Board). "Res judicata, which subsumes the doctrine of collateral estoppel, applies to administrative adjudications in Utah." *Id.* 938 (internal citation and quotation marks omitted). Indeed, the court explained that "[t]he enforcement action before us now is not a continuation of the former administrative adjudication, but a

separate action to enforce the order in Parker's grievance proceeding. *Id.* 939.

The Utah Supreme Court expressly rejected the claim that a civil enforcement action could be used to collaterally attack the decision underlying the order at issue in the action. "This section does not create a loophole in the doctrine of collateral estoppel by permitting defendants to resurrect issues in an enforcement action that were decided and put to rest in previous administrative proceedings between the parties." *Id.* at 940. Res judicata applies to default judgments just as much as it does to other judgments. A default judgment is a final judgment for the purposes of res judicata. "The Judgment by Default was a final judgment, i.e., one which puts an end to a lawsuit by declaring that the plaintiff is or is not entitled to recover the remedy sought." *Schoney v. Memorial Estates, Inc.*, 863 P.2d 59, 61 (Utah Ct. App. 1993). Mr. Price's claims are barred by res judicata.

Second, section 63G-4-401(2)(b) does not apply to this matter. This section permits a party to an administrative proceeding, in limited circumstances, to seek immediate judicial review rather than exhaust all administrative remedies and wait for the entry of a final agency action. Nothing in this statute allows a party to seek untimely judicial review through subsequent garnishment proceedings. Indeed, subsection 3 of the

statute requires that a petition for review be filed within 30 days of the entry of the final agency action. Utah Code § 63G-4-401(3)(a). This Mr. Price failed to do.

II. Utah law does not require the service of notice be sent by certified mail in wage claim proceedings.

The applicable Utah statute requires that notices to parties be mailed. Utah Code § 63G-4-201(2)(b)(i) ("mail the notice of agency action to each party"). Nothing in the statute requires that any particular type of mail be used, such as certified mail. Contrary to the district courts' decision, this Court has not required that service be made by certified mail when the rule in question required that the service be by "mailing a copy to the last known address." *Davis v. Goldsworthy*, 2008 UT App 145, ¶ 13, 184 P.3d 626. In *Davis*, the district court held that personal service was required to serve the defendant a notice to appear personally or appoint new counsel and set aside a prior default judgment. *Id.* ¶ 8. In reversing, this Court held that serving notice by first class mail was sufficient where the rule simply required the service be mailed. *Id.* ¶ 13. The district court erred when it held that a statute requiring notice to be mailed meant certified mail.

The Supreme Court's decision in *Anderson v. Public Service Commission*, 839 P.2d 822 (Utah 1992) is not to the contrary. In that case,

the statute required that notice be sent by certified mail. *Id.* 825. The PSC had complied with the certified mail requirement, but Anderson still argued that he should have been served by personal service. The Court disagreed and held that certified mail was adequate and personal service, or proof of actual notice was not required: "The most burdensome form of service articulated [in the statute] is certified mail. Thus, we can infer that, at most, the legislature intended that the Commission be obligated to serve its orders by certified mail, not by personal service." *Id.*

Likewise, this Court recently held that a statute mandating that notice be sent by "certified mail" required notice by U.S. Postal Service certified mail, not some other method of sending notice. *John Kuhni & Sons Inc. v. Labor Commission*, 2018 UT App 6, ¶¶ 20-21. This Court only required the use of the statutory method for providing notice. It did not require, as did the district court, the use of a more burdensome method of service.

Despite Mr. Price's implications to the contrary, "actual notice" in an administrative proceeding is not the standard for determining whether a party was afforded due process. The Utah Supreme Court rejected that standard in *Anderson*, 839 P.2d at 825 ("We do not believe that the Constitution requires actual notice under these circumstances").

The standard for due process, or service of notice, for an administrative proceeding is not the same as that for a civil action commenced under the Utah Rules of Civil Procedure. "[N]otice must be 'reasonably calculated under all the circumstances' to give interested parties an opportunity to protect their interests. Under this standard, the proper inquiry focuses on whether the agency 'acted reasonably in selecting means likely to inform persons affected, not whether each [affected person] actually received notice.'" *Id.* (citing *Mullane v Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950)).

When adjudicative proceedings are commenced by a State agency, Utah law requires that the agency mail the notice of agency action to each party, publish the notice of agency action if required by statute, and mail the notice of agency action to any other person who has a right to notice under statute or rule. Utah Code § 63G-4-201(2)(b).

In this case, the Commission's actions satisfied the requirements of due process because the Commission's mailings to Mr. Price were reasonably calculated to give him an opportunity to protect his interests. Mailing the original notices of the wage claim, as well as the Preliminary Findings and the final Order, to the addresses for Mr. Price found in the Articles of Organization for Mad Cow and Level 11 was reasonably calculated to give

Mr. Price an opportunity to protect his interests. The Commission acted reasonably in selecting these addresses as being the means most likely to inform Mr. Price of the matter. While stating, that the Department of Commerce's business directory was open to fraud, the district court admitted that "[n]either party has presented evidence of whether this sort of situation has occurred in the past and how often." R. 301.

III. *Heaps* applies retroactively to those actions that are ongoing.

Mr. Price's argument that *Heaps v. Nuriche, LLC*, 2015 UT 26, 345 P.3d 655, should be applied in this appeal fails to address this Court's prior holding that new precedents are applied retroactively only to ongoing actions. *Home Health & Hospices LLC v. Rita Huber*, 2016 UT App 183, ¶¶ 5, 10-12, 382 P.3d 1074.

The default order at issue was entered in 2011. R. 203-206. The Abstract of Judgment was filed in the district court on June 6, 2012. R. 1-2. The underlying administrative action had been completed well before *Heaps* was decided. Mr. Price's argument would require a new decision to be applied to unappealed final orders. New decisions should only be applied in ongoing actions, including those timely appealed from a lower court's decision or an administrative decision.

LABOR COMMISSION'S RESPONSE BRIEF

STATEMENT OF ISSUES ON APPEAL

The district court denied attorney fees "at this point" based on a question of fact. R. 305. Has Mr. Price properly briefed his attorney fees issue when he fails to address the actual decision made by the district court?

Preservation and Standard of Review

This issue was ruled on by the district court. R. 305. "A district court's factual findings are reviewed deferentially under the clearly erroneous standard, and its conclusions of law are reviewed for correctness with some discretion given to the application of the legal standards to the underlying factual findings." *Ericksen v Ericksen*, 2018 UT App 184, ¶ 12 (internal quotation omitted).

STATEMENT OF THE CASE

The district court denied Mr. Price's motion for attorney fees, holding that there were insufficient facts in the record to make the necessary finding of bad faith. "At this point, it is insufficient to demonstrate that the Commission acted in bad faith." R. 305. The court explained that if the Commission proceeded in this matter "based on a prior interpretation of the law and believed in good faith that its counsel told them it would not be

retroactive, it would not be bad faith. However, the facts are insufficient to determine that bad faith has occurred at this juncture." *Id.*

SUMMARY OF ARGUMENT

Mr. Price appeals the denial of his attorney fees that he sought pursuant to Utah Code § 78B-5-825. But he has failed to address the actual holding of the district court. It only denied his motion "at this point" because there were inadequate facts in the record to determine whether the Commission's conduct was in bad faith. Specifically, the court was concerned that there was insufficient evidence as to whether the Commission was acting in good faith by relying on the advice of its counsel. R. 305. The current action deals with an abstract of judgment and efforts to collect on the Commission's decision. Mr. Price has not addressed the district court's actual decision. Whether or not the facts before the district court were adequate has not been briefed.

ARGUMENT

Mr. Price has failed to address the district court's actual factual findings regarding his claim for attorney fees.

Mr. Price sought attorney fees based on his claim that the Commission had acted in bad faith in trying to collect on the default judgment against him. His claim is based on the *Heaps* decision that was decided after the

default judgment was issued and the garnishment proceeding commenced. The district court declined "at this point" to grant his motion because of factual questions that remained unresolved. To award bad faith attorney fees, the statute requires both that the case was without merit and that it was brought in bad faith. *Still Standing Stable, LLC v. Allen*, 2005 UT 46, ¶ 9, 122 P.3d 556. Finding that a party acted in bad faith "turns on a factual determination of a party's subjective intent." *Id.* (internal quotation omitted). The court must find that one or more of the following factors is lacking. "(1) [a]n honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others." *Id.* at 12 (internal quotations omitted).

The district court declined to grant Mr. Price's request for attorney fees because it found there were inadequate facts to make its decision on whether this test was met. The court noted that, by statute, the Commission was to rely on the legal opinion of its counsel or the attorney general that its order "is well grounded in fact and is warranted by existing law." Utah Code § 34A-5-108(1)(b). The court added that "[i]f it did proceed in this action based

on a prior interpretation of the law and believed in good faith that its counsel told them it would not be retroactive, it would not be bad faith." R. 305.

Mr. Price claims that the Commission's failure to return the amount it has garnished from him is proof of its bad faith. Price's Brief at 44. And yet the district court noted that the Commission does not have that money, it had already sent the money to the wage claimant. R. 304-05.

It is also significant that the Commission's challenged decisions and the abstract of judgment that it filed with the district court have not been overturned. The district court's order quashed one particular writ of garnishment and ordered Mr. Price to "pursue a motion to set aside in the administrative proceeding with notice to all interested parties." R. 306.

CONCLUSION

For the reasons set forth above, the district court's decision should be reversed.

Respectfully submitted this 9th day of Occtober, 2018.

/s/ Brent A. Burnett
BRENT A. BURNETT
Assistant Solicitor General
Attorney for the Office of Recovery Services

CERTIFICATE OF COMPLIANCE

1. This brief complies with the total type-volume limitations of Utah Rule of Appellate Procedure 24(g)(1) because:

   · this brief contains words, excluding the parts of the brief exempted by Rule 24(g)(2).

2. This brief complies with the typeface requirements of Utah Rule of Appellate Procedure 27(b) because:

   · this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Century Schoolbook font.

3. This brief complies with the non-public information requirements of Utah Rule of Appellate Procedure 21(g) because:

   · this brief contains no non-public information.

CERTIFICATE OF COMPLIANCE WITH RULE 24(g)(1)

I hereby certify that the Labor Commission's Reply Brief as Appellant and Response Brief as Cross-Appellee contains 2597 words, including headings, footnotes, and quotations, but excluding the Table of Contents and Table of Authorities.

I have relied upon the word count of the word processing system, Word 2016, used to prepare this brief. The font used is Century Schoolbook, 13 point.

/s/ Brent A. Burnett
Brent A. Burnett

CERTIFICATE OF SEEVICE

This is to certify that I emailed a copy of the foregoing LABOR COMMISSION'S REPLY BRIEF AS APPELLANT AND RESPONSE BRIEF AS CROSS-APPELLEE to the following this 9th day of October, 2018:

Mark D. Tolman
Jessica P. Wilde

Attorneys for Defendant
Derek Price

mtolman@joneswaldo.com
jwilde@joneswaldo.com

/s/ Brent A. Burnett