

1969

**Robert L. Velasquez, By and Through His Guardian Ad Litem,  
Corinne F. Muniz v. Union Pacific Railroad Company, A Utah  
Corporation; Heinz Reinhold and State of Utah, Public  
Commission : Brief of Respondent**

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

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ROBERT L. VELASQUEZ, by and  
through his Guardian Ad Litem,  
CORINNE F. MUNIZ,  
*Plaintiff-Appellant,*

vs.

UNION PACIFIC RAILROAD COM-  
PANY, a Utah corporation; HEINZ  
REINHOLD,  
*Defendants,*

and

STATE OF UTAH, PUBLIC SERVICE  
COMMISSION,  
*Defendant-Respondent.*

Case No.

11883

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff was injured when the vehicle in which he was asleep and riding as a passenger was struck by a Union Pacific Railroad Company train at a grade crossing in a residential area in Sandy, Utah on March 9, 1968.

DISPOSITION IN THE LOWER COURT

Summary Judgment was entered September 19, 1969 in favor of Defendant-Respondent.

## RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the District Court's order of Summary Judgment.

## STATEMENT OF FACTS

On March 9, 1968 at approximately 11:50 p.m., plaintiff was a passenger and asleep in a pickup truck driven by Manuel Ortega, which pickup truck was proceeding easterly on 400 North Street in Sandy, Utah, when a collision occurred between said pickup truck and one of Union Pacific Railroad Company's locomotives, which was traveling in a southerly direction, at the grade crossing at 400 North near 100 East Street, in Sandy City, Utah, and that as a result of said collision, plaintiff sustained some injuries.

## ARGUMENT

## POINT I.

STATE OF UTAH, PUBLIC SERVICE COMMISSION, WAS AT ALL TIMES ACTING IN ITS CAPACITY AS A GOVERNMENTAL ENTITY OF THE STATE OF UTAH, AND, AS SUCH, IS IMMUNE FROM THIS SUIT.

The Public Service Commission comes within the meaning of "State" as defined in U. C. A. 63-30-2(1) (1953), Utah Governmental Immunity Act, and the word "state" is within the term "governmental entity" as defined in 63-30-2(3). Therefore, the Public Service Commission is included within the term "governmental entity" as defined

in 63-30-2(3) and used in 63-30-3 and 63-30-10. U. C. A. 63-30-3 states:

“Except as may be otherwise provided in this act, *all governmental entities shall be immune* from suit, for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function.” (Emphasis added.)

In order for appellant to maintain an action against respondent, they must show a specific waiver of this immunity. It is apparent from the statute there is no specific waiver available. U. C. A. 63-30-10 provides:

“Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury: (1) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused.”

This statute has come before this court in the case of *Sheffield v. Turner*, 21 Utah 2d 314, 445 P. 2d 367, (1968). This court said that:

“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.”

The Court compared this general rule with the Governmental Immunity Act, 63-30-10 U. C. A. (1953), dealing with waiver of immunity. This Court pointed out that, even

though the act provides for a waiver of immunity, it still preserves immunity in certain areas. The *Sheffield* case dealt specifically with the exception of injuries arising out of incarcerations, 63-30-10(3) U. C. A. 1953. In the case at bar, we are concerned with the exception in 63-30-10(1) mentioned above.

The principle enunciated by the court in the *Sheffield* case applied with equal force to both subsections, and the Public Service Commission has governmental immunity as provided for in U. C. A. 63-30-10(3) and as such is immune from suit in this action.

Section 54-4-14 U. C. A. 1953 provides :

“The commission shall have power by general or special orders, rules or regulations, or otherwise, to require every public utility to construct, maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to prescribe among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances, including interlocking or other protective devices at grade crossings or junctions, and block or other system of signaling, and to establish uniform or other standards of construction and equipment, and to require the performance of any other acts which the health or safety of its employees, passengers, customers or the public may demand.”

Any duty which may have been imposed upon the Public Service Commission is by the wording of this statute a matter of discretion, there being no words of mandate to

the Commission to prescribe any particular order, rule or regulation. Even if such duty were to be imposed upon the commission, that duty has been fulfilled. The commission promulgated rules and regulations for the installation and inspection of railroad highway grade crossing signal devices. These rules are found in General Order No. 61 and Supplemental Order No. 1 dating back to June 1951, which order of the Public Service Commission was attached to the respondent's motion for summary judgment (R. 90-100).

This view of the discretionary nature, powers and duties of the Public Service Commission finds support in the language of cases which define discretionary act as decisions made at planning levels as distinguished from decisions made at operational levels. *Dalehite v. United States*, 346 U. S. 15, 42 (1953). It seems evident that the Public Service Commission, by passing a rule or regulation, and exercising its discretion therein, at a planning level, does not become liable for the act of every private person or corporation who, for some reason, fails to comply with or implement the regulation at the operational level.

In the above case, the Supreme Court of the United States, referring to the Federal Tort Claims Act whose language is very similar to that of the Utah act, discusses the theory and operation of the waiver of governmental immunity. The court states:

“It is not intended that the constitutionality of legislation, the legality of regulations or the propriety of the discretionary administrative act should

be tested through the medium of a damage suit for tort.”

It is noted that the Utah act, in Section 63-30-10(1), contains a non-waiver of immunity where injury “arises out of the exercise of performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused.”

It is clear that, even if appellant were able to show all facts set forth in the complaint and establish that the Public Service Commission had the responsibility to enforce the rules and regulations and failed to act, that the commission would still be immune from this suit.

Plaintiff appears to have assumed that the Governmental Immunity Act, which waives governmental immunity in certain instances, applies and that the Motion for Summary Judgment, based upon other facts, is premature. It is, however, proper under Rule 56 to grant summary judgment based upon the facts as stated in plaintiff's complaint without need for allowing discovery and without the need for the respondent to plead by way of answer setting forth any defenses or facts, summary judgment becomes tantamount to a motion to dismiss for failure to state a claim, except that where affidavits or other evidentiary matters accompanied the motion, it was properly brought as a motion for summary judgment. The court below was correct in granting summary judgment for the reason that the Public Service Commission was at all times acting in

its capacity as a governmental entity of the State of Utah and was immune from suit, such immunity having not been waived. It is evident from plaintiff's complaint and the amendment to the second cause of action therein that any and all acts of negligence claimed against the Public Service Commission of the State of Utah would clearly arise out of the performance of, omission of, or exercise of a discretionary function; namely, the promulgation of rules and regulations and the enforcement thereof. The plaintiff has failed to plead or set forth any facts which would allow suit against the Public Service Commission of Utah.

Respondent takes no issue with cases cited by plaintiff indicating summary judgment should be granted on the basis of the complaint alone, only under a liberal construction of the facts pleaded and assuming all such facts to be true a claim has been stated. We submit that plaintiff in this case given that liberal construction, and after once amending the complaint, sets forth no such facts.

### CONCLUSION

The Public Service Commission is a governmental entity protected with governmental immunity pursuant to 63-30-10(1) U. C. A. (1953). It has complied with and fulfilled the duties imposed upon it pursuant to 54-4-14 U. C. A. (1953). There are no facts in dispute which would,

if resolved in favor of appellant, allow this suit to be maintained. Therefore, the summary judgment rendered by the District Court should be affirmed.

Respectfully submitted,

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