

1984

## **Metropolitan Finance Co. v. The State of Utah, The State Tax Commission of Utah, And John Does 1 Through 25 : Brief of Respondent**

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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METROPOLITAN FINANCE CO.,            )  
  )  
    Plaintiff/Appellant,            )  
  )  
vs.                                        )  
  )  
  )  
THE STATE OF UTAH, THE STATE        )  
TAX COMMISSION OF UTAH, and        )  
JOHN DOES 1 through 25,            )  
  )  
  )  
    Defendants/Respondents.         )

Case No. 19291

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BRIEF OF RESPONDENT

---

Appeal from the Judgment of the Third District Court,  
Salt Lake County, the Honorable Timothy R. Hanson, Judge

---

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**FILED**

JUN 27 1984

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

This case involves Chapter 30 of Title 63, the  
Governmental Immunity Act.

DISPOSITION IN THE LOWER COURT

Judge Timothy R. Hanson ruled that "the issuance of  
Motor Vehicle Certificates of Title falls into the category of  
governmental functions." He further ruled that the acts of  
defendants "are specifically not waived under Section 63-30-10  
(3) and (6), Utah Code Ann., 1953."

RELIEF SOUGHT ON APPEAL

Defendants State of Utah and the State Tax Commission  
request that the Order of the District Court be affirmed.

### STATEMENT OF FACTS

The State Tax Commission, through the Motor Vehicle Division, issued a clear title on the 1974 Rolls Royce on November 15, 1974, to Kenneth Melby. On May 8, 1975, a duplicate title was issued to Melby.

Stephen J. Gibbs was issued a new title on June 15, 1978, upon surrender of the original title. This new title showed Metropolitan Finance as a lien holder.

Metropolitan Finance obtained a Judgment of Foreclosure and Order of Sale against Stephen J. Gibbs.

### ARGUMENT

#### POINT I

THE ISSUANCE OF TITLE CERTIFICATES IS AN EXERCISE OF A GOVERNMENTAL FUNCTION.

Standiford v. Salt Lake City Corp., 605 P.2d 1230, outlines the criteria essential for governmental immunity under Section 63-30-3 of the Governmental Immunity Act. That section provides that "all governmental entities are immune from suit for any injury which results from the exercise of a governmental function . . ."

Standiford defined a governmental function as an activity "of such a unique nature that it can only be performed by a governmental agency." A possible enlargement of that definition was made in Madsen v. Borthick, 658 P.2d 627.

The Utah Motor Vehicle Act, Chapter 1 of Title 41, Utah Code Ann., provides for the Motor Vehicle Division of the Utah Tax Commission to administer, regulate and issue motor vehicle registrations and titles. In Utah, as in all other states, this activity is completely administered and operated by the state government to facilitate law enforcement and related activities. The issuing of motor vehicle titles is "of such a unique nature that it can only be performed by a governmental agency."

POINT II

GOVERNMENTAL IMMUNITY IS NOT WAIVED UNDER  
63-30-10(c) AND (f).

As the injury "allegedly" suffered by the plaintiff resulted from the "exercise for governmental function" under Section 63-30-3 the state is immune unless immunity is expressly waived in other sections of the Immunity Act. Plaintiff bases his action on the purported negligence of the State Tax Commission (Motor Vehicle Division). It is true that Utah Code Ann. 63-30-10 generally waives governmental immunity for injuries caused by the negligent acts or omissions of governmental employees; however, that section specifically Preserves immunity as to certain activities, including those where the alleged injury:

(c) arises out of the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization, or . . . .

(f) arises out of a misrepresentation by said employee whether or not such is negligent or intentional. . . .

The Utah Supreme Court has ruled that Utah Code Ann. 63-30-10(f) provides complete immunity from suit to a governmental entity for the negligent misrepresentation of an employee, even where a plaintiff has suffered pecuniary loss in reliance upon the misrepresentation. In Rapp v. Salt Lake City, 527 P.2d 651 (Utah 1974), the plaintiff sued to recover the expense he incurred in preparing a bid for a construction project, where the City's invitation for bids failed to disclose that a competitive advantage had already been granted to a third party and that the bidding was not truly competitive. The Court found that the plaintiff's action was a tort action, alleging deceit, and cited Utah Code Ann. 63-30-3, 10(2) and 10(6) in holding that the trial court properly granted the city's motion for summary judgment. Also, an action against the State for the alleged misrepresentation of an employee as to the status of plaintiff's access after highway improvement was dismissed in Boyce v. State, 26 Utah 2d 138, 486 P.2d 387 (1971).

Defendant is not aware of other Utah case law which construes Utah Code Ann. 63-30-10(3) and (6), ((c) and (f) in pocket supplement.) However, it is highly instructive to look to decisions by California courts construing statutes substantially identical to the Utah sections where pecuniary

loss has been alleged due to the issuance of an incorrect certificate or to a negligent misrepresentation by a public employee. The California statutes were enacted in 1963, two years before the enactment of the Utah states.<sup>1</sup>

In Brown v. City of Los Angeles, 267 Cal.App. 849, 73 Cal.Rptr. 364 (1968), plaintiff, the erstwhile operator of a therapeutic massage parlor and income tax service, sued for damages incurred in closing her business after being notified by the city that her business violated local zoning and being misinformed by city personnel that no zoning variance had been granted. The Court found that the erroneous notification

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<sup>1</sup>Section 818.4 of the California Government Code states:

A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

Section 818.8 of the California Government Code states:

A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional.

The language emphasized is contained verbatim in Utah Code Ann. 63-30-10(c) and (f), respectively.

amounted to a misrepresentation within the meaning of section 818.8 and on the basis of that section, 818.4, and other sections of of the Governmental Code, held that such a misrepresentation could not be the basis for public liability.

And in a case almost exactly on point the innocent purchaser of a stolen automobile brought an action against the California Department of Motor Vehicles because its personnel had negligently issued a certificate of title to the thief, and had failed to require the filing of a bond, Hirsch v. People, Department of Motor Vehicles, 42 Cal.App.3d 352, 115 Cal.Rptr. 452 (1972). The court ruled that in light of California's specific statutory reference to "certificates" of automobile ownership, such certificates were within the meaning of section 818.4, which immunized the State for the issuance of "any . . . certificate" (see footnote 1 and Utah Code Ann. 63-30-10(3)). The Court held that the erroneous certificate of title constitutes a "misrepresentation:" under section 818.8, and "defendant would be entitled to immunity under that section alone." Id. at 455. The Court affirmed the lower court's dismissal of the action.

Similarly, in Schonfeld v. City of Vallejo, 50 Cal.App.3d 401, 123 Cal.Rptr. 669 (1975), dismissal of an action against the city because it was immune under the "misrepresentation" section, 818.8, was affirmed. There, the plaintiff alleged that the city manager's misrepresentations

wrongfully induced him to do development work on a marina which he would not have done absent the misrepresentation.

In Grenell v. City of Hermosa Beach, 103 Cal.App.3d 864, 163 Cal.Rptr. 315 (1980), the purchasers of real property sued the sellers and the city for damages, where city employees had negligently misstated the content of city records by representing that local zoning law would allow two dwelling units on the property. The sellers also cross-claimed against the city, on the basis that, at the time of the sellers' earlier purchase of the property, a similar negligent misstatement of the records had been made by city personnel. The trial court dismissed the cross-complaint, and the appellate court affirmed, on the basis that section 818.8 provided the city with absolute immunity from liability for the negligent misrepresentation alleged.

New Jersey has similar statutes providing that a "public entity is not liable for an injury caused by the issuance . . . of . . . any permit, license, certificate. . ." New Jersey statutes Ann. 59:2-5 and that a public entity is not liable for the "misrepresentation" of its employee, N.J.S.A. 59:2-2(b), 3-10. In Mallory v. State, 76 N.J. 515, 388 A.2d 622 (1978), suit was brought against the state real estate licensing body for its erroneous notification to plaintiff that he had failed the licensing examination. The Court found that the "licensing" statute cited above granted a "pervasive"

immunity to "all phases of the licensing function," Id. at 625, and, therefore, found it unnecessary to consider the applicability of the "misrepresentation" section.

Finally, the Federal Tort Claims Act has a section which preserves governmental immunity for "any claim arising out of . . . misrepresentation . . .", 28 U.S.C. 2680 (h). This section has been described as analogous to section 818.8 of the California Government Code, Johnson v. State, 69 Cal.2d 782, 447 P.2d 352 (1968), and must be deemed as analogous also to the very similar Utah statute, Utah Code Ann. 63-30-10 (f). The Utah Supreme Court has previously looked to the judicial interpretations of provisions of the Federal Tort Claims Act as an aid in construing similar provisions of the Utah Governmental Immunity Act, e.g., Frank v. State, 613 P.2d 517, 519 (1980).

In United States v. Neustadt, 366 U.S. 696, 81 S.Ct. 1294 (1961), the Supreme Court held as a matter of law that the purchaser of a home who was induced by a negligently performed FHA appraisal to pay in excess of fair market value could not recover damages against the government. Pursuant to 12 U.S.C. 1715q, a section of the National Housing Act, the seller had delivered to the buyer an official FHA document, setting forth a statement of the FHA-appraised value. The Court held that this negligent misrepresentation was comprehended by 28 U.S.C. 2680 (h), and the action was

dismissed. The Court cited with approval, inter alia, Hall v. United States, 274 F.2d 69 (10th Cir. 1959), where the Court of Appeals held that plaintiff could not recover where, relying on a negligent report by Department of Agriculture agents that his cattle were diseased, he had sold them at less than fair value.

A factual comparison of the Utah, California, New Jersey and federal cases cited above with the instant case clearly demonstrates that this action must be dismissed. In each of the cited cases, as in the present action, plaintiffs alleged that they had suffered a pecuniary loss through reliance on a negligently issued certificate or license, or on a misrepresentation of fact by a governmental agency. Each action was dismissed as a matter of law, on the basis either of a statute providing immunity for negligent misrepresentations (Rapp, Schonfeld, Grenell, Neustadt, and Hall cases), or a statute providing immunity for the issuance of a certificate or license (Mallory case), or both statutes (Brown and Hirsch cases).

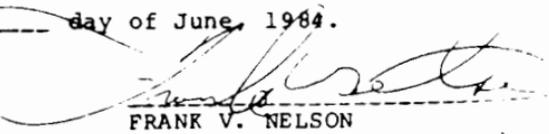
In both the Hirsch and Neustadt cases, governmental agencies which were directed by statute to issue informational statements or certificates did so, erroneously and negligently; in each case, a third party conveyed the inaccurate information to the plaintiff, who, in reliance on it, suffered pecuniary damage. The instant case is in exactly

the same posture -- it is alleged that the State Tax Commission, charged by statute with the issuance of certificates of title (see Chapter 1 of Title 41, Utah Code Ann.) negligently issued a duplicate certificate of title and plaintiff subsequently suffered a pecuniary loss through reliance upon the erroneous certificate. Both the Hirsch and Neustadt cases were dismissed under statutes substantially the same as Utah Code Ann. 63-30-10(6). The defendant, State of Utah, in this action is clearly granted immunity from suit, and the matter must be dismissed.

#### CONCLUSION

Pursuant to Utah Code Ann. Chapter 1 of Title 41, the State Tax Commission, Motor Vehicle Division issued a "certificate" of title. Plaintiff claims that the certificate misrepresented the true record, and that plaintiff suffered a financial loss in reliance on the negligent misrepresentation. Utah Code Ann. 63-30-10(c) and (f) expressly preserve governmental immunity for damages arising from the issuance of any certificate or from a negligent misrepresentation. Both the unambiguous statutory language and the case law construing these and nearly identical statutes in other jurisdictions require that this action be dismissed.

DATED this \_\_\_\_\_ day of June, 1984.

  
FRANK V. NELSON  
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify I mailed two true and exact copies of the foregoing Brief of Respondent, first-class, postage prepaid to Boyd M. Fullmer, Attorney for Plaintiffs/Appellants, 240 South 2nd East, Salt Lake City, UT 84111.

DATED this 27<sup>th</sup> day of June, 1984.

Vickie L. Walker