

1967

Leah Richins v. The Industrial Commission of Case
Utah, Otto A. Wiesley, Carlyle F. Gronning and
John R. Schone, Its Members, and Richard G.
Mitchell : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEAH RICHINS,

Plaintiff-Appellant,

vs.

THE INDUSTRIAL COMMISSION OF
UTAH, OTTO A. WIESLEY, CARLYLE
F. GRONNING and JOHN R. SCHONE,
its members, and RICHARD G.
MITCHELL,

Defendants-Respondents.

Case
No. 10852

Defendant
BRIEF OF ~~RESPONDENT~~,
RICHARD G. MITCHELL

APPEAL FROM AN ORDER OF THE INDUSTRIAL
COMMISSION OF UTAH

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TABLE OF CONTENTS

| | Page |
|--------------------------|------|
| Statement of Facts | 1 |
| Argument | 8 |
| Conclusion | 20 |

POINTS

| | |
|---|---|
| I. RICHARD G. MITCHELL AS RECEIVER IS NOT PERSONALLY LIABLE TO APPELLANT RICHINS FOR HER INJURIES. | 8 |
|---|---|

| | |
|--|----|
| II. APPELLANT SHOULD NOT HAVE A FULL HEARING OF HER CASE UNTIL SHE MAKES HER CLAIM AGAINST THE RIGHT PARTY. | 20 |
|--|----|

CASES AND AUTHORITIES CITED

| | |
|--|--------|
| Bredeweg v. First State Bank of Holland, et al. 273 N. W. 556 (1937) | 9 |
| Bartlett v. Cicero Light H and P Company 177 Ill. 68, 52 N.E. 339, 42 LRA 715 | 10 |
| Thompson on Corporations | 11 |
| Unrine v. Saline Northern R. Co. et al, 104 Kan. 236, 178 P 614 | 12 |
| 99 C.J.S. Workmen's Compensation, Para. 40 and 55 | 12, 13 |
| Anderson v. Polleys, 165 A. 436 | 13 |
| Minchew v. Huston, et al, 193 Georgia 272, 18 S.E. 2d 487 (1942) | 14 |
| Mitchell v. Haines, 122 N.J.L. 292, 5A 2d 680 (1939) | 14 |
| Barker v. Eddy, 97 Ind. 94, 185 NE 878 (1933) | 15 |
| Tardy's Smith on Receivers, pp. 169-171 | 16 |

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its members, and RICHARD G.
MITCHELL,

Defendants-Respondents.

Case
No. 10852

BRIEF OF RESPONDENT,
RICHARD G. MITCHELL

STATEMENT OF FACTS

Appellant's Statement of Facts should be amended
by adding the following facts:

Leah Richins, appellant, was hired as a hostess by
respondent, Mitchell, in his capacity as a court-appointed
receiver of a business owned by Loren Nelson and Edith

Nelson doing business as Day-Nite Laundercenter No. 33 at 3330 South Main Street, Salt Lake City, Utah. Nelsons' business was a self-service operation, usually requiring only a hostess on duty to assist the patrons.

On February 18, 1963, the Nelsons commenced an action against the Day-Nite Coin-Op Dry Cleaning in the District Court of Salt Lake County seeking damages for an alleged breach of warranty as to certain dry cleaning machines purchased by the Nelsons from the Day-Nite Coin-Op Dry Cleaning. Coin-Op answered and counterclaimed seeking payment in full on the machines or the return of the same under the terms of a conditional sale contract. Day-Nite Franchise Distributors then entered the action as a third party plaintiff seeking from the Nelsons, as third party defendants, payment for, or the return of, certain laundry machines sold by such plaintiff to the Nelsons under a conditional sale contract. The Nelsons had fallen behind in their payments, but were continuing the use of the drycleaning and laundry machines in their said business.

Pursuant to a stipulation between the District Court litigants, the Court, on March 29, 1963, ordered that the business be placed in the hands of a receiver, namely Richard G. Mitchell, respondent herein, who was authorized to take possession of the machines and run the business as a receiver until the further order of the Court.

Upon becoming receiver, Mitchell immediately

opened up a bank account for the receivership funds in the Valley State Bank in South Salt Lake, through which account all receipts and expenses of the receivership business were exclusively channeled during the entire period of the receivership, including the wage payments to Leah Richins. All that Mitchell or Richins did in the business from April 1 to November 30, 1963, was in furtherance of the business in receivership, and both received their pay from the receivership.

From the time that Leah Richins was employed April 8, 1963, she knew that she was working for the receivership, or for Mitchell in his capacity as receiver. She was injured July 2, 1963, and was off work for approximately one hour on July 2, during which time she was attended at the hospital for a laceration on her head. At no time thereafter during the time of the receivership was she off work as the result of the injury. Nor, during this time, did she file a claim under the Workmen's Compensation Act.

On December 23, 1963, the Court entered its Order discharging Mitchell as receiver as of November 30, 1963, and ordering him to deliver the drycleaning and laundry machines into the hands of the Day-Nite Coin-Op Dry Cleaning and the Day-Nite Franchise Distributors, respectively, and to file his accounting of the receivership operation with the Court, all of which he did in December, 1963.

Richins filed her workmen's compensation claim

against Mitchell in his personal capacity June 12, 1964, or six months after the court had terminated the receivership.

The Stipulation upon which the Court bases its Order appointing Mitchell receiver is as follows:

The plaintiffs, Loren Nelson and Edith Nelson, by and through their attorney, Lawrence L. Summerhays, and defendant, Day-Nite Coin-Operated Dry Cleaning, and also Day-Nite Franchise Distributors, by and through their attorney, A. Park Smoot, hereby stipulate as follows:

1. That, beginning April 1, 1963, the business of the plaintiffs, as set forth in their Complaint, located at 3330 South Main Street, Salt Lake City, Utah, under the name of Day-Nite Laundercenter No. 33, which business includes self-service laundry and dry cleaning, shall be placed in the hands of Richard G. Mitchell, who resides at 2580 East 21st South, Salt Lake City, Utah, as Receiver of such business, whose duties shall be as follows:

a. To operate all the laundry and dry cleaning equipment therein located, which equipment is referred to in plaintiff's Complaint and in the Third Party's Complaint and said descriptions are hereby made a part hereof by this reference.

b. To receive and control all moneys accruing from the operation thereof.

c. From such receipts to pay all expenses of the operation of such business, including rent on the building, the payments on the installation loan to Valley State Bank, utilities, insurance, property and sales taxes, swamp cooler payments.

expense of hostess, advertising, maintenance and any and all expenses involved in the running of said business, including a reasonable fee for the receiver's own services.

d. To use the supply of perchlorethelyne and other chemical supplies now on hand and which belong to the plaintiffs, and to pay the Nelsons therefor the reasonable value thereof as such supplies are used; when such supplies that are now on hand are exhausted, the Receiver shall be free to purchase like supplies as and where he sees fit. Payment of supplies shall be made on or before August 1, 1963.

e. To permit the Nelsons to observe the condition of the clothes as they come from the dry cleaning machine on condition that said Receiver may terminate such right if, in his judgment, the exercise thereof by the Nelsons results in customer or employee harassment or is threatening any loss or hindrance of the said business.

f. To keep accurate records of all repairs made on any of the machines. Repairs to be made only during regular hours of operation.

g. To operate and receive moneys from the coca cola machine on the premises which belongs to the Nelsons, and to make the monthly payments required on the machine from such moneys. The said Mitchell shall keep an accounting of all moneys received from the machine and shall, after all expenses and payments on the same are made, retain the profits, if any, for disposition by the court. It is understood that whatever rights the Nelsons have as to the ownership of the machine shall remain in them.

2. The Receiver shall keep an accounting of

the relation of receipts to expenses in the operation of the dry cleaning machines as distinguished from a similar accounting which he shall make of the laundry machines, and if, in his judgment, the dry cleaning machines are not making a profit or appear not likely to make a profit, he may, in his discretion, terminate the operation of said machines and continue to operate only the laundry equipment.

3. All profits, if any, from the operation of such business by the Receiver shall be retained and possessed by him until the disposition thereof shall be determined by the above entitled court; and the court shall also determine the term of duration of the Receivership.

4. This Stipulation is made subject to the approval of the said court, and it is hereby further stipulated that the Receiver may, if the court agrees, act without bond.

L. L. Summerhays
Attorney for Plaintiffs
A. Park Smoot
Attorney for Defendant

The Order of the Court follows:

ORDER

Having read the foregoing Stipulation, and good cause appearing, and upon application of defendant, Day-Nite Coin-Op Dry Cleaning and Day-Nite Franchise Distributors, it is hereby

ORDERED, ADJUDGED AND DECREED

that Richard G. Mitchell be, and he is hereby, appointed Receiver of the Day-Nite Laundercenter No. 33, located at 3330 South Main Street, Salt Lake City, Utah, to act without bond, and is granted all the rights and powers set forth in the foregoing Stipulation which is hereby adopted and made a part of this Order. The term of said Order shall continue until further order of this Court.

Dated this 29th day of March, 1963.

BY THE COURT:

STEWART M. HANSON
Judge

The Order of the Court discharging Mitchell as Receiver is as follows:

Based upon the within Stipulation and Motion of Dismissal with Prejudice and for Termination of Receivership and Discharge of Receiver, and upon good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff's Complaint, the defendants' Counterclaim and the Third Party Complaint, all on file herein, be, and they are hereby, dismissed with prejudice and on the merits, each party bearing his own costs. It is further

ORDERED, ADJUDGED AND DECREED that Richard G. Mitchell, the Receiver of the properties herein involved, be, and he is hereby, ordered to transfer, as of the close of business on November 30, 1963, all of the dry cleaning ma-

chines and equipment in his possession to the defendant, Day-Nite Coin-Op Dry Cleaning, and to transfer all of the laundry machines and equipment in his possession to the third party complainant, Day-Nite Franchise Distributors, and shall file his accounting of receipts and expenditures of the said business operation from April 1, 1963, to November 30, 1963, and that upon the filing thereof, together with the filing of receipts by Day-Nite Coin-Op Dry Cleaning and Day-Nite Franchise Distributors showing receipt by them respectively of the said machines and equipment, that the said Richard G. Mitchell shall be, and he is hereby, discharged as said Receiver.

Dated this day of November, 1963.

BY THE COURT:

STEWART M. HANSON

Judge

ARGUMENT

POINT I. RICHARD G. MITCHELL AS RECEIVER IS NOT PERSONALLY LIABLE TO CLAIMANT RICHINS FOR HER INJURIES.

Appellant argues that Mitchell is personally liable because:

1. A receiver may be an employer under the Workmen's Compensation Act.
2. A receiver may be personally liable in a contract

entered into by him without the sanction of the Court.

3. "Denial of plaintiff's claim would have a curious and inequitable result." (p. 11 of Brief)

We answer the foregoing assertions in their order as follows:

1. We readily concede that a receiver may be an employer, but hasten to add that under the facts of this case Mitchell was an employer in his capacity as a receiver. The issue here is whether liability, if any, runs against Mitchell personally or against Mitchell in his capacity as receiver only. Every authority cited by appellant on this point, when applied to the facts of this case, limit the liability of a receiver to his capacity as a receiver backed up only by receivership assets. They further stress the rule that any action against the receiver by an employee must be commenced against him during the receivership, not thereafter. After the receivership an employee may look only to the entity into whose hands the business assets of the receivership have been placed following the discharge of the receiver, if there are any such assets. If not, the employee is without a remedy.

Appellant cites the Michigan case of *Bredeweg v. First State Bank of Holland, et al*, 273 N.W. 556 (1937). This was a case where the injured employee sued three banks, which had been in receivership, for injuries received as an employee of the receiver during the receiv-

ership. His suit was to obtain workmen's compensation against the banks after the assets were returned to the banks following the termination of the receivership. The Michigan Court in stating the problem and the solution thereto quotes from the case of *Bartlett v. Cicero Lighthouse & P Company*, 177 Ill 68, 52 NE 339, 42 LRA 715, as follows:

"The main question presented * * * * is this: Where a corporation has been placed in the hands of a receiver, and an injury or death has been caused by the negligence of the receiver while he is operating the property of the corporation; and where, by stipulation between the parties, the receiver is discharged, and the property is restored to the possession of the corporation, can the corporation itself be held liable for damages for the injury so received during the receivership. * * *"

"The receivers in such cases are not personally liable upon their discharge for claims of this character, but the claims follow the property or fund which alone can be used to satisfy them. * * * Not merely claims arising out of contracts, but claims for torts, arising through the negligence of the receivers or their subordinates, thus follow the property or fund."

"In the case at bar, if the plaintiff has no remedy for the death of his intestate against the company, then he has no remedy at all, inasmuch as the receiver, during whose administration the death occurred, has been discharged from his office, and cannot be held personally liable."

The Court in the *Bredeweg* case then quotes further from the *Bartlett* case which in turn quotes from

Thompson on Corporations as follows:

“The receiver becomes the new custodian of a property which was before, in a sense, a trust property in the hands of the corporation. In the management of this trust property negligences are committed by his servants, for which, under the settled principles of law, the receiver is liable—not personally, except where he has been guilty of personal fault,—but out of the trust funds in his hands. The liability then is essentially the liability of the fund and not of the custodian. When, therefore, the fund is transferred to a new trustee, whether it be to a new and reorganized corporation created by the purchasers at a mortgage sale, * * * * or whether it be the original corporation, its former owner, to whom it is re-delivered under a new management, it is the case of a trust property, to which a liability has attached, passing into the hands of a new trustee. The trust property continues liable; but from the very nature of the case, any action brought to charge it must, if the receiver has been discharged prior to the bringing of the action, be brought against the corporation which is its custodian, that is to say, against the new trustee.’ ”

Thus, “the liability is essentially a liability of the fund, and not a liability of the custodian”, and if suit is not brought against the receiver during the receivership, it must be brought, if at all, against the entity that now has custody of the business property formerly owned and operated within the receivership. The plaintiff Bredeweg properly sued, not the discharged receiver — although the injury occurred in the employment of the

receiver and during the receivership -- but sued the banks into whose hands the property had been returned, and succeeded by reason of the principles above set forth.

Appellant next cites the case of *Unrine v. Saints Northern R. Co., et al*, 104 Kan. 236, 178 P 614. This case supports the rule that "receivers were an 'employer' within the provisions of the Workmen's Compensation Act", with which rule we agree. The point at issue in our case, however, was not dealt with directly in the *Unrine* case but it is important to note that claimant made his claim during the receivership, and there is nothing in the case to suggest that liability rests upon the receiver personally. Since action was brought during the receivership, the receivers had to be made parties defendant rather than the railroad company which had lost control of the business to the receivers. A judgment against the receivers during the time the business is operated as a receivership involves receivership assets and not the receivers personally.

Appellant next cites 99 C.J.S. *Workmen's Compensation*, Par. 40 and 55 and quotes therefrom the following:

"* * * * one who makes a contract of employment as a receiver is liable to the employee injured on the job. * * * *".

If one reads the entire paragraph (Par. 40), from

when the foregoing extract is taken, one finds further impressive support for our position that a receiver is not to be held personally liable for employment contracted by a receiver in his capacity as a receiver. The following is from Par. 40 of C.J.S.:

“An employee is entitled to notice of any change of employer, and for compensation purposes, cannot have an employer thrust on him against his will or without his knowledge. Thus, an employer remains liable for compensation for an injury occurring thereafter where without notice to his employee he sells his business, assigns his contract, or enters into secret agreements with another as to the manner of operating the business; and one who makes a contract of employment as a receiver is liable as receiver to the employee injured on a job taken by the receiver in his individual capacity without notice to, or knowledge by, the employee of the change in his employer’s capacity.”

As support for the foregoing statement, C.J.S. cites the case of *Anderson v. Polleys*, 165 A. 436 (*Rhode Island* 1933). On March 2, 1931, Polleys was appointed receiver of the William V. Polleys Company, a business engaged in dock building and water front work. In June, 1931, Anderson was employed by the receiver to do receivership business on a job at Riverside. After four months, Anderson was ordered by Polleys to work on another job at Bristol. Polleys failed to inform Anderson that the latter job was a personal job of Polleys which had nothing to do with the receivership job, and Ander-

son thought he was still working for the receivership. In fact Anderson had made it known to Polleys he would not work for Polleys except in his receivership capacity. Three or four days after starting on the Bristol job, Anderson was killed in the course of his employment. The court held that Anderson was entitled to compensation from Polleys as a receiver backed by the receivership assets rather than from Polleys personally because Anderson was entitled to know of any change in his employer's capacity.

On p. 5 of Appellant's brief, the cases of *Minchew v. Huston, et al*, 193 Georgia 272, 18 S.E. 2d 487 (1942) and *Mitchell v. Haines*, 122 N. J. L. 292, 5A 2d 680 (1939) are cited in support of Appellant's point that receivers are employers under Workmen's Compensation Acts. We agree with these cases. It should be noted that in both cases the receiver was a defendant during his tenure as receiver with receivership assets available to support the claim, and in the *Minchew* case the court specifically explains that a receiver "is subject in his representative capacity to the provisions of the Workmen's Compensation Law * * *". In the *Mitchell* case, the issue was raised by the receiver as to whether he could properly be sued as a receiver in view of the fact that he was a receiver of a National Bank and therefore a governmental agent immune from suit. The Court was not impressed with the governmental immunity argument and held that, as receiver, he represented the assets of the Bank, conserving the same "for the benefit of deposi-

ors, creditors, and stockholders, and in the performance of this function, the receiver in fact acts as an agent of such depositors, creditors, and stockholders, and performs a duty which is not strictly a governmental function". Thus, the Court adds: "' * * * a receiver, stepping in to manage the bank in order to provide an orderly liquidation of its assets and the payment of its liabilities, stands in no better position than the bank itself. A judgment against the receiver can only affect the assets in his possession received in his official capacity, and in no wise affects the United States Government.'" (our emphasis)

The case of *Barker v. Eddy*, 97 Ind. 94, 185 N.E. 878 (1933) cited also on p. 5 of Appellant's brief is a case where the issue raised by the parties was whether the death of an employee occurred in the course of an employee-employer relationship. The fact that the employer was acting as a receiver when the employee's death occurred and whether he could be a defendant as a receiver was not an issue raised in the case.

2. We come now to the question as to whether the contract of employment of Richins by the receivership was sanctioned by the Court. The Court order appointing Mitchell and the stipulation upon which the Order is based specifically authorizes the receiver to pay all expenses in the operation of the business including "expense of hostess" (par. 1 c) at the location of the business at 3330 South Main Street. Finally, the court approves the conduct of receiver and all that he has done

by discharging him pursuant to stipulation of all the parties involved upon his filing an accounting with the court, which he did in December, 1963.

In this phase of appellant's argument, a quotation from *Tardy's Smith on Receivers* is given in support of her position (page 10 of Brief). A careful perusal of this authority, rather than supporting appellant's view, really sustains the position taken by respondent herein. The following is taken from Par. 38 of this work (pp 169-171) and includes the quotation found in appellant's brief:

"A receiver is not individually liable on contracts made by him in his official capacity under the orders of the court. The only remedy which the other contracting party has under such proceedings must be sought in the receivership proceeding.

"Persons contracting with a receiver are chargeable with notice that contracts made by him must be authorized or ratified by the Court. A Court may modify or repudiate contracts made by its receiver without its sanction or approval * * * *
"A receiver may be personally liable in a contract entered into by him without the sanction of the court even though in relation to a matter which otherwise would be a charge against the receivership. But a receiver who is managing a receivership as a going concern has implied power to make such reasonable contracts as are necessary for the proper management of the receivership. * * * * Of course, it is not required that a receiver should be obliged to go to court for an

order for every trifling matter. * * *

“The rule in short is, that if a receiver contracts debts on behalf of the receiver without having been authorized by the court or without his acts in so doing having been ratified by the court, he will be personally responsible to the creditors for the debts so incurred, but if, however, he has been previously authorized or his acts have been ratified by the court, the creditor will be obliged to look to the receivership fund for payment unless the receiver has in his individual capacity guaranteed the debts.”

Although appellant argues the point that Mitchell operated without court sanction and approval, there is really no such factual issue raised in the record, nor is it actually asserted in their brief; and the fact remains, as appears in the District Court record, that all that Mitchell did as a receiver was sanctioned before and approved after he did it; and at the conclusion of the receivership he was properly discharged by the court by an Order entered six months before appellant filed her claim with the Industrial Commission.

3. Appellant argues that “denial of plaintiff’s claim would have a curious and inequitable result” (page 11) in that an impaired worker “would have no right of recovery,” and further for the reason “that a receiver who hires agents or employees to assist him in the conduct of the business, without specific approval of the court, does so ‘at his peril’ ”.

As to the latter point, the receiver did have the ap-

proval of the court in all that he did as receiver. This was not a situation where the receiver was acting in his personal business, or as a receiver acting beyond the scope of his receivership duties. Everything he did was sanctioned by the court both before and after the period of the receivership.

The premise upon which appellant suggests a "curious and inequitable result" appears to be that Mitchell is the only one upon whom Richins "would have a right of recovery". Appellant's own authorities directed her to seek help from those to whom the receivership business or assets are returned. In this case there were no assets except a settlement payment, growing out of the law suit which gave rise to the receivership, which payment went to the Nelsons. In this sense, the business of the Nelsons, if any, was returned to the Nelsons at the time the receivership was terminated. Appellant's cases give us the rule that she must look to that source *after* the receivership is terminated. And the Industrial Commission specifically so directed her in its Order.

On page 11 of appellant's brief, we read "the property and business transferred in the District Court proceeding to the receivers was never returned to the prior owners". The legal title of the washing and dry cleaning machines, never belonged to the Nelsons, their right to possession thereof had terminated prior to the receivership because of their failure to make the agreed payments thereon. The business of the Nelsons was thus

terminated at the conclusion of the receivership on November 30, 1963, by a simple abandonment thereof. Without the machines, the use of which was their primary asset in the business, they had no course but to replace them or abandon the business. They chose the latter.

Also on page 11 of appellants brief, we read:

“Although it subsequently developed that defendant has no workman’s compensation insurance, defendant Mitchell advised the plaintiff that insurance was available.”

If Mitchell so advised her, it was only because the Nelsons or the Nelson’s insurance agent had lead Mitchell to believe that the business had such insurance coverage. He did not learn otherwise until after July 2, 1963. The crucial fact remains, however, that appellant while working for a receiver is limited in her claim to receivership assets either during the receivership or thereafter wherever such assets may be found. And if there are no assets, there is no justification or legal precedent to look to the receiver personally for a remedy to appellant’s alleged loss.

The court in the Bredeweg case states that “if the plaintiff has no remedy * * * * against the company, then he has no remedy at all, inasmuch as the receiver, during whose administration the death occurred has been discharged from his office, and cannot be held personally liable”.

POINT II. APPELLANT SHOULD NOT HAVE A FULL HEARING UNTIL SHE MAKES HER CLAIM AGAINST THE RIGHT PARTY.

Respondent concedes that if appellant had named a proper party as defendant, then this case has not been fully heard. Much that is set forth in the statements of facts by both parties before the court are not from the record, because a full record of facts has never really been made in this case. We have hinted herein and we assert that the injury appellant suffered on July 2, 1901 is in no way connected to the malady she now claims grew out of such injury. The Commission was reluctant to investigate this phase of the case until claimant involved the proper defendant. Actually there were enough facts appearing in the District Court record which indicated to the Commission that Mitchell was not an appropriate defendant, and it appears that the Commission was strongly influenced by the District Court record in its decision to have no further hearing on the matter until a proper and lawful defendant was involved. A careful study of appellant's authorities appears to justify and support the Commission in this decision.

CONCLUSION

Although a receiver may be an employer for Workmen's Compensation Act purposes, any workmen's compensation claim against a receiver must be in his receiver's name.

ership capacity backed by receivership assets, if any, and not against the receiver personally nor against his personal assets.

Inasmuch as Leah Richins failed to file her claim against the receiver in his receivership capacity during the period of the receivership, her only remedy thereafter is against the entity into whose possession the receivership assets were placed upon the termination of the receivership.

Although there is perhaps much to be desired in the record before the court, it appears that there are sufficient basic facts either in the record or conceded by the parties that sufficiently indicate the futility of a further hearing before the Commission as long as appellant seeks to hold Mitchell personally liable for her injuries, and the appeal to remand for any purpose should therefore be denied.

Respectfully submitted,

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