

1991

# William G. Bruhn v. Associated Students of the University of Utah : Brief of Respondent

Utah Supreme Court

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## Recommended Citation

Brief of Respondent, *Bruhn v. Associated Students of the University of Utah*, No. 914567.00 (Utah Supreme Court, 1991).  
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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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WILLIAM G. BRUHN,

Plaintiff-Appellant,

vs.

Case No. 14567

ASSOCIATED STUDENTS OF THE  
UNIVERSITY OF UTAH,

Defendants-Appellee.  
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BRIEF OF RESPONDENT  
\_\_\_\_\_

An Appeal for the Dismissal of the  
Complaint in the District Court of Salt Lake County

The Honorable G. Hal Taylor, Judge

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**FILED**

SEP 24 1976

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

This is an action for slander and libel.

DISPOSITION IN LOWER COURT

Defendants Associated Students of the University of Utah (hereinafter "ASUU") and Andrew Welch both moved to dismiss. The Court looked to matters outside the pleadings, thus treating the Motion as a motion for summary judgment. ASUU's motion was granted; Andrew Welch's motion was denied without prejudice; and the plaintiff was given twenty days within which to amend his Complaint for the purpose of naming additional parties defendant.

This appeal is from that part of the trial court's order which grants ASUU's Motion to Dismiss.

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the trial court's order.

## STATEMENT OF FACTS

This action arises from an article printed in the Daily Utah Chronicle (hereinafter "Chronicle"), a student publication of the University of Utah. The action was brought against both the Associated Students of the University of Utah and the individual reporter, Andrew Welch. The record contains the affidavit of Rex Nutting, who was then the editor of the Chronicle.

Nutting's affidavit establishes:

That the Chronicle consistently operates at a loss. This loss is compensated for by appropriations from the Publications Council of the University of Utah, and ASUU.

That the ASUU funds came from mandatory tuition deductions from each student.

That, in addition, the Chronicle receives office space, tuition waivers and miscellaneous services from ASUU and the University of Utah.

That the equipment used by the Chronicle is owned by the Publications Council of the University of Utah.

The editors and business managers of the Chronicle are appointed by the Publications Council.

The terms of the Chronicle's contracts are determined by the Publications Council.

The Publications Council approves the budget, reviews expenditures, and insures acceptable business and editorial practices of the Chronicle.

The Publications Council makes budget requests to ASUU for the Chronicle.

The Publications Council approves the Chronicle pay structure and awards scholarships to Chronicle staff members.

The Publications Council deals with criticism directed towards the Chronicle.

The Publications Council consults with the Chronicle staff relating to good taste and standards of propriety.

The Publications Council has authority to remove editors and business managers and to impose other sanctions upon Chronicle personnel.

Each issue of the Chronicle includes a notice which reads:

Published daily during fall, winter and spring quarters, twice weekly during summer quarter (not including test week or quarter breaks) by Publications Council of the University of Utah. (Emphasis added).

In Opposition to the Motion to Dismiss, plaintiff's attorney submitted an affidavit by which he indicated that he could not respond to the above allegations until further discovery was completed. He also attached a copy of a report to the University of Utah Institutional Council from the University's President, David P. Gardner. President Gardner's report included the following conclusions:



- 2.(a) . . . The identity of the publisher of the Daily Utah Chronicle . . . is not clear.
3. . . . [U]ltimate legal responsibility for student publications is reposed by the Higher Education Act of 1969 in the Institutional Council of the University.

#### ARGUMENT

POINT ONE. THERE IS NO GENUINE ISSUE  
AS TO A MATERIAL FACT.

ASUU's Motion was made under Rule 12, Utah Rules of Civil Procedure. That Rule provides:

If, on a motion asserting defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . .

The pleadings were supplemented by affidavits submitted by both parties, which affidavits were considered by the Court. The motion was consequently treated as a motion for summary judgment, and the issue to be decided upon this appeal is whether there was a genuine issue as to a material fact.

The affidavit of Rex Nutting clearly indicated that the Publications Council of the University of Utah, not ASUU, owns the equipment used by the Chronicle, appoints and removes the editorial personnel, deals with criticism and

advises as to good taste and standards of propriety, sets pay structure, etc.

In short, the Publications Council performs all the functions that a publisher of a newspaper would normally perform. In addition, each issue of the Chronicle informs its readers that the Chronicle is published by the Publications Council.

The plaintiff's attorney's affidavit was insufficient to raise any genuine issue as to the above facts. Neither the affidavit nor the attached report state any fact to dispute or overcome the averments of Rex Nutting's affidavit. Although the report of President Gardner states that it is his conclusion that the identity of the Chronicle's publisher is unclear, this alone cannot raise an issue of fact. Rule 56(e) provides:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence . . .

Obviously, President Gardner's opinion as to the identity of the Chronicle's publisher or as to the ultimate legal responsibility for student publications is not an admissible fact. This Court has specifically held that hearsay and opinion testimony may not properly be set forth in affidavit. Walker v. Rocky Mountain Recreation Corp., 29 Utah2d 274, 508 P.2d 538 (1973).

It is incumbent upon a plaintiff, when he files a lawsuit, to come forth with some fact which at least raises a reasonable inference that the defendant he chooses to sue is legally liable. This court held in Abdulkadir v. Western Pacific Railroad, 7 Utah2d 53, 318 P.2d 339 (1957):

Speaking generally, it is to be assumed that when a plaintiff files his action he has sufficient evidence to demonstrate a right to recovery.

In this case, the plaintiff came forth with no such evidence; the Motion to Dismiss was properly granted.

POINT TWO. THIS ACTION IS BARRED AS TO ASUU, BY UTAH CODE ANN. §63-30-10(2) (1967).

Utah Code Ann. §63-30-10(2) provides:

63-30-10. Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury:

. . .

(2) arises out of . . . libel, slander . . .

The term "governmental entity" is defined in §63-30-2(3) as "the state and its political subdivisions." "The state" is defined in §63-30-2(1) as:

[T]he state of Utah or any office, department . . . college, university or other instrumentality thereof;

It is clear, therefore, that ASUU is immune from liability if it is an "instrumentality" of the University of Utah.

ASUU is, in fact, the student government of the University of Utah and is an integral part of that public institution. ASUU cannot have and does not have any function nor existence apart from the University and is controlled thereby. President Gardner may have expressed some question as to the identity of the University agency responsible for publication but the statutes leave no doubt that ultimate responsibility rests with the University itself. As indicated by the Affidavit of Rex Nutting, ASUU is funded by mandatory deductions from the tuition of each student. It is established under the authority of the president of the University, pursuant to Utah Code Ann. §53-48-15 (1970), which provides:

[T]he president of each institution with the approval of the institutional council:

. . .

- (6) May enact rules and regulations for administration and operation of the institution which are not inconsistent with the prescribed role established by the board, rules and regulations enacted by the board or the laws of the state of Utah. Such rules and regulations may . . . provide for student government and student affairs organization . . . (Emphasis added).

The Board of Higher Education is charged with the responsibility to see that student tuition monies are used for only legitimate University needs. Utah Code Ann. §53-48-10 (1970) provides:

2. . . . The board may fix the tuition, fees and charges for each institution at such level as it finds necessary to meet the budget requirements of each institution. (Emphasis added).

The Chronicle as a student newspaper is an integral part of the University. It is as essential to the University in teaching students journalism as a laboratory is to the proper instruction of chemistry. It also provides a media for students to become aware of University functions and activities and a forum for expression of student opinion.

As such, actions taken by student newspapers which are funded by mandatory tuition deductions have been held to be "state action" for constitutional purposes. Panarello v. Birenbaum, 60 Misc. 296, 302 N.Y.S.2d 427 (1969).

Similarly, the actions of the Chronicle, as an instrumentality of the University of Utah come within the definition of a governmental entity. Immunity from suits alleging libel or slander has been expressly preserved by the Utah Governmental Immunity Act. (See Section 63-30-10(2), U.C.A. 1953, as amended.)

CONCLUSION

The Daily Utah Chronicle, as a student publication of the University of Utah, is an integral and necessary part of the University. The plaintiff admits to being unable to present any evidence that it is published by ASUU. Rather the Chronicle is published by the Publications Council of the University of Utah.


The Affidavit of the Chronicle's editor, Rex Nutting, affirmatively establishes that all of the normal functions of a publisher are performed by the Publications Council.

In any event, ASUU, and the Chronicle, as instrumentalities of the University of Utah are entitled to the benefits of the Utah Governmental Immunity Act, which specifically excludes liability for libel or slander.

The trial court correctly dismissed ASUU and should be affirmed.

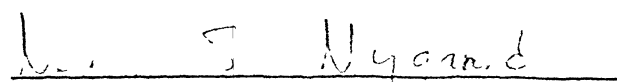
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I delivered two (2) copies  
of the foregoing brief to counsel for Plaintiff-Appellant,  
Richard J. Leedy, 744 East 300 South, Salt Lake City,  
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Carol Canfield