

1970

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

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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

RESPONDENT'S BRIEF

Interlocutory Appeal From the Third District Court
in and for Salt Lake County, State of Utah
Honorable Merrill C. Faux, Judge.

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Plaintiff-Respondent,

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Defendants-Appellants.

Case No.
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RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an interlocutory appeal by the defendants from an order denying their motion to dismiss.

DISPOSITION IN THE LOWER COURT

Judge Merrill C. Faux denied the defendants' motion for dismissal.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks to have the order and judgment of the lower court sustained and to have the case returned for trial upon the issues.

STATEMENT OF THE FACTS

This is an action in the District Court for the recovery of damages sustained by the plaintiff because of the wrongful and unlawful acts of the defendants not in the course of their employment. The complaint alleges that the defendants on or about the 12th day of March, 1969 conspired together to harass, annoy, threaten and intimidate the plaintiff. Punitive damages are also requested. (R. 1). No answer has been filed. Instead the defendants filed affidavits and moved for a dismissal (R. 3, 7 and 11). The plaintiff filed a controverting affidavit (R. 13). The court denied the defendants' motion to dismiss (R. 14) and this interlocutory appeal was taken (R. 17).

The defendants allege in their affidavits that they are acting in the scope of their employment. The plaintiff states in its affidavit that they were not, that the acts complained of were done right at the very time that the State Tax Commission was conducting an audit of the plaintiff's books to harass, annoy, threaten, and intimidate the plaintiff.

ARGUMENT

POINT I.

THERE WAS AMPLE EVIDENCE IN THE RECORD TO SUPPORT THE COURT'S ORDER DENYING THE DEFENDANTS' MOTION TO DISMISS.

The single question to be resolved in this interlocutory appeal is whether or not there exists a genuine issue of fact:

"In considering a motion for summary judgment, the basic and controlling consideration is whether there exists a genuine issue of fact."

Larsen v. Christensen, 21 U.2nd 219, 443 P.2nd 402

"On defendant's summary judgment motion, the court surveys the evidence and all reasonable inferences fairly to be drawn therefrom in light most favorable to plaintiff. Rules of Civil Procedure, Rule 56(c)."

Strand v. Mayne, 14 U.2nd 355, 384 P.2nd 396

One fact in dispute is whether or not the defendants at the time and under the circumstances complained of were acting in the scope of their employment. The defendants say that they were (R.3 and 7). The Plaintiff says that they were not (R.13). The defendants claim that there had been a determination of tax liability (R.5 and 6 and R.9 and 10). Whereas the plaintiff claims that there was at said time no determination since the books were still in the process of an audit with the State Tax Commission (R.13), and that any such claim was therefore necessarily premature, spurious and made for the purpose of harassment, annoyance and intimidation.

The defendants defend on the ground of official immunity.

Whether there was immunity in this case and for these defendants would depend on the determination of facts to be considered at the time of the hearing, and especially since the matter of the scope of the defendants employment is challenged by the plaintiffs controverting affidavit, and it would also and further depend on whether the defendants were acting in a discretionary or a ministerial capacity.

The doctrine is plainly stated in the case of Logan City v. Allen, 86 U.375 at page 381, 44 P.2d 1085:

"Where the same officer is charged with the performance of judicial as well as ministerial duties, the judicial privilege will not protect him in the exercise of ministerial functions. Such officers may become civilly liable where they act in excess of authority or where there is a total want of jurisdiction."

CONCLUSION

Since the questions of whether these defendants, in committing the acts complained of, were acting within or without the scope of their employment, or in a ministerial or a judicial capacity are yet to be resolved, it is the plaintiff's position that the interlocutory appeal of the defendants should be dismissed.

Respectfully submitted,

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