

1948

Winnetta J. Llewelyn v. The Industrial Commission of Utah, Clayton Investment Company, and United States Fidelity and Guaranty Company

Utah Supreme Court

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Case No. 7166

IN THE SUPREME COURT OF THE STATE OF UTAH

WINNETTA J. LLEWELYN, widow
 of Isaiah J. Llewelyn,
 deceased,

Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF
 UTAH, CLAYTON INVESTMENT
 COMPANY, and UNITED STATES
 FIDELITY AND GUARANTY COMPANY,

Defendants.

BRIEF OF PLAINTIFF

FILED

JUN 4 1949

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BRIEF OF PLAINTIFF

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

All italics are ours.

Winnetta J. Llewelyn was the wife of
Isaiah J. Llewelyn at the time of his in-
jury and death. She made application to
The Industrial Commission of Utah for the
compensation provided for dependents under

Section 42-1-67 of U.C.A. 1943.

Two hearings were held at which the plaintiff presented her evidence. On January 19, 1948 the Commission approved and filed its decision and findings. The Commission decided and found that Isaiah J. Llewelyn died as a result of an accidental injury arising out of or in the course of his employment. The jurisdictional facts were stipulated at the beginning of the hearing. The Commission then found as follows:

"That the applicant was not living with the deceased at the time of his accident or his death; that she received no support whatever from him for several years prior to his death; that she was therefore not dependent upon deceased for support, at the time of his accidental injury and death.

"The commission therefore, concludes that the application for dependency benefits under the Compensation Law dated September 22, 1947 and signed by the applicant should be denied."

It is the lawfulness of the quoted findings which is now before the Court.

The finding as to the cause of death was satisfactory to both parties. The petition for rehearing raised only the question of plaintiff's dependency.

B. THE FACTS

The facts having a bearing on plaintiff's dependency are as follows:

Plaintiff obtained a decree of separate maintenance in the District Court of the Third Judicial District, in and for Salt Lake County in 1936 (R. 78). That decree admittedly contained a finding that plaintiff was a dependent of the deceased and provided that he pay to her the sum of \$25.00 per month (R. 127, 128).

The plaintiff, after getting the decree for separate maintenance, collected some \$200.00 to \$225.00 (R. 78). She had to make strenuous efforts to make the deceased pay his legal obligation to her (R. 128). She garnisheed his wages and had

him brought into court hearings (R. 128). On two or three such occasions Mr. Spooner, counsel for the insurance company, appeared for plaintiff at the hearings (R. 76). The deceased at the time of his injury was earning approximately \$150.00 per month (R. 26).

Plaintiff worked during the period of her separation from deceased until she became too old (R. 75). She was able to earn only about \$75.00 per month (R. 77). At the time of the injury and death of deceased, plaintiff had no property, no employment, and no source of income except from her separate maintenance decree (R. 77). Plaintiff had been able to get along, but only through the help and charity of her children (R. 78-80). Plaintiff's financial condition had not changed since her separate maintenance decree was made and entered (R. 128). The decree had not been changed since it was entered (R. 132). Certified copies of the Findings of Fact,

Conclusions of Law and Decree were offered in evidence. The Commission, when defendant objected, erroneously refused to permit their introduction into the record (R. 128, 129).

The evidence on the question of dependency presented by plaintiff was not disputed or contradicted. It consisted principally of the testimony of plaintiff and an offer of a certified copy of the Findings of Fact, Conclusions of Law and Decree in Case No. 56746, entitled Winnetta Llewelyn vs. Isaiah J. Llewelyn.

The consistency and conclusiveness of plaintiff's testimony on the subject of her needs and the legal status existing between herself and the deceased allows no room for doubt. Defendants must then admit that plaintiff, at the time of her husband's death, was in need of the support money payments deceased was legally obligated to make; that deceased was under the legal

duty of supporting plaintiff; that deceased had the ability to pay plaintiff the payments due her, and plaintiff had in no way waived or relinquished her right to expect and demand support money payments from deceased.

STATEMENT OF ERRORS

The decision of The Industrial Commission of Utah denying plaintiff's application for compensation was unlawful for the following reason:

That the undisputed and uncontradicted evidence established that plaintiff was a dependent of Isaiah J. Llewelyn on the date of the accidental injury which caused his death as matter of law.

The Commission erroneously failed to consider and give legal effect to the following facts:

1. That plaintiff had been found by a Court of competent jurisdiction of the

state of Utah, to be dependent upon the deceased, which finding never has been changed or amended.

2. Plaintiff was without employment or independent means of support and was in necessitous circumstances on the date of the injury resulting in the death of her husband.

3. Plaintiff has never relinquished, waived, or in any way prejudiced the rights which she had been granted by said decree of separate maintenance and therefore could rightfully expect and demand from deceased the support money payments awarded her.

QUESTIONS PRESENTED

The ultimate question presented by this case is, whether plaintiff was a "dependent" of Isaiah J. Llewelyn. The answer to this question will depend upon the following issue: Whether or not a wife, without employment or property and in neces-

situous financial circumstances, living apart from her husband under a separate maintenance decree, which decree provided for her an award of support money, is a "dependent" even though for some time the husband failed and neglected to make the payments that came due under said decree.

ARGUMENT

Point I.

PLAINTIFF WAS A DEPENDENT OF ISAIAH J. LLEWELYN ON THE DATE OF HIS ACCIDENTAL INJURY AS MATTER OF LAW.

Under the cases interpreting Section 42-1-67 U.C.A., 1943, two criteria seem to have been set down for use in determining when a person is or is not a dependent.

REASONABLE EXPECTATION CRITERION

What plaintiff chooses to call the "reasonable expectation" criterion was established by Utah Galena Corporation v. Ind. Comm., 78 Utah 495, 500, 5 P. (2d) 242, 244. The Court quoting Ruling Case Law stated:

" * * * The purpose of the statute is to provide the workman's dependent in future with something in substitution for what has been lost by the workman's death, and, consequently, to establish dependency the applicant for compensation must show that he or she had reasonable grounds to anticipate future support from the decedent. This reasonable expectation of continuing or future support and maintenance seems to be the true criterion as to who are dependents."

NEED PLUS LEGAL DUTY CRITERION

The "need plus legal duty" criterion is set down in Utah Fuel Co. v. Ind. Comm., 80 Utah 301, 305, 307, 15 P. (2d) 297, 299, in the following language:

" * * * The statutory language with respect to dependency is the same whether the applicant is a widow or a minor child, and the construction and application of the statute must be the same in either case. There is a difference in respect of the situation of the parties. A widow may for herself either assert or expressly or by conduct waive her right of support against a husband, while children of tender age have no capacity to either themselves assert or to waive their right to support by the father, and are not necessarily bound by the failure of the mother or other person to assert their rights for them."

The Court further dealing with the matter of dependency, defined the word "dependent" in the following language:

" * * * Dependency is something different from the right to have support or the duty of a parent to support his children. The word 'dependent' ordinarily means the need of aid or support, not self-sustaining. A dependent person is one who has not the means of his own to support himself. A total dependent is one who has no means whatever by which to support himself. A partial dependent is one who has some means but not sufficient for his support."

Under either criteria the dependency of plaintiff is conclusively established. She had more than a reasonable expectation of support from her deceased husband; she had a right which had been buttressed by a legal decree, and plaintiff had kept her right alive throughout all the time of her separation from the deceased. Of course, there can be no doubt whatsoever as to plaintiff's need for the payments which were due under the separate maintenance decree which fixed her legal right to support.

Plaintiff testified that during the war years she was able to obtain employment and support herself, at least to some extent; that since the war her ability to obtain steady employment has ceased. Prospective employers all tell her that she is too old to work.

The question of dependency under Sec. 42-1-67 U.C.A., 1943 is one of fact, but where there is no dispute as to the facts, the legal rights deducible or inferable from such proven facts are questions of law. Hancock et al v. Ind. Comm., 58 Utah 192, 195 P. 169.

The fact that plaintiff was able to obtain self-sustaining work during the war years is the explanation of the smallness of the amount which plaintiff has been paid by deceased on the separate maintenance award. It, of course, has never been the law that before a person can be classified as a dependent she must be entirely

unable to earn any money or support herself.

Utah Galena Corp. v. Ind. Comm., *supra*;

Park Utah Consol. Mines Co. v. Ind. Comm.,

84 Utah 481, 36 P. (2d) 979.

The general policy of the Workmen's Compensation Law is clearly stated in Park Utah Consol. Mines Co. v. Ind. Comm., *supra*, as follows:

" * * * Thus the Legislature sought to promote the public welfare by relieving society of the support of unfortunate victims of industrial accidents, *Reteuna v. Industrial Commission*, 55 Utah 258, 185 P. 535; *Amalgamated Sugar Co. v. Industrial Commission*, 75 Utah 556, 286 P. 959; *Industrial Commission v. Agee*, 56 Utah 63, 189 P. 414, and to avoid the necessity of the employee's dependents becoming objects of public charity. If there is any doubt 'respecting the right to compensation, such doubt should be resolved in favor of the employee or of his dependents as the case may be.' *Chandler v. Industrial Commission*, 55 Utah 213, 184 P. 1020, 1022, 8 A.L.R. 930." (84 Utah 486)

Point II.

THE RECEIPT OF ACTUAL SUPPORT IS NOT
NECESSARY TO ESTABLISH DEPENDENCY.

The proposition is well-established in

the law of Utah that under U.C.A. 1943, Sec. 42-1-67, it is not necessary that support money be actually received by the dependent to establish the dependency status.

McGarry v. Industrial Commission, 63

Utah 81, 87, 222 P. 592, 594 and 64 Utah 592, 232 P. 1090, 39 A.L.J. 306, an early case, establishes the law on this point.

Two decisions were written in the case. In the first decision the Court states:

" * * * we know of no authority which holds that the furnishing of support during the life of the deceased is absolutely essential to the establishment of actual dependency."

In the second decision, at page 599, the Court reiterated its former holding in these words:

" * * * The gist of plaintiffs' contention seems to be that there is no dependency, wholly or in part, because it is not shown in the evidence that the deceased furnished or promised any support to the minor down to within a recent date. In our former opinion we cited many authorities strongly tending to hold that the furnishing of support was not a necessary factor in determining actual dependency, but that it is a competent fact and in most cases is generally made to appear."

In the McGarry cases the Court was dealing with the rights of a minor child who had not received support money. However, that fact is no basis for distinguishing the case. The same consideration governs the determination of dependency whether the dependent be a minor child or widow. Utah Fuel v. Ind. Comm., *supra*.

Plaintiff, when she and her husband were no longer able to cohabit, obtained her separate maintenance decree, and so diligently had her husband's duties to support her reduced to the form of a legal decree. Since said decree was entered, plaintiff has made strenuous efforts to enforce her rights. She collected substantial amounts by her efforts and it is absolutely certain that plaintiff, when the occasion arose, as long as her husband was living, could have collected further amounts under her decree. The fact that a few years have intervened since the last payment by deceased does not prejudice plaintiff's

rights. The efforts of plaintiff to protect her right to support money and her strenuous efforts to obtain payments from deceased completely vanquish any inference that plaintiff could not and did not expect or anticipate support in the future from the deceased. Utah Apex Min. Co. v. Ind. Comm., 66 Utah 529, 244 P. 656.

An interesting discussion of dependency is found in Diaz v. Ind. Comm., 80 Utah 77, 88, 13 P. (2d) 307, 311. Justice Straup, after a learned discussion of the cases wherein the widow was not consistently receiving support money from her husband prior to his accidental demise, made the following pertinent observations:

" * * * The statute of Pennsylvania provided that 'no compensation shall be payable under this section to a widow unless she was living with her deceased husband at the time of his death or was then actually dependent upon him for support.' In considering it, the Supreme Court of Pennsylvania in the case of Creasy v. Phoenix Utilities Co., 276 Pa. 583, 120 A. 659, held that, where the separation is merely for the mutual convenience of the parties, and the

wife is dependent, and the obligation to support her is either recognized or performed, the mere fact that the husband, for any reason, fails to perform that duty for a time, does not deprive the wife of her status as a dependent. If this were not so, the mere fact of separation, though perhaps for a proper and legitimate purpose, such as the future establishment of a new home, would, in all cases, bar a claim on behalf of the family. That it was not the intention of the Legislature to establish such a harsh rule seems amply proven by the fact that the word 'dependent' was used, rather than make the right of the widow depend upon the fact of receiving support at the time of the accident. The criterion in cases of this character, consequently, must be whether or not a wife, living apart from her husband and dependent upon him, but not actually receiving support from him, has acquiesced in his action under circumstances amounting to a repudiation by him of his legal obligation to support his family. To the same effect are the following cases: *Coletrane v. Ott*, 86 W. Va. 179, 103 S. E. 102; *Muncie Foundry & Mach. Co. v. Coffee*, 66 Ind. App. 405, 117 N. E. 524; *Johnson v. Republic Iron & Steel Co.*, 212 Ala. 149, 102 So. 44; *Belle City Malleable Iron Co. v. Rowland*, 170 Wis. 293, 174 N. W. 899, 7 A.L.R. 1071; *Geytko v. Pittsburgh & E. Coal Co.*, 88 Pa. Super. Ct. 522; *Shunkus v. Philadelphia & Reading Coal & Iron Co.*, 280 Pa. 88, 124 A. 335; *Landerath v. Ind. Acc. Comm.*, 77 Cal. App. 509, 247 P. 277."

The Courts of Pennsylvania have since the Diaz case decided several cases which

are very close on the facts to the case at bar and under the statute quoted by Justice Straup.

Urban v. Manticoke City et al., 111 Pa. Super. Ct. 195, 169 A. 466, was a case where the deceased husband had failed for eleven years to provide support payments for his wife who was confined in a mental hospital, supported by Public authorities. The Court held that she was the dependent of her husband at the time of his accidental injury and death.

In a very recent case, Binkley v. Stone & Webster Engineering Corp., 156 Pa. S. 381, 40 A. (2d) 132, 134, the Pennsylvania Superior Court had before it practically the very case now before this Court. The Pennsylvania dependency statute, as amended in 1939, now reads:

" * * * 'No compensation shall be payable under this section to a widow, unless she was living with her deceased husband at the time of his death, or was then actually dependent upon him and receiving from him a substantial portion of her support.' "

The widow, claimant, had a court order for support money; some payments had been made, but for four years before his death, the decedent failed and neglected to pay any amount. The Court, reviewing the earlier Pennsylvania cases, held:

" * * * The manifest purpose of this legislation was to bar fraudulent claims, and in our view this dominant intent overrides a literal interpretation of the limitation in question when applied to the facts in this case. The circumstance that claimant was employed did not rebut the assertion of actual dependency (Morris v. Yough Coal & Supply Co., 266 Pa. 216, 109 A. 914), nor the fact that she was not receiving support from her husband at the time of his death. Cressy v. Phoenix Utilities Co., 276 Pa. 583, 120 A. 659. In the Morris case it was held (266 Pa. 216, 109 A. 915): 'No rigid rule can be laid down as to the amount or character of evidence necessary to show actual dependency; therefore each case must be controlled by its own circumstances.' The Cressy case thus states the test to be applied (276 Pa. 583, 120 A. 660): 'The criterion in cases of this character, consequently, must be whether or not a wife, living apart from her husband and dependent upon him, but not actually receiving support from him, has acquiesced in his action under circumstances amounting to a repudiation by him of his legal obligation to support his family.' Cf. Berman v. George J. Blair Co. et al., 137 Pa. Super. 193, 8 A. 2d 731."

In concluding the Court stated:

" * * * We must accept the finding and conclusion of the board since the evidence is sufficient to support it (Berman v. George J. Blair Co. et al., supra) and consider her continued effort to collect as the legal equivalent of actual receipt of support.

"We think the test laid down in Greasy v. Phoenix Utilities Co., supra, is applicable under the 1939 amendment to the facts in the present case and is controlling in determining claimant's right to an award. The legislature in our view, did not intend to lay down a harsh rule that recovery in cases like the present must rest upon actual payment of support."

Merrill v. Penasco Lumber Co. et al.,

27 N. M. 632, 204 Pac. 72, 73, is a case cited with approval in the McGarry cases, supra, and the Diaz case. In the Merrill case the Supreme Court of New Mexico stated:

" * * * If dependency were determined only by the fact of contribution to support, a wife and children might be dependent one week and cease to be the next according to the caprice of the husband and father. Such a theory lacks support from authority."

Whether the court chooses to apply the need plus legal duty or the reasonable expectation of future support criterion to the case at bar, plaintiff respectfully

submits that only one conclusion can be reached by the exercise of logic and reason and that is that plaintiff was a dependent of Isaiah J. Llewelyn at the time of the injury which caused his death.

Under her separate maintenance decree plaintiff not only had a "reasonable expectation of continuing or future support" she had an absolute legal right to demand such support from her husband as long as he lived.

CONCLUSION

It is most respectfully submitted that the evidence herein established that plaintiff was the dependent of Isaiah J. Llewelyn as matter of law, and therefore the decision of The Industrial Commission of Utah that plaintiff was not the dependent of deceased should be set aside.

Respectfully submitted,

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