ORIGINAL Docketed

No. 13722

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF ARIZONA, A PUBLIC BODY; MAJOR GEN. A. M. TUTHILL, THE ADJUTANT GENERAL, CONSTITUTING THE ARIZONA NATIONAL GUARD; AND THOMAS L. KIMBALL, DIRECTOR, AND DR. W. J. RICHARDS, FRED FAVER AND JACK MANTLE, MEMBERS OF AND CONSTITUTING THE ARIZONA GAME AND FISH COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR STATE OF ARIZONA, ET AL., APPELLEES

FILED

JAN 20 1954

PAUL P. O'BRIEN
CLERK

ROSS F. JONES
The Attorney General of the State of Arizona

IRWIN CANTOR
Assistant to the Attorney General

ROBERT C. STUBBS
Assistant to the Attorney General

Photocopy made at NARA's Pacific Region (San Francisco)

Photocopy made at NARA's Pacific Region (San Francisco)

INDEX

	Page
Statement	1
Questions presented	3
Constitution and statutes involved	3
Argument	4
I. The Federal Government may not, to indemnify itself for a claim paid pursuant to the Federal Tort Claims Act, sue a state which has not waived its constitutional or sovereign immunity	4
II. The United States does not state a claim whereby it is entitled to contribution and/or indemnity or any other relief	6
Conclusion	12

CITATIONS

Cases:	
Booth-Kelly Lumber Co. v. *Southern Pacific Co.*, 183 Fed. 2d 902	8, 11
City of Astoria v. *Astoria C. R. R. Co.*, 67 Or. 538, 136 P. 645	7, 9, 11
Feres v. *United States*, 340 U.S. 135	5
Grande v. *Casson*, 50 Ariz. 397	5
Hans v. *State of Louisiana*, 134 U.S. 1	5
Hubsch v. *United States*, 74 Fed. 2d 7, cause remanded 70 S. Ct. 225	6
Jefferson v. *United States*, 340 U.S. 135	5
Kithcart v. *Metropolitan Life Ins. Co.*, 62 F. Supp. 93	7
Lowell v. *Boston & Lowell Railroad*, 23 Pick. 24, 34 Am. Dec. 33	11
Principality of Monaco v. *State of Mississippi*, 292 U.S. 319, 329	5
Schweizer v. *United States*, 174 Fed. 2d 7, cause remanded 70 S. Ct. 225	6
Staples v. *Central Surety & Ins. Corp.*, 62 Fed. 2d 650	8
State v. *Sharp*, 21 Ariz. 424	5
Union Stockyards Co. of Omaha v. *Chicago B. & Q. R. R. Co.*, 196 U.S. 217	9, 11
United States v. *Greggs*, 340 U.S. 135	5
Washington Gas & Light Co. v. *Dist. of Columbia*, 161 U.S. 316	8, 9, 10
Yudin v. *Carroll*, 57 Fed. Supp. 793	7
Constitution and Statutes:	
United States Constitution:	
11th Amendment	3, 5
Federal Statutes:	
28 U.S.C.A. 1346 (b)	3, 5, 6
28 U.S.C.A. 2671	6
28 U.S.C.A. 2674	4, 5
Fed. Rules Civ. Proc., rule 14 (a), 28 U.S.C.A.	8
Fed. Rules Civ. Proc., rule 8, 28 U.S.C.A.	8
Arizona Statutes:	
Arizona Code Ann., 1939:	
Sec. 27-101	5
Sec. 27-102	5
Sec. 27-104	5
Miscellaneous:	
Restatement of the Law of Restitution:	
Section 95	9, 11
Section 102	9, 10

FCFH00838

In the United States Court of Appeals for the Ninth Circuit

No. 13722

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF ARIZONA, A PUBLIC BODY; MAJOR GEN. A. M. TUTHILL, THE ADJUTANT GENERAL, CONSTITUTING THE ARIZONA NATIONAL GUARD; AND THOMAS L. KIMBALL, DIRECTOR, AND DR. W. J. RICHARDS, FRED FAVER AND JACK MANTLE, MEMBERS OF AND CONSTITUTING THE ARIZONA GAME AND FISH COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR STATE OF ARIZONA, ET AL., APPELLEES

STATEMENT

Appellants' statement of facts is correct insofar as stated in its brief. However, appellees submit the following additional statement to give the entire history of the case.

The State of Arizona, et al., appellees, hereinafter called the third-party defendants, moved to dismiss the third-party complaint not only on the grounds that the District Court lacked jurisdiction, but also on the grounds that the third-party complaint failed

FCFH00839

to state a claim against the third-party defendants or any of them, and failed to state facts sufficient, if true, to entitle the appellant, hereinafter referred to as third-party plaintiff, to indemnity or any relief whatsoever, and that the third-party complaint did not contain a statement of facts as distinguished from mere conclusions of the pleader which show existence of a cause of action (R 8).

The third-party plaintiff in its answer filed January 29, 1951, made a general denial of the allegations of the complaint; alleged that plaintiff's injury was caused by his own acts or the acts or omissions of the agents of the State of Arizona; and alleged that the property in question was deeded to the State of Arizona for conservation of wild life and for use by the National Guard and that if the plaintiff were injured it was the result of the acts or omissions of the State of Arizona (R 24-27).

On April 11, 1951, third-party plaintiff filed an amendment to its answer wherein it alleged that the said area was decontaminated in a careful and prudent manner by the chief engineers (R 28). Trial of said cause was held on April 11, 1951, before the Honorable Claude McColloch, Judge of the District Court. Third-party defendants were not present at said trial. After the noon recess, the court announced it would reserve ruling on third-party defendants' motion to dismiss until after trial of the case and allowed third-party defendants 10 days in which to answer (R 30). The plaintiff and third-party plaintiff (defendant—United States Government) presented their case on the matters and issues herein involved (R 31-32).

The cause was then submitted and taken under advisement by the Court. On the 29th day of October, 1951, the Court made certain findings of fact and conclusions of law, with reference to plaintiff, defendant, and third-party defendants (R 34-43, incl.).

On October 6, 1952, the court granted third-party defendants' motion to dismiss the third-party complaint and ordered the case

dismissed without prejudice as to third-party defendants. No opinion or further order was given (R 11).

The third-party plaintiff states on page 3 of its brief, footnote 1, that it is *informed* that the court granted the third-party defendants' motion to dismiss for lack of jurisdiction on the two grounds set forth in said footnote. The third-party defendants are informed entirely to the contrary and in fact the Court designated no specific grounds for the dismissal (R 11). It is third-party defendants' position that so long as the court was justified in granting the motion to dismiss for any of the three reasons set forth in said motion, the action of the lower court should be affirmed.

QUESTIONS PRESENTED

1. May the Federal Government, to indemnify itself for a claim paid pursuant to the Federal Tort Claims Act, sue a state which has not waived its constitutional or sovereign immunity?

2. Does the Federal Government state a claim whereby it is entitled to contribution and/or indemnity against the State of Arizona?

CONSTITUTION AND STATUTES INVOLVED

1. The Eleventh Amendment to the Constitution of the United States provides as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

2. 28 U.S.C.A. 1346 (b)—part of the Federal Tort Claims Act—provides:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive juris-

FCFH00840

diction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

3. 28 U.S.C.A. 2674, provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

ARGUMENT

This case presents the problem whether the United States Government, having waived its sovereign immunity from suit by private persons under the Federal Tort Claims Act, may bring an action against the State of Arizona for indemity and/or contribution. The Federal Government is here attempting to waive the constitutional or sovereign immunity of the State of Arizona from suit by private persons.

I

The Federal Government may not, to indemnify itself for a claim paid pursuant to the Federal Tort Claims Act, sue a state which has not waived its constitutional or sovereign immunity.

After further research, third-party defendants admit that if the United States Government were suing in its sovereign capacity, the State of Arizona could be impleaded as a third-party defendant

in the District Court. It is the contention of the State of Arizona that it has never waived its sovereign immunity to be sued in tort. Sections 27-101, 27-102 and 27-104 of the Arizona Code Annotated allow only a remedy to sue the State where a right already exists. *State* v. *Sharp*, 1 Ariz. 424, 189 P. 631; *Grande* v. *Casson*, 50 Ariz. 397, 72 P. 2d 676. The plaintiff, Roderick J. Krause, could not have sued the State of Arizona for injuries he received at Fort Huachuca, because the State is immune from suit from any of its citizens, or other states, or foreign countries. *Hans* v. *State of Louisiana*, 134 U.S. 1, 10 S. Ct. 504; *Principality of Monaco* v. *State of Mississippi*, 292 U.S. 319, 329, 54 S. Ct. 745; *U. S. Constitution, 11th Amendment.*

The United States Government has waived its immunity to be sued for its torts under certain conditions. 28 U.S.C.A. 1346 (b). The State of Arizona has never done so. *Grande* v. *Casson, supra.* It is our position that the Federal Government, having waived its sovereign immunity by the Federal Tort Claims Act, stands in no better position than a private person, when it brings a third-party claim for indemnity or contribution. The Federal Tort Claims Act uses the following language: "if a *private person* would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. 1346 (b). (Emphasis supplied)

The provision of the Federal Tort Claims Act that the United States shall be liable in the same manner as a private individual under like circumstances indicates that the act does not create new causes of action, but constitutes a mere acceptance of liability under circumstances that would bring private liability into existence. 28 U.S.C.A. 2674, *Feres* v. *United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152; *Jefferson* v. *United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152, and *United States* v. *Griggs*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152.

Under the Federal Tort Claims Act, whether an employee of the Federal Government was acting in the line of duty at the time of accident, so as to render the Government liable for his negli-

FCFH00841

gence, must be determined by the doctrine of respondeat superior in like manner as it would be determined in case of private persons under that doctrine. 28 U.S.C.A. §§ 1346, 2671, *et seq.*, *Hubsch* v. *United States*, 174 F. 2d 7, cause remanded 338 U.S. 440, 70 S. Ct. 225, 94 L. Ed. 244, and *Schweizer* v. *United States*, 174 F. 2d 7, cause remanded 338 U.S. 440, 70 S. Ct. 225, 94 L. Ed. 244.

The Federal Government by the Federal Tort Claims Act has been stripped of its shield of sovereignty in certain well-defined instances. The Federal Government has allowed itself to be sued as a private person. Roderick J. Krause sued the Federal Government as a private person and received a judgment against the Federal Government (R 44). Now the Federal Government is attempting to wield its power as a sovereignty in this suit against the State of Arizona. The third-party defendant admits that the Federal Government as a sovereign has the power and authority to sue any state without the state's consent. In the case at bar, however, the Federal Government is suing not as a sovereign but as a private person against whom a judgment for personal injuries has been secured. It is the contention of the third-party defendants that the Federal Courts are without jurisdiction of this matter until the State of Arizona has given its consent to be sued. The third-party defendants' research has failed to uncover any direct authority either against or for the position taken. However, we feel that our view is based on sound legal logic and justice.

II

The United States does not state a claim whereby it is entitled to contribution and/or indemnity or any other relief.

The lower court could properly look to the entire record which included plaintiff's complaint, the answer, the findings of fact and conclusions of law, and the third-party complaint to determine whether or not a claim entitling third-party plaintiff to relief had been stated.

It is our position that those matters which were adjudicated in the suit between plaintiff and third-party plaintiff are *res*

judicata on the same facts and issues involved in the claim by the third-party plaintiff against the third-party defendant, as stated in *City of Astoria* v. *Astoria & C.R.R. Co.*, 67 Or. 538, 136 P. 645, 649, 49 L.R.A., N.S., 404. "The scope of the estoppel created by the judgment in the primary case embraces all of the issues determined by it."

An examination of the pleadings and of the findings of fact and conclusions of law in the primary case indicates that the question of which act of negligence was primary, or which was active or direct as between the third-party plaintiff and the third-party defendant was in issue. In the original cause the third-party plaintiff pleaded as its second and third defenses the primary or direct and active negligence of third-party defendant and the court made a specific findings of fact that "the allegations of the defendant in its Second and Third Defenses, as set up in its answer, are not sustained by the record; and the defendant is not entitled to any relief by reason of its Second and Third Defenses" (R 42).

In determining whether or not the third-party plaintiff failed to state a claim upon which relief may be granted, the court may determine the motion upon the allegations of the complaint and undisputed facts as they appear from the pleadings, orders and records of the case. *Yudin* v. *Carroll*, 57 F. Supp. 793. In *Kithcart* v. *Metropolitan Life Ins. Co.*, 62 F. Supp. 93, affirmed 150 F. 2d 997, certiorari denied 326 U.S. 777, 66 S. Ct. 267, 90 L. Ed. 470, rehearing denied 326 U.S. 812, 66 S. Ct. 469, 90 L. Ed. 496, rehearing denied 327 U.S. 813, 66 S. Ct. 520, 90 L. Ed. 1038, the lower court sustained a motion to dismiss when supplemented by facts of which judicial knowledge was taken, that the controversy presented was *res adjudicata*.

Paragraph 2 of third-party defendants' motion to dismiss the third-party complaint (R 8), sets forth the grounds for the motion, *i.e.*, the third-party complaint fails to state a claim against third-party defendants or any of them and fails to state facts sufficient,

FCFH00842

if true, to entitle the third-party plaintiff to indemnity or any relief whatsoever.

Fed. Rules Civ. Proc., rule 14 (a), 28 U.S.C.A. provides when defendants may bring in third party. It is still incumbent upon the third-party plaintiff to state a claim for which relief may be granted pursuant to Fed. Rules Civ. Proc., rule 8, 28 U.S.C.A. The above rule with reference to third party practice is procedural and does not establish a right of reimbursement, indemnity or contribution. The third-party plaintiff has attempted to allege a claim against third-party defendants in the alternative, either contribution or indemnity.

The right of indemnity may arise by contract of indemnity or by reason of an act of negligence where the one secondarily liable is entitled to indemnity from the one primarily liable for any damages which the tortfeasor, secondarily liable has sustained. *Staples* v. *Central Surety & Ins. Corp.*, 62 Fed. 2d 650 and cases cited therein; *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 Fed. 2d 902 (9th circuit, 1950).

In the third-party complaint (R 3) there is nowhere pleaded a contract of indemnity. The third-party plaintiff sets forth in its third-party complaint certain restrictions and reservations contained in the deed on the purposes for which the property involved may be used, but these do not constitute an indemnity agreement. Any violation of these restrictions might constitute a basis for the third-party plaintiff to retake possession of the property, but not a basis for indemnity pursuant to agreement.

In Paragraph VII of third-party complaint (R 6), it appears that third-party plaintiff is attempting to plead a claim for relief based upon the common law rules of indemnity and contribution. The common law rules relating to indemnity and contribution are quite fully discussed in the case of *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, (9th circuit) *supra*, decided June 28, 1950. This case points out that the Restatement of the Law of Restitution, Sections 95 and 102, are a summarization of the leading cases on this subject which are as follows: *Washington Gas & Light Co.*

v. *Dist. of Columbia*, 161 U.S. 316, 16 S. Ct. 564, 40 L. Ed. 712; *Union Stockyards Co. of Omaha* v. *Chicago B. & Q. R. R. Co.*, 196 U.S. 217, 25 S. Ct. 226, 229, 49 L. Ed. 453, 2 Anno. Cas. 525; *City of Astoria* v. *Astoria & C. R. R. Co.*, 67 Or. 538, 136 P. 645, 649, 49 L.R.A., N.S., 404.

These sections of the Restatement read as follows:

> *Section 102:*
>
> "Where two persons acting independently or jointly, have negligently injured a third person or his property for which injury both became liable in tort to the third person, one of them who has made expenditures in the discharge of their liability is not entitled to contribution from the other." (The court indicated that this rule was a summarization of the *Union Stockyards* case, *supra.)*
>
> *Section 95:*
>
> "Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition." (The court indicated that this section was a summarization of the *Washington Gas Co.* and *Astoria* cases, *supra.)*

Under Section 102, Restatement of the Law of Restitution, and the *Union Stockyards* case, *supra,* does the third-party complaint state a claim for which the third-party plaintiff is entitled to relief? In the *Union Stockyards* case, *supra,* the lower court had sustained a demurrer to petition of the plaintiff in error, and the question involved concerned the liability of a railroad company which had delivered a car with a defective brake to a terminal company to indemnify the terminal company for damages which the terminal company has been compelled to pay to one of its employees because of its negligence in failing to inspect the car. At page 227 the court stated the general rule as follows:

FCFH00843

"Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another although he may have been compelled to pay all the damages for the wrongdoer. In many instances, however, cases have been taken out of this general rule, and it has been held inoperative in order that the ultimate loss may be visited upon the principle wrongdoer. * * * "

In this case the terminal company's negligence had been established previously and the court held that the terminal company did not come within the exception providing that the principle wrongdoer shall be held liable for the ultimate loss because both parties have been negligent in the same manner, *i.e.,* the negligence of the parties was of the same character for both the railroad company and the terminal company failed by proper inspection to discover the defective brake.

In the case at bar, assuming for the purpose of the motion to dismiss that the allegations of the third-party complaint (R 6, paragraph 7) are true and that such act or omission constitutes negligence, it still appears from the record that the third-party plaintiff and third-party defendants were negligent in the same manner in that they both failed to properly inspect the area and designate safe or unsafe areas. The third-party plaintiff admits in his answer to plaintiff's complaint (R 22, paragraph 2) that it had posted no signs in the area. That both parties were negligent in a like manner is giving a most favorable interpretation to the record of this case, for it appears from the lower court's Finding of Fact and Conclusions of Law (R 34) that the principal wrongdoer was the third-party plaintiff and that there was no negligence on the part of third-party defendants inasmuch as they did not have sufficient time within which to examine the land to ascertain its dangerous condition.

Thus it appears that third-party plaintiff's allegations cannot bring it under the rule of indemnity or contribution to a joint tortfeasor as stated in Section 102, Restatement of the Law of Restitution.

For the third-party plaintiff to state a claim for which it is entitled to relief against third-party defendants under the law of contribution and indemnity as summarized in Section 95, Restatement of the Law of Restitution, it must be shown that the dangerous condition of the land in question was created by the misconduct of third-party defendants. It must further be shown that third-party defendants had a duty to make the property safe and that the third-party plaintiff had no such duty as between the two. It is apparent from the pleadings of the plaintiff Krause and the findings of fact in the original cause that the dangerous condition of the land was created by the third-party plaintiff and that third-party plaintiff had the duty to make it safe and that if third-party defendants were negligent it was constructive rather than actual negligence. This rule of Restatement of Law of Restitution could be invoked by third-party defendants if found liable to plaintiff, but the third-party plaintiff does not stand in such a position.

In discussing the *Astoria* case, *supra,* the court in *Booth-Kelly Lumber Co.* v. *Southern Pacific Co. supra,* points out that the *Astoria* case noted the distinction pointed out in the *Washington Gas Co.* and *Union Stockyards* cases, *supra, i.e.,* there can be no recovery where there is concurring or mutual negligence.

At page 909 of the *Booth-Kelly* case, *supra,* the court cites *Lowell* v. *Boston & Lowell Railroad,* 23 Pick. 24, 32, 34 Am. Dec. 33, and quoted therefrom, a part of which is set forth herein.

" * * * 'In order accurately to determine whether plaintiff and defendant are joint tortfeasors standing *in pari delicto* in the commission of the act which produced the mishap to Annie Anderson, recourse must be had to the complaint filed by Miss Anderson, in the action against plaintiff herein

* * * * *

'From a *resume* of the salient features of the declaration, it plainly appears that the active negligence charged is against the railroad company, while passive negligence only is laid at the feet of the municipality. All that is

FCFH00844

urged against the city is its failure properly to care for the safety of the traveling public, by not providing barriers along the street where the accident occurred. While the city failed to perform its full duty in not requiring the company to construct and maintain aprons sufficient to protect the public from harm, and in not seeing that proper barriers were placed along the track where injury was possible, and, for that account, was liable to Annie Anderson, yet that situation does not render the parties equally delinquent. The efficient and primary cause of the accident was the negligence of the company, while the subsequent negligence of the city in not enforcing obedience to the terms of the ordinance was constructive rather than actual. * * * "

An examination of the complaint filed by the plaintiff Krause in the case presently before this court against third-party defendants indicates that the active negligence charged is against the third-party plaintiff, while passive negligence only is laid at the feet of the third-party defendants by the third-party complaint. Therefore, under this rule of law the right of contribution or indemnity would rest with the third-party defendants and not third-party plaintiff.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order granting the motion to dismiss the third-party complaint and dismissing the third-party complaint should be affirmed.

ROSS F. JONES
The Attorney General
of the State of Arizona

IRWIN CANTOR
Assistant to the
Attorney General

ROBERT C. STUBBS
Assistant to the
Attorney General

January 1954

FCFH00845