

1970

Utah Steel and Iron Company v. Donald R. Bosch and Paul M. Holt : Brief OF Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STEEL AND IRON COMPANY
a corporation,

Plaintiff-Respondent

—vs.—

DONALD R. BOSCH AND PAUL H. HOLT,

Defendants-Appellants

BRIEF OF APPEAL

Interlocutory Appeal From the District Court
in and for Salt Lake County, Utah
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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STEEL AND IRON COMPANY,
a corporation,

Plaintiff-Respondent,

—vs.—

DONALD R. BOSCH AND PAUL M.
HOLT,

Defendants-Appellants.

Case No.
11759

BRIEF OF APPELLANTS

NATURE OF THE CASE

This is an interlocutory appeal from a decision of the Third Judicial District Court, Honorable Merrill C. Faux, Judge, presiding, wherein Judge Faux refused to grant the motion to dismiss which had been filed by the defendants.

STATEMENT OF FACTS

Donald R. Bosch is the Supervisor of Sales and Use Taxes, Auditing Division, Utah State Tax Commission (R. 7), and Paul M. Holt is the Director of the Auditing Division of the Utah State Tax Commission (R. 3),

and it is their official duty to supervise the auditors of the Utah State Tax Commission.

One of the audits performed by those auditors was an audit of the books of Utah Steel and Iron Company, and the auditors returned a report showing a total sales tax due, including penalty and interest, of \$16,865.45. Upon receipt of this report, a form letter (R. 5 & 9) was sent, dated March 12, 1969, which informed Utah Steel and Iron Company of the findings of the Sales and Use Tax Auditing Division of the Utah State Tax Commission, and clearly informed them that if they did not agree with the proposed adjustments, they could submit a request for redetermination at any time within ten days. On June 18, 1969, another form letter (R. 6 & 10) was sent which informed Utah Steel and Iron Company that the proposed adjustment had been approved by the Utah State Tax Commission and constituted an assessment which was due and payable unless a petition for redetermination was filed within ten days. The record does not show whether a petition for redetermination was filed after either one of the letters, but such a petition would not have any significance in this case, in which the tax assessed is not in question, but only whether the defendants, in their individual capacity, are subject to this type of action, and also whether they were entitled to have their motion to dismiss granted.

Both letters (R. 5, 6, 9 & 10) had the name of Donald R. Bosch typed in the upper right hand corner, and both letters (R. 5, 6, 9 & 10) were purportedly signed by Paul M. Holt and his signature was rubber stamped by members of his staff (R. 3).

Those two letters (R. 5, 6, 9 & 10) were the only direct contact, either written or verbal, which the defendants had with the plaintiff. The only indirect contact was the auditing of the books of the plaintiff by other auditors of the Utah State Tax Commission. The uncontroverted affidavits of the defendants clearly set forth the above and also state that this was merely the normal procedure followed for thousands of similar cases each year (R. 4 & 8). Those affidavits also state that all actions by the defendants (the mailing of two form letters) were performed in their official capacities, although the plaintiff, by and through its president, filed an affidavit which denied that the defendants were acting in the course of their employment.

Following the sending of the two form letters, the plaintiff filed this action in the district court alleging that:

“2. That on or about the 12th day of March, 1969 these defendants have conspired together to harass, annoy, threaten and intimidate the plaintiff, and that since the said time they have unlawfully threatened, intimidated, harassed and annoyed the plaintiff, acting together and in concert with each other until it has been necessary for the plaintiff to and the plaintiff has discontinued its business and suffered damage in the sum of \$275,000.00, no part of which has been paid.

3. That the said acts on the part of these defendants have been deliberate, malicious and without probable cause and the plaintiff has in addition thereto suffered punitive damages in the sum of \$25,000.00.” (R.1)

Immediately after the filing of the complaint, the defendants filed their answer, along with their affidavits and Motion to Dismiss.

DISPOSITION IN THE LOWER COURT

Upon the hearing of the motion to dismiss of the defendants, that motion was denied, whereupon the defendants filed their Petition for Interlocutory Appeal, which was granted by the Supreme Court of the State of Utah.

RELIEF SOUGHT ON APPEAL

This appeal is from the denial of the motion to dismiss of the defendants, and they seek a reversal of that order.

ARGUMENT

POINT I

THE EVIDENCE BEFORE THE COURT SHOWED SUFFICIENT SPECIFIC FACTS TO SHOW THAT THERE WAS NO GENUINE ISSUE FOR TRIAL, WHICH REQUIRED THE GRANTING OF DEFENDANTS' MOTION.

Rule 12(b) of the Utah Rules of Civil Procedure provides, in part:

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

posed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

At the hearing of the motion to dismiss filed by the defendants herein, affidavits of both defendants were presented to, and not excluded by the court, as was a controverting affidavit signed by the president of the plaintiff corporation. Thus, the motion should clearly have been treated as one for summary judgment and disposed of as provided in Rule 56 of the Utah Rules of Civil Procedure.

Rule 56(e) of the Utah Rules of Civil Procedure provides, in part, as follows:

“When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by *affidavits* or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial*. If he does not so respond, summary judgment, if appropriate, *shall* be entered against him.” (Emphasis added)

The purpose of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial. 6 *Moore’s Federal Practice, 2nd Ed., Rule 56, p. 2022*. The affidavits filed by the defendants herein, and the controverting affidavit filed by the defendant do not show that there is a genuine issue for trial.

Defendants' affidavits (R. 3 & 7) clearly show that they have never had any personal contact of any type or nature with the plaintiff, either written or oral, or over the telephone, other than two form letters which were sent to the plaintiff company and which merely stated that an assessment had been made and if Utah Steel and Iron Company did not agree with the assessment they should petition for a redetermination within ten days. Those letters do not show any possibility of the defendants "conspiring together to harass, annoy, threaten and intimidate the plaintiff," nor do they show that the actions of the defendants were deliberate, malicious or without probable cause as was alleged in the complaint filed by the plaintiff herein.

The affidavits filed by the defendants also stated that any and all acts, specifically the acts of mailing two letters to the plaintiff, were done in their official capacity as employees of the Utah State Tax Commission, and there is nothing which would indicate that there was any action carried on in any other capacity than as employees of the **Utah State Tax Commission**, other than the controverting affidavit of the plaintiff herein. However, the affidavit of the plaintiff should clearly have been ignored by the judge in hearing the motion, because of additional provisions of Rule 56(e) of the Utah Rules of Civil Procedure, which provides as follows:

"Supporting and opposing affidavits shall be made on *personal knowledge*, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." (Emphasis added)

The controverting affidavit of the plaintiff states that the defendants were not acting as agents or employees of the Utah State Tax Commission at the time an audit was conducted on their books, records and affairs, and it further denies that they were acting in the course of their employment. However, that controverting affidavit is somewhat confusing in that it also states that "at the present time the Utah State Tax Commission was and is conducting an audit of the plaintiff's books, records and affairs . . ." Thus, the plaintiff has admitted that the audit was performed by the Utah State Tax Commission, but seems to assert that the actions of the defendants in sending two form letters informing them of the results of that audit were not within the scope of their employment. The affidavits filed by the defendants clearly show that such is otherwise and under Rule 56(e) of the Utah Rules of Civil Procedure, as cited above, *the plaintiff must have personal knowledge* that the defendants are not acting as agents or employees of the Tax Commission, and *he must also be competent to testify to that matter and that testimony must be admissible into evidence to be considered during a hearing on a motion to dismiss*, which is being considered as a motion for summary judgment..

This court has had occasion to consider the recently amended Utah rule in *Preston v. Lamb*, 20 Utah 2d 260, 436 P.2d 1021 (1968). This was a slip and fall case in which the defendant moved for summary judgment which was granted and this court affirmed on appeal. In the plaintiff's complaint, she had alleged that there was water, slush and snow on the floor of the defendant's cafe

which caused her to fall. She later amended the complaint when she learned through depositions that there was no water, slush or snow on the floor, to allege that the defendant was negligent in applying an excessive amount of wax, which negligence had caused her fall. The defendant's answer denied that there was excessive wax on the floor and the defendant moved for a summary judgment.

The plaintiff submitted an affidavit of an expert who had run some tests on a sample floor and the affidavit of the expert had been to the effect that the floor was dangerous because there was not enough wax on the floor. This court pointed out that the motion for summary judgment was correctly granted because of the discrepancy between the pleading which alleged excessive wax and the plaintiff's affidavit which alleged not enough wax was a basis for a dismissal. The problem was that the affidavit did not support the allegations of the complaint. *Id.* at 263. *See also: United American Insurance Company v. Willey*, 21 Utah 2d 279, 285, 44 P.2d 755 (1968). Defendants respectfully submit to this court that the plaintiff herein has failed to substantiate the allegations of its complaint in its controverting affidavit and that therefore the trial court should have accepted the allegations of the defendants as to the nature and types of contacts with plaintiff and granted the motion for summary judgment. Defendants also respectfully submit that there was no valid evidence before the court that they were not acting in the scope of their employment, and the plaintiff was not competent to testify to such a fact. The facts show that the defendants' only

actions were sending form letters commonly sent by the Utah State Tax Commission and this was not denied by the plaintiff, because the plaintiff is well aware that those were the only actions performed by the defendants herein. It is also respectfully submitted that, based on the affidavits of the defendants, and either with or without the controverting affidavit of the plaintiff, there is no genuine issue for trial, and the defendants' motion to dismiss should have been granted.

POINT II

PUBLIC OFFICERS ARE NOT LIABLE IN A PRIVATE ACTION FOR GOOD FAITH ACTS PERFORMED WITHIN THE SCOPE OF THEIR AUTHORITY.

Although the plaintiff denies that the defendants were acting in the scope of their authority, the facts clearly show otherwise. The affidavits filed by the defendants are uncontroverted in the statement that the only contact between the plaintiff and defendant was two form letters on which the defendants' names were typed and rubber stamped. *This is uncontroverted prima facie evidence that the defendants acted in good faith within the scope of their employment.*

The courts appear unanimous in their decisions that a public officer is not liable in a private action for acts performed in good faith within the scope of his authority. 67 C.J.S., *Officers*, Section 125 et seq.

In *Kelley v. Dunne*, 344 F.2d 129 at 131, (1st Cir. 1965), the court said:

“A long line of decisions has, both before and since, recognized that in many instances ‘the protection of the public interest by shielding responsible government officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities’ outweighs ‘the protection of the individual citizen against damage caused by oppressive or malicious action on the part of public officers.’” (Emphasis added)

As Chief Judge Learned Hand said in *Gregoire v. Biddle*, 177 F.2d (2nd Circ. 1949), Cert. den. 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1963, at p. 581 :

“The justification [for denying recovery] *** is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.”

In *Kelley v. Dunne, supra*, at 132-133, the court set forth the following common denominators in disallowing private suits against public officers.

1. The conduct of the defendant-official was within the scope of agency powers.
2. The act complained of was prima facie in accordance with the officer's duties and customary behavior.
3. The free exercise of the public function outweighed private interests.

The Montana Supreme Court has held that immunity from personal liability is not extended to the official for his own sake but because the public interest requires full independence of action and decision on his part, uninfluenced by any fear or apprehension of consequences personal to himself. *Meinecke v. McFarland*, 206 P.2d 1012, 1014 (1949).

In *Industrial Commission v. Superior Court*, 5 Ariz. App. 100, 423 P.2d 375 (1967), the Court said:

“The very purpose of the rule of immunity afforded to public officers was to *avoid potential harassment and/or coercion by means of a threat of a lawsuit.*” (Emphasis added)

One of the best statements of the rule of law which speaks against the plaintiff in the instant case is in *Lipman v. Brisbane Elementary School Dist.*, S.C. of California, 359 P.2d 465, at 467 (1961).

“Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious. (*Citations omitted.*) The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation.”

The Utah Supreme Court recently considered this problem when construction of a junior high school resulted in destruction of an irrigation ditch and landowners in

Utah's Granite School District instituted suit against the school district and the individual board members. The defendants' motion to dismiss was granted by the Third District Court, and the Supreme Court affirmed:

“In common with other public officials, they [school board members] *have authority to do whatever is reasonably necessary* in carrying out the duties imposed upon them. It would be quite impractical and unfair to require them to act at their own risk. This would not only be disruptive of the proper functioning of public institutions, but undoubtedly would dissuade competent and responsible persons from accepting responsibilities of public office. Accordingly, it is the settled policy of the law that when a *public official acts in good faith, believing what he does to be within the scope of his authority and in the line of his duty, he is not liable for damages* even if he makes a mistake in the exercise of his judgment.”

Anderson v. Granite School District, 17 Utah 2d 405, 413 P.2d 597 (1969) at 599. *Citing: Roe v. Lundstrom*, 89 Utah 520, 57 P.2d 1128 (1936).

The case at hand appears to be one of the specific type for which the rule is intended, i.e., this case appears to be a vindictive and ill-founded law suit which was filed purely for harassment, intimidation and/or coercion of public officials to prevent any future audits of the plaintiff by the Utah State Tax Commission, or to force a public agency to compromise a just and lawful debt of that agency by offering to dismiss the spurious action in exchange for a compromise of the just debt (as has heretofore been offered in this case). To permit suits of this type would be tantamount to blackmail and they should not be permitted, much less encouraged.

POINT III

THE PLAINTIFF CANNOT AVOID THE IMPACT OF GOVERNMENTAL IMMUNITY BY SUING A PUBLIC OFFICER IN A PRIVATE SUIT.

The doctrine named above in Point II, that a public officer is not liable for his good faith acts performed within the scope of his authority, is a form of the common-law doctrine of sovereign immunity. That doctrine, of course, prevents any private suit against the State or Federal Governments without the consent of the Government to be sued. However, many attempts have been made to circumvent this rule by bringing the action against the individual, employee, or public official to indirectly achieve what could not be achieved directly. Because of this, the courts subsequently adopted the doctrine that the impact of governmental immunity could not be avoided by bringing the suit against the employee or public official in his individual capacity. This principal and the reason therefor are well explained in 160 A.L.R. 332 at 333, wherein it says:

“However, while a suit against state or Federal officials is not necessarily a suit against the state, within the rule of immunity of the state from suit without its consent, that rule cannot be evaded by bringing an action nominally against an officer or a board, commission, or department in his or its official capacity when the real claim is against the sovereign itself, who is the party vitally interested. While formerly, in determining whether a state was a party to controversy, the court would look only to the record to see who were the parties, that is, the court would not consider the state a party unless nominally so, this view has long since

been discarded. The rule is now well settled that a suit against an officer as representing the sovereign in action and liability, where the state, although not a party to the record, is the real party against which relief is sought, and where a judgment for the plaintiff, although nominally against the officer as an individual, could operate to control the action of the state or subject it to liability, is to be deemed a suit against the state, and is not maintainable unless the state has consented to be sued."

It is respectfully submitted that the case at hand is almost identical to the principals set forth above. Although the State Tax Commission is not a party of record, if a judgment were rendered in favor of the plaintiff against the defendants for their simple act of sending out two standard form letters from the governmental agency for which they were employed, it would certainly act to control the actions of the state, and all state employees would be hesitant to send out any official correspondence for apprehension of being personally liable. This would be especially true for persons charged with the somewhat unpleasant task of collecting delinquent taxes due to the State of Utah, as are the defendants.

The Utah Supreme Court has recently discussed the above principals in *Sheffield v. Turner*, 21 U.2d 314, 445 P.2d 367, (1968), which was a private action against the Warden of the Utah State Prison by an inmate who had been stabbed by a fellow prisoner. The complaint alleged that the Warden had permitted his employees to super-

vise the inmates in a negligent manner, which enabled the fellow prisoner to enter the plaintiff's quarters and stab him. Justice Crockett wrote the opinion of the Utah Supreme Court and stated:

"The anciently established and almost universally recognized general rule which this court has consistently announced and adhered to is that the government, its agencies and *officials performing governmental functions are protected by sovereign immunity.*" (Emphasis added).

The authorities cited by the Court for that statement were:

"Sehy v. Salt Lake City, 41 Utah 535, 125 P. 691, 42 L.R.A., N.S., 915; Bingham v. Board of Education of Ogden, 118 Utah 582, 223 P.2d 432; Niblock v. Salt Lake City, 100 Utah 573, 111 P.2d 800; Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157."

The Court did delve into the question of whether the Utah Governmental Immunity Act (Sec. 63-30-1, *et seq.*, Utah Code Ann., 1953) had any influence on the above stated principals and cases, but the court finally concluded, at p. 369:

"Upon our consideration of the various aspects of the problem and an examination of the authorities which have dealt with it, it is our opinion that in a situation such as this, . . . *the warden and other prison officers are protected by the doctrine of sovereign immunity against claims of negligence so long as they are acting in*

good faith and within the scope of their duties, and that they could not be held liable unless they were guilty of some conduct which transcended the bounds of good faith performance of their duty by a wilful or malicious wrongful act which they knew or should know would result in injury."

The Court indicated that the reason for its holding was "the imperative need for those in a supervisory capacity to have reasonable freedom to discharge (their) burdensome responsibilities . . . If such officials are too vulnerable to lawsuits for anything, . . . capable persons would be discouraged from taking such public positions." *Id.* at 369.

The above reasons are also clearly present in the case at hand, and it is respectfully submitted that the Court should hold similarly to *Sheffield v. Turner, supra*.

CONCLUSION

For the purpose of the defendants' motion to dismiss, the facts are not in controversy, and based on those facts there was no claim upon which relief could be granted. The sending of two form letters from a governmental office is clearly not a sufficient action to establish a tortious claim upon which relief could be granted.

Even if the content of those letters had maliciously slandered the plaintiff, which seems inconceivable in this case, the record shows no bad faith in the defendants

performance of those acts, and those acts were clearly in the scope of their authority making them immune from liability. The law is clear that the impact of governmental immunity cannot be avoided by suing a public officer in a private suit, and it is respectfully submitted that the motion to dismiss should have been granted.

Respectfully submitted,

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