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Mary Amelia Wood et al v. Walter L. Budge : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY AMELIA WOOD, HAZEL
STEVENS, LLOYD WARNER —

Guardian Ad Litem for

Nancy Louise Ovard,
WAYNE JOHN STERLING, and
DEAN J. HADFIELD,

Plaintiffs and Respondents,

— vs. —

WALTER L. BUDGE,

Attorney General of Utah,

Defendant and Appellant.

FILED

OCT 11 1961

Supreme Court, Utah

Case
No. 9541

BRIEF OF APPELLANT

WALTER L. BUDGE
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Nancy Louise Ovard,

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DEAN J. HADFIELD,

Plaintiffs and Respondents,

— vs. —

WALTER L. BUDGE,

Attorney General of Utah,

Defendant and Appellant.

Case
No. 9521

BRIEF OF APPELLANT

NATURE OF CASE

This is an appeal from a peremptory writ of mandamus issued by the Third Judicial District Court, compelling Attorney General Walter L. Budge to pay certain moneys to respondents.

DISPOSITION OF CASE

The Third Judicial District Court granted respondents' petition for writ of mandamus and issued a writ

compelling Attorney General Walter L. Budge to pay certain sums to respondents.

RELIEF SOUGHT

Appellant requests that the Court find that (1) a peremptory writ of mandamus is not a proper remedy in this action, there being a proper remedy at law; (2) that in any event Article VII, Section 13 of the Utah Constitution precludes the Attorney General from paying claims which have been denied by the Board of Examiners and subsequently approved by the Legislature.

STATEMENT OF FACTS

The respondents, and others not mentioned in the petition, had their respective claims denied by the Utah Board of Examiners. (See Ex. D-2.) The Board of Examiners is a constitutional body consisting of the Governor, Secretary of State and Attorney General, who have vested in them, by virtue of Article VII, Section 13 of the Utah Constitution, the power to examine, consider and act upon all claims against the State of Utah. (R. 35-36)

The 34th Legislature, on March 9, 1961, subsequently allowed all of respondents' claims which had been denied, and others. The Legislature then appropriated the necessary amounts to pay the claims (Chapter 185, Section 13, Item 126, Laws of Utah 1961), and directed Attorney General Walter L. Budge to pay the same. (R. 34)

On June 26, 1961, Walter L. Budge, Attorney General, issued an opinion concerning whether or not Article

VII, Section 13 of the Utah Constitution gives the State Legislature the power to overrule the decisions of the Board of Examiners with respect to unliquidated claims against the State of Utah. His conclusions were as follows:

“The Supreme Court of the State of Utah has at no time passed upon the specific question set forth and for which an opinion has been requested. Case law has been carefully studied from other jurisdictions whose constitutional provisions with relation to the duties of the Board of Examiners are similar to those of the State of Utah, and as is seen from the foregoing opinion, there is much uncertainty as to the law covering this subject matter.

“It is my opinion that no claim should be paid without a court clarification of the question as presented. Therefore, as the Attorney General of the State of Utah, I feel it my duty to refuse to dispense any appropriated funds to pay claims that have been denied by the Utah State Board of Examiners and subsequently allowed by the Utah State Legislature until the law appertaining thereto is clarified by court determination.” (R. 36)

On July 13, 1961, respondents filed a petition for a writ of mandamus in the Supreme Court of the State of Utah to compel the Attorney General, Walter L. Budge, to pay the herein mentioned claims. The petition was denied by the Supreme Court of the State of Utah, and thereafter, on July 18, 1961, respondents filed another writ of mandamus in the Third District Court of the State of Utah. (R. 28) On this same date the Honorable A. H. Ellett granted an alternative writ of mandamus, wherein

the appellant, Walter L. Budge, was commanded to either issue proper warrants to each of said parties, or to show cause before the Court on the 27th day of July, 1961, at 10:00 a.m. why he had not done so. (R. 28, 29)

On July 28, 1961, the Court of the Third Judicial District issued a peremptory writ of mandamus ordering appellant, Walter L. Budge, to pay to the respondents certain sums of money, and commanded appellant Walter L. Budge to make known to the above entitled Court, on the 16th day of August, 1961, how he had executed this writ. The Court also denied appellant's motion to dismiss which asserted that a writ of mandamus was not the proper remedy in this action.

STATEMENT OF POINTS

POINT I.

A PEREMPTORY WRIT OF MANDAMUS IS NOT THE PROPER REMEDY IN THIS ACTION BECAUSE THERE IS A PROPER REMEDY AT LAW, AND THE DUTY OF THE ATTORNEY GENERAL TO PAY THE CLAIMS IS NOT CLEAR.

POINT II.

THE TOTAL CONSTITUTIONAL POWERS OF THE UTAH BOARD OF EXAMINERS RESPECTING THEIR POWER OVER CLAIMS AGAINST THE STATE OF UTAH ARE NOT CLEARLY DEFINED, AND COURT DETERMINATION IS NECESSARY TO DETERMINE WHETHER OR NOT THE ATTORNEY GENERAL, UNDER ARTICLE VII, SECTION 13, UTAH STATE CONSTITUTION, HAS AUTHORITY TO PAY CLAIMS

WHICH HAVE BEEN DENIED BY THE BOARD OF EXAMINERS AND SUBSEQUENTLY APPROVED BY THE LEGISLATURE.

POINT III.

THE UTAH SUPREME COURT HAS REPEATEDLY INTERPRETED ARTICLE VII, SECTION 13 OF THE UTAH CONSTITUTION AS VESTING GREAT POWER AND DISCRETION IN THE BOARD OF EXAMINERS TO EXAMINE, CONSIDER AND PASS UPON CLAIMS AGAINST THE STATE OF UTAH.

POINT IV.

THE UTAH BOARD OF EXAMINERS HAS GREATER POWER ON UNLIQUIDATED CLAIMS THAN ON CLAIMS UPON WHICH THE LEGISLATURE HAS ALREADY MADE AN APPROPRIATION.

POINT V.

THE CONSTITUTIONS OF IDAHO AND NEVADA, IN ESSENCE, ARE IDENTICAL TO ARTICLE VII, SECTION 13 OF THE UTAH CONSTITUTION, AND THE SUPREME COURTS OF THESE RESPECTIVE STATES HAVE CONSTRUED THEIR CONSTITUTIONAL PROVISIONS AS VESTING GREAT POWERS IN THE BOARDS OF EXAMINERS OF THESE STATES.

POINT VI.

WHEN THE BOARD OF EXAMINERS HAS DENIED A CLAIM ON THE GROUND THAT THE STATE HAS NO LEGAL OR MORAL OBLIGATION TO PAY THE ALLEGED CLAIM, THE LEGISLATURE, BY ALLOWING SUCH A CLAIM, WOULD BE GRANTING A SPECIAL PRIVILEGE,

IMMUNITY OR FRANCHISE TO A PRIVATE INDIVIDUAL OR CORPORATION AND, THEREFORE, THERE WOULD BE A VIOLATION OF ARTICLE VI, SECTION 26 (16), UTAH CONSTITUTION.

ARGUMENT

POINT I.

A PEREMPTORY WRIT OF MANDAMUS IS NOT THE PROPER REMEDY IN THIS ACTION BECAUSE THERE IS A PROPER REMEDY AT LAW, AND THE DUTY OF THE ATTORNEY GENERAL TO PAY THE CLAIMS IS NOT CLEAR.

The purpose of a writ of mandamus is defined in Rule 65B(b) (3) of the Utah Rules of Civil Procedure, which reads as follows:

“Where the relief sought is to compel any inferior tribunal, or any corporation, board or person to perform an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully excluded by such inferior tribunal or by such corporation, board or person; * * *.”

The Utah Supreme Court in the recent case of *Cope v. Toronto*, 8 U. 2d 255, 322 Pac. 977 (1958), held that the above rule had, by decisional law, been limited to its literal wording; thus, the purpose of mandamus is to compel an inferior tribunal or any corporation, board or person to perform an act which the law specifically enjoins as a duty resulting from an office, trust or station.

The Utah Court¹ has also been explicit in holding that in a mandamus proceeding the legal right to require a public officer to proceed, and the legal duty to do so must be free from doubt. Several other Utah cases² have held that a public officer will not be coerced by a writ of mandamus to do an official act when right of applicant and duty of the officer are not reasonably clear.

In the case at bar there is a serious question under Article VII, Section 13 of the Utah Constitution as to whether the Attorney General has the right to pay claims against the State of Utah which have been denied by the Board of Examiners and subsequently approved by the Legislature. The particulars of this question will be amplified later in this brief. The Attorney General thus felt that before funds were paid to the respondents, this question should be resolved by the courts, and this is the only reason why he has refused to pay the claims of respondents. It would, therefore, seem that mandamus is not the proper remedy.

POINT II.

THE TOTAL CONSTITUTIONAL POWERS OF THE UTAH BOARD OF EXAMINERS RESPECTING THEIR POWER OVER CLAIMS AGAINST THE STATE OF UTAH ARE NOT CLEARLY DEFINED, AND COURT DETERMINATION IS

¹*Hoffman v. Lewis*, 31 Utah 179, 87 Pac. 167 (1906).

²*Kyrimes v. Kyrimes*, 45 Utah 168, 143 Pac. 232 (1914); *Ketchum Coal Co. v. District Court of Carbon County*, 48 Utah 342, 350, 159 Pac. 737, 4 ALR 619 (1916); *Woodcook v. Board of Education of Salt Lake City*, 55 Utah 458, 187 Pac. 181, 10 ALR 181 (1920); *Towler v. Warenski*, 59 Utah 171, 202 Pac. 374 (1921).

NECESSARY TO DETERMINE WHETHER OR NOT THE ATTORNEY GENERAL, UNDER ARTICLE VII, SECTION 13, UTAH STATE CONSTITUTION, HAS AUTHORITY TO PAY CLAIMS WHICH HAVE BEEN DENIED BY THE BOARD OF EXAMINERS AND SUBSEQUENTLY APPROVED BY THE LEGISLATURE.

Article VII, Section 13³ creates a Board of Examiners consisting of the Governor, Secretary of State and Attorney General, with power to examine, consider and act upon claims. An early Utah case⁴ states that the Board of Examiners is a creature of the Constitution and not the Legislature. It is, therefore, clear that the Board derives its powers from the Constitution and not the Legislature and, therefore, any legislative enactment which goes contra to Article VII, Section 13 of the Utah Constitution, is void.

There are certain phrases in Article VII, Section 13, which are not clear. The words, "They shall, also, constitute a Board of Examiners, with power to examine all claims against the State except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law; and no claim against the State, except for salaries and compensation of offi-

³"Until otherwise provided by law, the Governor, Secretary of State and Attorney General shall constitute a Board of State Prison Commissioners, which Board shall have such supervision of all matters connected with the State Prison as may be provided by law. They shall, also, constitute a Board of Examiners, with power to examine all claims against the State except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law; and no claim against the State, except for salaries and compensation of officers fixed by law, shall be passed upon by the Legislature without having been considered and acted upon by the said Board of Examiners."

⁴*Wilkinson v. State*, 42 Utah 483, 494, 134 Pac. 626, 631 (1913).

cers fixed by law, shall be passed upon by the Legislature without having been considered and acted upon by the said Board of Examiners'' need court clarification. The Board is given power to examine, consider and act upon all claims. This wording gives the Board great powers over claims, and makes it substantially more than just an auditing board, but its exact powers are not clearly defined.

Article VII, Section 13, also gives the Legislature power to "pass" upon claims which have been examined, considered and acted upon by the Board. Does the word "pass" mean for appropriation purposes, or something more, and if so, what? Since only the Legislature can appropriate money, it would seem that the word "pass" means for purposes of appropriation only.

It should be noted that there were few discussions concerning any of the sections of the Constitution which include the Board of Examiners' provision,⁵ and, therefore, little aid for clarification can be derived from this source.

POINT III.

THE UTAH SUPREME COURT HAS REPEATEDLY INTERPRETED ARTICLE VII, SECTION 13 OF THE UTAH CONSTITUTION AS VESTING GREAT POWER AND DISCRETION IN THE BOARD OF EXAMINERS TO EXAMINE, CONSIDER AND PASS UPON CLAIMS AGAINST THE STATE OF UTAH.

⁵¹ Proceedings, Utah Constitutional Convention 933 (1898); 2 Proceedings, Utah Constitutional Convention 1015, 1016 (1898).

The Bateman case⁶ is the latest pronouncement by the Utah Supreme Court in which the powers of the Board of Examiners were clarified. The Court stated:

“Short of capricious and arbitrary acts, the Board of Examiners and its administrative arm, the Commission of Finance, have the authority to examine and approve or disapprove of proposed expenditures * * *.”

The Court then got more specific as to the discretion of the Board in replying to Bateman's contention that except as to unliquidated claims, the Board has no discretionary authority and can perform only on auditing function. The Court stated:

“The question as to the extent of the power of Examiners has been dealt with by this Court in numerous decisions. They clearly demonstrate that Examiners has powers beyond mere auditing.”

The Court thus realized that if Bateman's contentions were adopted, the Board would be relegated to an auditing board, thus duplicating the duties of the State Auditor, and the Board would in essence be nothing more than a rubber stamp of the Legislature.

The Ajax case⁷ is another decision which throws additional light on the powers of the Board. In this case a writ of mandamus issued to compel the State Auditor to pay bounty certificates for killing predatory animals.

⁶*Bateman v. State Board of Examiners*, 7 U. 2d, pp. 221 and 235; 322 P. 2d, pp. 381, 385 and 390 (1958).

⁷*Uintah State Bank v. Ajax*, 77 Utah 455, 466, 297 Pac., pp. 434 and 438 (1931).

The Uintah State Bank contended that the amount of the bounty was "fixed by law" and, therefore, there was merely a ministerial duty of payment by the Auditor and no need to go to the Board of Examiners. The Court, however, said:

"The Constitution has vested in the Board of Examiners the power to examine and pass on all claims except those exempted, and the Legislature is without authority to delegate such power to any other board or officer."

One of the clearest pronouncements by the Utah Supreme Court was in the Edwards case⁸ where the Court held that the Examiners must approve a claim of the court reporter for mileage. The Court said:

"The powers conferred upon the Board of Examiners with regard to claims against the state, by the constitutional provision quoted above (Article VII, Section 13), are general and sweeping."

POINT IV.

THE UTAH BOARD OF EXAMINERS HAS GREATER POWER ON UNLIQUIDATED CLAIMS THAN ON CLAIMS UPON WHICH THE LEGISLATURE HAS ALREADY MADE AN APPROPRIATION.

In the Thoreson case⁹ the Legislature passed a law creating a legal obligation in place of a moral obligation concerning reimbursement for lease of school lands by

⁸*State ex rel. Davis v. Edwards*, 33 Utah 243, 93 Pac. 720 (1908).

⁹*Thoreson v. State Board of Examiners*, 19 Utah 18, 57 Pac. 175 (1899); Rehearing in 21 Utah 187, 189, 60 Pac. 982 (1900).

the State of Utah. The Court was careful to point out that on the particular facts of the case the Board had only ministerial duties. The exact language of the Court is as follows:

“We did not hold as intimated in appellant’s brief that the Board of Examiners is a mere perfunctory body, not capable of exercising any judgment or discretion in matters of allowing or rejecting claims against the state, but held that in the particulars mentioned in this case, where the claim is admitted to be just, the Board had no discretion, but their duties were mandatory.

In short, there is nothing in the Thoreson case which restricts the power of the Board as to unliquidated claims. The decision of the Thoreson case, as the Court pointed out, was limited to the fact situation in that case.

In a very recent Idaho case¹⁰ in which an attorney was appointed by the Board of Highway Directors as attorney for the Board, without designation of Assistant Attorney General, and the Board fixed his compensation, an action of the State Board of Examiners in directing the Auditor to refuse to pay the attorney’s claim, was held not valid. The reasoning of the court was that where a claim against the state is based on an obligation authorized by the Legislature against a specific appropriation made by the Legislature, authority of the Board of Examiners is limited to determining that the claims are in perfect form, properly certified to the State Auditor by the Department of Highways, and chargeable against

¹⁰*Padgett v. Williams*, 348 P. 2d 944 (1960), Supp. Opinion 350 P. 2d 353 (1960).

the appropriations. This ruling, however, does not apply where there is no prior policy determination by the Legislature as is the case with unliquidated claims.

POINT V.

THE CONSTITUTIONS OF IDAHO¹¹ AND NEVADA,¹² IN ESSENCE, ARE IDENTICAL TO ARTICLE VII, SECTION 13, OF THE UTAH CONSTITUTION, AND THE SUPREME COURTS OF THESE RESPECTIVE STATES HAVE CONSTRUED THEIR CONSTITUTIONAL PROVISIONS AS VESTING GREAT POWERS IN THE BOARDS OF EXAMINERS OF THESE STATES.

A. *Idaho Cases.* The Idaho Supreme Court¹³ defined the jurisdiction of the three branches of state government when it said:

“The Legislature has no more jurisdiction to direct or control the actions of the Board than the court has, since all three bodies, the Legislature, the Board of Examiners and the Supreme Court, derive their respective powers from the same instrument.”

The Idaho Supreme Court¹⁴ in speaking of the discretionary powers of the Board, stated in substance that the Board’s discretion is absolute; it is constitutionally vested with sole and absolute power to determine allowance or disallowance of claims.

¹¹Article IV, Section 18, Idaho Constitution.

¹²Article V, Section 107, Nevada Constitution.

¹³*State ex rel Hansen v. Parsons*, 57 Ida. 775, 69 P. 2d 788, 793 (1937).

¹⁴*Gem Irrigation District v. Gallet*, 43 Ida. 519, 253 Pac. 128 (1927).

The Idaho Supreme Court, in another case,¹⁵ said the following concerning the powers of the Examiners:

“The Constitution creates the State Board of Examiners as a tribunal with full power and jurisdiction to pass upon all claims against the state, except those specifically excepted by the Constitution, and no court or other tribunal is authorized to set aside or reject such action.”

B. *Nevada Case*. A leading Nevada case on the subject ¹⁶ held in substance that the Legislature has no authority to deprive the Board of Examiners of its duty and authority over claims against the state. If the Legislature were allowed to overrule the Board's discretion, it would be usurping most of the powers which have been constitutionally vested in the Board of Examiners.

There are, however, two early Nevada cases¹⁷ which seem to indicate that the Board of Examiners has only an advisory capacity to the Legislature; however, these cases must be viewed in light of the fact that the Nevada Constitution was copied almost directly from the California Constitution, and the California Constitution established a board of examiners by legislative enactment and not by a constitutional provision.

POINT VI.

WHEN THE BOARD OF EXAMINERS HAS DENIED A CLAIM ON THE GROUND THAT THE STATE HAS NO LEGAL OR MORAL OBLIGA-

¹⁵*Bargaw v. Gooding*, 14 Ida. 288, 94 Pac. 438, 441 (1908).

¹⁶*State ex rel. Lyon County v. Hallock*, 20 Nev. 326, 22 Pac. 123 (1889).

¹⁷*Ash v. Parkinson*, 5 Nev. 15, 30, 31 (1869); *Lewis v. Doran*, 5 Nev. 399, 410 (1870).

TION TO PAY THE ALLEGED CLAIM, THE LEGISLATURE, BY ALLOWING SUCH A CLAIM, WOULD BE GRANTING A SPECIAL PRIVILEGE, IMMUNITY OR FRANCHISE TO A PRIVATE INDIVIDUAL OR CORPORATION AND, THEREFORE, THERE WOULD BE A VIOLATION OF ARTICLE VI, SECTION 26 (16), UTAH CONSTITUTION.

Article VI, Section 26 (16) of the Utah Constitution, provides :

“The Legislature is prohibited from enacting any private or special laws in the following cases : * * *
“16. Granting to an individual, association or corporation any privilege immunity, or franchise.”

It would seem that after the Board of Examiners has exercised its constitutional duty of considering and acting upon claims, and has denied them for the reason that there is no legal or moral obligation against the state, that the Legislature, in allowing such claims, would be granting a special privilege, immunity or franchise to a private individual or corporation, and would thus be making a void appropriation. In short, the Legislature would be making an appropriation of public monies for a private purpose and, in essence, would be making a gift of public monies to an individual who had no legal or moral right to make any claim upon the state.¹⁸ It should, therefore, be evident that uniformity of legislation should be required to prevent the granting to any person or class of persons the privileges or immunities which, upon the same terms, do not belong to all persons.

¹⁸*State ex rel. Cashman v. Simms*, 43 S. E. 2d 805 (W. Va. 1947).

In summary, it would appear that the question of whether the Legislature made an appropriation for a public or private purpose when it appropriated monies to pay the claims of respondents, is a question that must be determined by the courts of this state. The language of State ex rel. *Cashman v. Simms*, supra, is explicit and conclusive on this point. The court, on page 817 of the opinion, stated:

“It is well established that the courts possess the power to consider an appropriation of public funds to determine whether it is for a public or private purpose. That question is not a legislative but a judicial function. The Legislature cannot make a private purpose a public purpose by its mere fiat or declaration.”

The court then went on to cite other authority on this point.

CONCLUSION

The Utah Constitution gives the Board of Examiners power to examine all claims against the state (except salaries and compensation of officers fixed by law), and provides that no claim shall be passed upon by the Legislature without having been considered and acted upon by the Board. It is evident that the framers of the Utah Constitution intended to vest great discretion and power over claims in the Board of Examiners, as Utah case law as well as the case law of states with comparable constitutional provisions bears out.

To allow the Legislature to pass claims which have previously been denied after careful scrutiny by the

Board, or to disallow claims which have been allowed by the Board, is not only an interference with executive discretion, which does violence to the whole conception of the separation of powers, but also relegates the Board to a mere auditing body. Certainly, the framers of the Utah Constitution envisioned the Board as something more than a body just to audit claims; they were creating a Board constituting the three chief elective officials of the state to examine, consider and act upon claims.

The Legislature may pass upon claims heard by the Board of Examiners, but the wording of the Constitution in cases construing it would seem to indicate that this is for purposes of appropriation, since only the Legislature can appropriate money to pay claims against the state, and this appropriation must be for a valid public purpose, not falling within the prohibitions of Article VI, Section 26 of the Utah Constitution.

It should be noted that the Legislature is not equipped to handle claims for the following reasons:

“(1) Adjudication of tort claims often involves the consideration of very technical legal questions. To cope with these questions requires legal training and laymen are not suited for this task. (2) Legislatures do not have the necessary facilities for gathering evidence. (3) Political and personal considerations are inherent in the legislative system. (4) The legislature does not have time adequately to consider each claim. (5) The infrequency of the legislative sessions results in the claimant's having to wait to have his claim heard. (6) Because of the growing importance of legislation, the legislators could spend their time more

beneficially by devoting it to general bills which affect the public welfare.”¹⁹

It is, therefore, respectfully requested that this Honorable Court find and enter its order that the Constitution of the State of Utah does not grant to the State Legislature the power to make appropriations for claims that have first been properly considered by the Board of Examiners of the State of Utah and denied by such Board.

It is also respectfully requested that this Honorable Court find that a writ of mandamus is not the proper remedy to bring this action before the Court, there being an adequate remedy at law.

Respectfully submitted,

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¹⁹5 Utah Law Review, 243-244 (1956).