

1994

Joseph Wisden, Plaintiff and Appellant, vs. Norman Bangerter, RICHARD D. WYSS, DOROTHY POULSEN, O. BRENTON ROWE, GLENWOOD HUMPHRIES, JON NEIGHBOR. CORY PULSIPHER, BYRON T. KNIGHTON. AND JOHN DOES ONE THRU TEN, Defendants and Appellees : Brief of Appellee

Utah Court of Appeals

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Lynn J. Lund.

Joseph M. Wisden .

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IN THE UTAH COURT OF APPEALS

JOSEPH M. WISDEN,

Plaintiff/Appellant,

-vs-

NORMAN H. BANGERTER,
RICHARD D. WYSS, DOROTHY
POULSEN, O. BRENTON ROWE,
GLENWOOD HUMPHRIES, JON
NEIGHBOR, CORY PULSIPHER,
BYRON T. KNIGHTON, AND JOHN
DOES 1 THRU 10,

Defendants/Appellees.

Case No. 940264-HON

APPELLEE'S BRIEF

Priority #15

This appeal is taken from the December 9th, 1993, denial of Plaintiff's Motion to Reconsider, which upheld the April 20th, 1993, decision of the Fifth District Court granting summary judgment dismissal to O. Brenton Rowe, Glenwood Humphries, Jon Neighbor, Cory Pulsipher, and Byron T. Knighton in this case, to Honorable J. Philip Eves, presiding.

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COURT OF APPEALS
BRIEF

FILED
Utah Court of Appeals

SEP 15 1994

Marie M. Branch
Clerk of the Court

940264

IN THE UTAH COURT OF APPEALS

JOSEPH M. WISDEN,)	
)	
Plaintiff/Appellant,)	Case No. 940264-CA
-vs-)	
)	
NORMAN H. BANGERTER,)	
RICHARD D. WYSS, DOROTHY)	
POULSEN, <u>O. BRENTON ROWE,</u>)	APPELLEE'S BRIEF
<u>GLENWOOD HUMPHRIES, JON</u>)	
<u>NEIGHBOR, CORY PULSIPHER,</u>)	
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JURISDICTION

This appeal is taken from the December 9, 1993, denial of Plaintiff's Motion to Reconsider, which upheld the April 20, 1993, order granting summary judgment dismissal to O. Brenton Rowe, Glenwood Humphries, Jon Neighbor, Cory Pulsipher, and Byron T. Knighton in this case.

This case was poured over from the Utah Supreme Court to the Utah Court of Appeals. The Utah Court of Appeals has jurisdiction over this case pursuant to Utah Code Ann. §78-2a-3(2)(k)(1994 supp).

ISSUES PRESENTED ON APPEAL

ISSUE Did the trial court commit prejudicial error by granting the Washington County Defendants' Rule 12(b)(6) motion and ordering summary judgment in Defendants' favor?

STANDARD OF REVIEW When reviewing a dismissal under Rule 12(b), the appellate court must accept "the material allegations of the complaint as true, and [consider] them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff." St Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991). The propriety of granting dismissal is a question of law. The appellate court gives the trial court's ruling no deference and reviews it under a correctness standard. Id.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,
RULES AND REGULATIONS

Utah Code Annotated §63-30-4(4)

An Employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

Utah Code Annotated §78-11-10. Actions against officers - Costs and attorneys' fees.

Before any action may be filed against any sheriff, constable, peace officer, state road officer, or any other person charged with the duty of enforcement of the criminal laws of this state, or service of civil process, when such action arises out of, or in the course of the performance of his duty, or in any action upon the bond of any such officer, the proposed plaintiff, as a condition precedent thereto, shall prepare and file with, and at the time of filing the complaint in any such action, a written undertaking with at least two sufficient sureties in an amount to be fixed by the court, conditioned upon the diligent prosecution of such action, and, in the event judgment in the said cause shall be against the plaintiff, for the payment to the defendant of all costs and expenses that may be awarded against such plaintiff, including a reasonable attorney's fee to be fixed by the court. In any such action, the prevailing party therein shall, in addition to an award of costs as otherwise provided, recover from the losing party therein such sum as counsel fees as shall be allowed by the court. The official bond of any such officer shall be liable for any such costs and attorney fees.

STATEMENT OF THE CASE

Plaintiff's complaint raised five Causes of Action against O. Brenton Rowe, Glenwood Humphries, Jon Neighbor, Cory Pulsipher, and Byron T. Knighton, all Washington County Employees (together referred to as "the Washington County Defendants"). Count One alleged violations of the Utah Racketeering Enterprises Act, Utah Code Ann. §76-10-1602 et seq., by the Washington County Defendants and other officers and employees of the State of Utah. (Record pp. 21-29) Count Two alleged False Arrest and False Imprisonment both in Utah and Arizona against all defendants named in the Complaint. (Record p. 29) Count Three alleged Aggravated Kidnapping and/or Kidnapping on the part of all defendants. (Record pp. 29-30)

Count Four alleged Fraud, and specifically alleged that:

1. Plaintiff was arrested under a fraudulent Utah Governor's Warrant; (Record p. 30)
2. A Memorandum was written by Defendant Poulsen to Defendant Neighbor which was fraudulent since it stated that there were no time limitations of Governor's Warrants; (Record p. 30)
3. Defendant Neighbor committed fraud by testifying under oath that the Utah Governor's Warrant was valid when he knew it was not valid or did not know whether or not it was valid; (Record p. 30)
4. Defendant Rowe, knowing that Judge Sorensen had ordered the March 14, 1991, Governor's Warrant invalidated, misrepresented to the Judge at the September 5, 1991, hearing on Plaintiff's Petition in Habeas Corpus that the Utah

Governor's Warrant was valid and further that he withheld the March 14, 1991, Arizona Requisition Documents and Executive Agreement from the Court at that hearing while defending the position that the Governor's Warrant was valid; (Record p. 30)

5. Defendant Rowe also represented to the Court that there was a Utah Attorney General's Opinion that opined that there was no time limitation on Governor's Warrants when in fact no such Opinion existed. (Record p. 31)

In Count Five Plaintiff alleged that he suffered public humiliation and/or wrongful punishment before conviction at the hands of Defendant Knighton.

Course of the Proceedings and Disposition in the Court Below

Plaintiff filed his Complaint on January 7, 1993, in the Fifth Judicial District Court. (Record p. 1) On February 3, 1993, the Washington County Defendants filed a Pre-Answer Motion to Dismiss, pursuant to Rule 12(b)(6). (Record p. 116) Oral arguments on the Motion to Dismiss were heard on March 22, 1993, before Judge Eves. (Record p. 177) Judge Eaves issued a Memorandum Opinion on April 20, 1993, in which he granted the Motion and dismissed all of Plaintiff's claims against the Washington County Defendants. (Record p. 185) Plaintiff filed a Motion to Reconsider on August 27, 1993. (Record p. 217) The Washington County Defendants filed an opposing Memorandum (Record p. 365), and a hearing on the Motion to Reconsider was held on November 22, 1993. (Record p. 376) On December 9, 1993, Judge Eaves issued an Order upholding his

previous Memorandum Opinion, dismissing Plaintiff's case against the Washington County Defendants. (Record p. 377)

Statement of the Facts

On August 23, 1990, Plaintiff was arrested on a Warrant issued by Maricopa County, Arizona. (Record p. 11) Plaintiff was arraigned on a Utah Fugitive Complaint in the Fifth Circuit Court and bond was set at \$20,000.00, pending further extradition proceedings from Arizona, the demanding State, pursuant to the Utah Extradition Act. (Record p. 11) On August 28, 1990, bond was reduced by the Fifth Circuit Court to \$4,500.00 and Plaintiff was thereafter freed on bond. (Record p. 12)

Plaintiff was re-arrested on February 15, 1991, on the same Warrant out of Maricopa County, Arizona. (Record p. 12) He was again incarcerated in the Washington County Jail. (Record p. 13) From August 23, 1990 to February 15, 1991, Arizona took no action to extradite Plaintiff on the charges outstanding in that State. (Record p. 13) On February 19, 1991, Plaintiff was arraigned on a new Utah Fugitive Complaint in the Fifth Circuit Court and was released on his own recognizance pending further extradition proceedings from Arizona. (Record p. 13) On March 20, 1991, Plaintiff sought extraordinary relief pursuant to a Writ of Habeas Corpus in the Fifth District Court, the Honorable Allen Sorensen presiding. (Record p. 14) At the conclusion of the case Judge Sorensen ruled that the failure of the State of Arizona to obtain a Governor's Warrant within 90 days of the Plaintiff's first arrest caused the State of Utah to lose jurisdiction over the Plaintiff.

Judge Sorensen also ordered that any existing or pending Utah Governor's Warrant could not be executed against Plaintiff. (Record p. 14)

On March 14, 1991, Arizona Governor Fife Symington executed Rendition Documents for the extradition of Plaintiff on the same charges. (Record p. 15) Those documents were submitted to the Utah Executive Department later that same month. (Record p. 15) On March 25, 1991, a Utah Governor's Warrant was executed by then Governor Bangerter for the arrest of Plaintiff. (Record p. 16) The March 25, 1991, Governor's Warrant was not served on Plaintiff because of the outstanding Order of Judge Sorensen. (Record p. 16)

On August 13, 1991, a second Utah Governor's Warrant was executed by then Governor Bangerter for the arrest of Plaintiff for the same charges previously mentioned out of Arizona pursuant to the March 14, 1991, rendition documents. (Record p. 17)

On August 19, 1991, Defendant Dorothy Poulsen, the Extradition Coordinator for Governor Bangerter, sent a Memorandum to Defendant Jon Neighbor, Washington County Undersheriff. Defendant Poulsen enclosed both the March Warrant and the August Warrant, along with a Memorandum informing Defendant Neighbor that the Governor's Warrant was in effect and that there was no statute of limitations on the Governor's Warrant. (Record p. 17)

The Arizona Rendition Documents had all been approved as to legal form and validity by the Defendant Richard D. Wyss, Assistant Utah Attorney General. (Record p. 18)

On August 26, 1991, Defendant Cory Pulsipher, a Washington

County Deputy Sheriff, arrested Plaintiff pursuant to the August 13, 1991, Utah Governor's Warrant. (Record p. 18) Plaintiff was thereafter incarcerated in the Washington County Jail. (Record p. 18) Plaintiff petitioned the Fifth Judicial District Court for Writ of Habeas Corpus pursuant to his arrest on the August, 1991, Governor's Warrant. (Record p. 18) On September 5, 1991, a hearing was held on Plaintiff's Petition in Habeas Corpus. (Record p. 18) The Writ was denied because there was a recently issued and apparently valid Utah Governor's Warrant before the Court. (Record p. 18) The Governor's Warrant had been in existence at the time Plaintiff was re-arrested on August 26, 1991. Plaintiff's Complaint alleges that during that Court proceeding both on the record and off the record, Defendant O. Brenton Rowe, a Deputy Washington County Attorney, alluded to an Attorney General's Opinion allegedly opining that there was no Statute of Limitations on Governor's Warrants. (Record p. 19)

On September 6, 1991, Defendant Knighton, assisted by Defendant Neighbor, processed Plaintiff out of the Washington County Jail. (Record p. 19) Plaintiff was then taken by Defendant Knighton to Arizona. (Record p. 19) Plaintiff claims that during the process of transferring him from Utah to the proper authorities in Arizona via the Las Vegas International Airport, Defendant Knighton exposed him to public humiliation by allowing him to stand on display in chains and shackles in various places in the airport. (Record pp. 20-21)

SUMMARY OF ARGUMENTS

- I. The trial court was correct in dismissing this action for failure to state a claim for which relief may be granted. All of the defendants in this appeal are governmental employees. The conduct of which the Plaintiff complains occurred while the defendants were performing duties within the scope of their employment, and the defendants acted without fraud or malice. Therefore, all of the defendants are protected from this suit by governmental immunity. Additionally, Defendant Rowe, as a deputy county attorney, is also protected by prosecutorial immunity.
- II. Plaintiff was required to file a written undertaking as a condition precedent to maintaining a lawsuit against the defendants who were charged with enforcing criminal laws. Plaintiff did not file an undertaking at the time he filed this law suit or at any time prior to filing his lawsuit. Therefore, Plaintiff's complaint was rightfully dismissed.

ARGUMENT

I. THE COURT BELOW DID NOT COMMIT PREJUDICIAL ERROR BY DISMISSING PLAINTIFF'S COMPLAINT BECAUSE ALL OF THE WASHINGTON COUNTY DEFENDANTS ARE PROTECTED BY GOVERNMENTAL IMMUNITY.

Dismissal of a case under Rule 12(b) of the Utah Rules of Civil Procedure is proper when the court construes the complaint in the light most favorable to the plaintiff, indulging all reasonable inferences in plaintiff's favor, and still finds with a certainty that plaintiff would not be entitled to relief under any state of facts which could be proved to support his claims. St. Benedict's Dev. Co., 811 P.2d at 196. In the case at hand, the acts which Plaintiff complained of were all committed by the defendants while acting within the scope of their employment pursuant to a duly executed Utah Governor's Warrant. Plaintiff was arrested, charged, detained, and extradited pursuant to the authority of the Warrant. The Washington County Defendants are all immune from this suit because of governmental immunity.

Plaintiff's claims are based on allegations that the Utah Governor's warrant under which he was arrested and extradited was void. If this allegation is true, then the responsible party is the Utah Governor's Office, not the Washington County Defendants who relied on a facially valid Governor's Warrant.

Defendant Rowe is a Deputy Washington County Attorney. Defendant Humphries is the Washington County Sheriff. Defendants Neighbor, Pulsipher, and Knighton are Washington County Deputy Sheriffs. The Washington County Defendants are all government employees. Under Utah Code Annotated §63-30-4(4), a governmental

employee cannot be held liable in his or her representative capacity unless the entity which employs the employee is held liable. Plaintiff did not name Washington County as a defendant. Therefore this action is against the Defendants personally, and not as representatives of Washington County.

According to Utah Code Annotated §63-30-4(4): "[N]o employee [of a governmental entity] may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under the color of authority, unless it is established that the employee acted or failed to act due to fraud or malice." This statute precludes all statutory and common law actions against a governmental employee in his or her personal capacity, except where fraud or malice is established. Madsen v. Borthick, 658 P.2d 627, 633 (Utah 1983).

The Utah Supreme Court has established strict requirements for proving fraud. The elements of fraud are:

- (1) That a representation was made;
- (2) Concerning a presently existing material fact;
- (3) Which was false;
- (4) Which the representor either: (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation;
- (5) For the purpose of inducing the other party to act upon it;
- (6) That the other party, acting reasonably and in ignorance of its falsity;
- (7) Did in fact rely upon it;
- (8) And was thereby induced to act;
- (9) To his injury and damage.

DeBry v. Salt Lake County et al., 835 P.2d 981, 988 (Utah App. 1992). Malice requires more than ill will. Malice is defined as "a wrongful act done intentionally, without just cause or excuse." Tinker v. Colwell, 193 U.S. 473 485-86, 24 S.Ct. 505, 508, 48 L.Ed.

754 (1903). Plaintiff has failed to allege actions on the part of the Washington County Defendants to establish a case of fraud or of malice. Therefore, the Washington County Defendants are protected against Plaintiff's lawsuit by governmental immunity. Utah Code Ann. §63-30-4(4).

Defendant Pulsipher is the Washington County Deputy Sheriff who arrested and imprisoned Plaintiff while executing the August 13, 1991, Utah Governor's Warrant. Executing what appears to be a properly issued, facially valid Governor's Warrant by arresting the subject of that warrant and placing him in jail is clearly within the scope of employment of a deputy sheriff. Defendant Pulsipher did not act outside the directives of the Warrant, and therefore, did not act with any discretion. Since Defendant Pulsipher's actions were not discretionary, and he did not commit a wrongful act without just cause or excuse, he could not have acted with malice. Nor did Defendant Pulsipher act fraudulently. Therefore, Defendant Pulsipher is immune to this suit by virtue of governmental immunity. Utah Code Ann. §63-30-4(4).

Defendant Knighton is the Washington County Deputy Sheriff who transported Plaintiff from the State of Utah to the State of Arizona. Plaintiff sued Defendant Knighton, alleging that Plaintiff was subjected to public humiliation or undue punishment while being transported from Utah to Arizona. Transporting prisoners is clearly within the duty of a Washington County Deputy Sheriff. In this case Defendant Knighton was directed to transport Plaintiff under the authority of a facially valid Utah Governor's

Warrant. Furthermore, Defendant Knighton transported Plaintiff only after a Utah Court held a hearing on Plaintiff's Petition for Writ of Habeas Corpus. In that hearing the Court determined that the Writ should be denied and Plaintiff should be extradited under the Governor's Warrant.

Defendant Knighton acted within the scope of his employment pursuant to a duly executed Utah Governor's Warrant. Defendant Knighton did not act outside the directives of the Warrant. Because the Defendant only acted pursuant to the Warrant he did not act with any discretion. Since the Defendant's actions were not discretionary, and he did not commit a wrongful act without just cause or excuse, he could not have acted with malice. Also, neither did Defendant Knighton act fraudulently. Therefore, Defendant Knighton is immune to this suit by virtue of governmental immunity. Utah Code Ann. §63-30-4(4).

Defendant Neighbor is a Washington County Deputy Sheriff, as well as the Undersheriff of Washington County, and the Jail Commander. Defendant Neighbor is a defendant in this lawsuit because Plaintiff alleges that Defendant Neighbor received a Memorandum from Defendant Poulsen, who was the Utah State Extradition Coordinator, advising him that there was no statute of limitations on a Governor's Warrant and that the August 13, 1991, Governor's Warrant was valid. Subsequently, when called to testify at Plaintiff's hearing on his Petition for Habeas Corpus, Defendant Neighbor testified that the Warrant was valid. Plaintiff alleges that Defendant Neighbor either knew that the Governor's Warrant was

not valid or did not know whether it was valid or not and that therefore he committed a fraud by so testifying.

Plaintiff's Complaint alleged that Defendant Neighbor acted fraudulently. However, in order to commit fraud a party must make a knowingly or reckless false representation or omission of a material fact. Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1373 (Utah 1980). The alleged actions of Defendant Neighbor clearly do not rise to that standard.

An executive warrant that is regular upon its face is prima facie evidence that all that was necessary to issue the warrant was completed by the Governor, and that the warrant was validly issued. Hyatt v. New York, 188 U.S. 691, 711, 23 S.Ct. 456, 458-59, 47 L.Ed. 657 (1903); Emig v. Hayward, 703 P.2d 1043, 1047 (Utah 1985). To be regular on its face, a Governor's Warrant must be signed by the Governor, sealed with the State Seal, address an official entrusted with its execution, and substantially recite the facts necessary to validate its issuance. Utah Code Ann. §77-30-7. The Governor's Warrant issued in this case satisfied all of those requirements. Accordingly, under Hyatt the existence of the Governor's Warrant was prima facie evidence that it was properly issued and valid.

When Defendant Neighbor received the August 13, 1991, Governor's Warrant it was accompanied with a Memorandum informing Defendant Neighbor that the Governor's Warrant was in effect. Defendant Neighbor had no duty or authority to question the validity of this Governor's Warrant. It appeared to be properly

issued and facially valid. Therefore, Defendant Neighbor's representation that it was valid was not a knowingly or reckless false representation. Therefore his testimony could not have been fraudulent.

When Defendant Neighbors testified that the August 13, 1991, Governor's Warrant appeared to be properly issued and facially valid he was doing so in the course of performing his duties as a Washington County employee. Under Utah Code Ann. §63-30-4(4), a governmental employee is protected by governmental immunity unless that employee acts with fraud or malice. Plaintiff's Complaint does not show fraud or malice on the part of Defendant Neighbor when Defendant Neighbor testified at Plaintiff's hearing. Therefore, Defendant Neighbor is protected by governmental immunity and Plaintiff's claim was properly dismissed.

Defendant Neighbor is also a defendant in this suit because after Plaintiff's Petition for a Writ of Habeas Corpus was denied, Defendant Neighbor assisted in preparing Plaintiff for transport from Utah to Arizona by helping to chain and shackle him. Defendant Neighbor was acting as the Undersheriff of Washington County as well as the Jail Commander while performing these duties. Preparing inmates for transport by helping to chain and shackle them is clearly within the scope of Defendant Neighbor's employment. Plaintiff failed to allege or demonstrate in his pleadings that Defendant Neighbor acted due to fraud or malice. Plaintiff's complaint against Defendant Neighbor was properly dismissed under Utah Code Ann. §63-30-4(4).

Defendant Humphries is a defendant in this lawsuit because he is the Washington County Sheriff. Apparently, Plaintiff wanted to hold Defendant Humphries liable for the actions of his deputies. However, Plaintiff did not make any claims against Defendant Humphries. Since Plaintiff made no claims against Defendant Humphries, Plaintiff's complaint against Defendant Humphries was properly dismissed for failing to state a claim upon which relief could be granted.

Defendant Rowe is a Deputy Washington County Attorney. He is a defendant in this lawsuit because Plaintiff claims that Defendant Rowe knew of the proceedings before Judge Sorenson following Plaintiff's arrest on the March, 1991, Fugitive Warrant from Arizona. Plaintiff alleged that at the September 5, 1991, hearing on Plaintiff's Petition for Writ of Habeas Corpus, Defendant Rowe withheld that information from the Court, failed to produce the supporting documents for the newly issued Governor's Warrant, and misrepresented to the Court that there was an Attorney General's Opinion which indicated that there was no statute of limitations on Governor's Warrants. The Complaint made no allegations that this conduct was malicious. Plaintiff did complain that the withholding of the information and the misrepresentation as to the existence of an Attorney General's position constituted a fraud.

Plaintiff failed to allege facts that could have constituted fraud by Defendant Rowe. In order to establish fraud, a party must prove that a representation was made by one party and that another party did in fact rely upon the representation, and was thereby

induced to act to his injury and damage. Debry, 835 P.2d at 988. Plaintiff did not allege in his Complaint that the Court relied in any way on Defendant Rowe's representation. Nor did Plaintiff's Complaint allege that the Court's determination to deny his Petition for Habeas Corpus and to order him extradited to Arizona was in any way effected by Defendant Rowe's representation as to the existence of an Attorney General's Opinion. In fact, Plaintiff alleges that the Court denied his Writ Primarily because it had before it a facially valid and apparently properly issued Governor's Warrant dated only a few days prior to Plaintiff's arrest. (Record p. 18) In order to prevail on a cause of action for fraud, Plaintiff must prove not only that there was a knowing misrepresentation of a material fact, but that it was relied upon to his detriment. No such reliance has been alleged and none can be demonstrated.

Plaintiff alleged in his Complaint that at his September 5, 1991, hearing, Defendant Rowe committed fraud by representing to the Court that a statute of limitation did not exist for Governor's Warrants. Plaintiff also alleged that Defendant Rowe committed fraud by failing to present the March 14, 1991, Arizona rendition documents to the Court, which he contends were previously invalidated. However, such acts, if committed, were not fraudulent because they were not knowing or reckless representations or omissions of material facts.

The Plaintiff was arrested pursuant to the August 13, 1991 Utah Governor's Warrant. The Plaintiff's Petition for Writ of

Habeas Corpus was subsequently denied at his September 5, 1991, hearing and he was extradited because of the presumptively valid August 13, 1991, Utah Governor's Warrant. Thus, the March 14, 1991, Arizona rendition documents were not material to the Plaintiff's September 5, 1991, hearing. Accordingly, even if the Plaintiff's allegation that Defendant Rowe failed to present the March 14, 1991 Arizona rendition documents is true, that is not a false representation of material facts. Moreover, the August 13, 1991, Utah Governor's Warrant represented prima facie evidence that it was validly issued. Therefore, Defendant Rowe was entitled to rely upon it for authority, and it was the Plaintiff's burden to present any documents to establish that the warrant was not validly issued. Hyatt, 188 U.S. at 711, 23 S.Ct at 458-59; Emig, 703 P.2d at 1047.

The same reasoning applies to the Plaintiff's allegation that Defendant Rowe acted fraudulently by representing to the Court that a statute of limitations did not exist for Governor's Warrants. Because the Plaintiff's August 26, 1991, arrest was on the August 13, 1991, Utah Governor's Warrant, the limitations period applicable to Governor's Warrants was not at issue. Therefore, assuming Plaintiff's allegation is true, Defendant Rowe's representation would not amount to a material fact and would not be fraudulent. Therefore, Defendant Rowe was protected by governmental immunity under Utah Code Ann. §63-30-4, and Plaintiff's Complaint failed to state a claim upon which relief could be granted. Plaintiff's Complaint against Defendant Rowe was

properly dismissed.

Even if Defendant Rowe was not protected by the Governmental immunity, Plaintiff's Complaint failed to state a claim upon which relief could be granted because Defendant Rowe was protected by prosecutorial immunity. It is well established law that a prosecutor enjoys absolute immunity for acts committed while engaged in an advocacy function. Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); McDonald v. Lakewood Country Club, 461 P.2d 437 (Colo. 1969); State ex rel. Dept. of Justice v. District Court of Eighth Judicial Dist. In and For Cascade County, 560 P.2d 1328 (Mont. 1976); Powell v. Seay, 560 P.2d 555 (Okla. 1976); Creelman v. Svenning, 410 P.2d 606 (Wash. 1966); Mulligan v. Grace, 666 P.2d 1092 (Ariz.App. 1983). The absolute immunity of a prosecutor is so broad that it is maintained even in civil rights cases where the prosecutor is alleged to have used misleading or false evidence. Myers v. Morris, 810 F.2d 1437, 1446 (8th Cir. 1987).

The claims made against Defendant Rowe, a Deputy Washington County Attorney, concern his participation in the charging and extradition of the Plaintiff. Such an activity is clearly within the advocacy function of a prosecutor. Therefore, regardless of the claims that the Plaintiff has made against Defendant Rowe he is absolutely immune from suit. Accordingly, Plaintiff has failed to state a claim against Defendant Rowe upon which relief may be granted.

II. THE PLAINTIFF FAILED TO POST A BOND, A CONDITION PRECEDENT TO FILING THIS ACTION.

Before any action may be filed against any peace officer or any other person charged with the duty of enforcing the criminal laws of the State of Utah for an act committed in the performance of that officer's or person's duty, as a condition precedent to maintaining that action, the potential plaintiff must file a written undertaking with at least two sureties. Utah Code Ann. §78-11-10.

The Washington County Defendants are law enforcement officers and or persons charged with the duty of enforcing the criminal laws of the State of Utah. This action is based on acts which were committed by the Washington County Defendants while performing official duties.

Filing a written undertaking is a condition precedent to maintaining an action against a law enforcement official. The law requires the written undertaking "[b]efore any action may be filed" Id. Plaintiff failed to file a written undertaking at the time he filed his Complaint. Therefore his Complaint was rightfully dismissed. See Rippstein v. City of Provo, 929 F.2d 576 (10th Cir. 1991) (Plaintiff's failure to file an undertaking at the time the complaint was filed warranted dismissal of the action.)

CONCLUSION


The Washington County Defendants are immune to this suit because of governmental immunity and prosecutorial immunity. The acts which Plaintiff complained of were committed by the defendants

while in performance of their official duties. Plaintiff's complaint failed to adequately allege fraud or malice on the part of the defendants. Furthermore, as governmental employees charged with upholding the criminal laws of Utah, the defendants are protected from this suit because Plaintiff failed to file an undertaking before filing this suit. Therefore, the trial court was correct in ordering this case dismissed against the Washington County Defendants.

Wherefore, the Washington County Defendants pray for the following relief:

1. Uphold the order of the trial court.
2. Award costs and attorney fees to the Defendants.

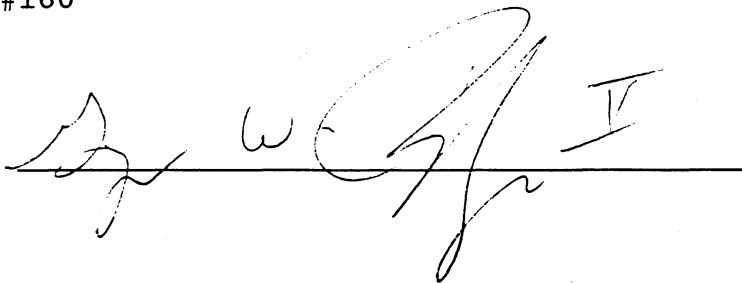
Dated this 15th day of September, 1994.


Lynn J. Lund
LYNN J. LUND & ASSOCIATES
Attorneys for Defendants Rowe,
Humphries, Neighbor, Pulsipher
& Knighton

CERTIFICATE OF MAILING

This is to certify that on the ____ day of September, 1994, two true and correct copies of the foregoing APPELLEE'S BRIEF was mailed, postage prepaid, to:

JOSEPH M. WISDEN
465 South Bluff Street, #160
St George, UT 84770
(801) 684-0378

A handwritten signature in dark ink, appearing to read "J M Wisden", is written over a horizontal line. The signature is stylized with large, sweeping loops.