2001

Travelers Express Company v. The State of Utah : Petition for Rehearing

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

TRAVELERS EXPRESS COMPANY, Inc., a Minnesota corporation,

Plaintiff and Respondent,

v.

STATE OF UTAH, EDWARD T. ALTER, in his capacity as Treasurer of the State of Utah, and VAL OVESON, in his capacity as Auditor of the State of Utah,

Defendants and Appellants.

CASE NO. 19216

PETITION FOR REHEARING

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
THE HONORABLE TIMOTHY R. HANSON

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v.	:	
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PETITION FOR REHEARING

Plaintiff-Respondent, Travelers Express Company, Inc., petitions this Court, under Rule 35 of the Utah Rules of Appellate Procedure for rehearing and reargument of the above-entitled matter. Plaintiff-Respondent, in recognition of the significant and burdensome demands on the time and resources of the Court, has made its decision to petition for rehearing only after long and deliberate consideration of the basis for such a request. This petition is not, therefore, made lightly or upon any normally expected losing party or attorney incredulity over an adverse decision.

The Court has chosen to overrule its previous decision in State ex rel. Baker v. Intermountain Farmers Association, 668 P.2d

503 (Utah 1983), in reliance upon the dissenting opinion of a justice of the Supreme Court of the State of Washington in a case which was decided and published after briefing and oral argument by the parties in this case. While it is not the petitioner's contention that the Court should refrain from consideration of relevant decisions by courts made subsequent to briefing and argument of cases before it; it is the contention of the petitioner that under the circumstances involved here, it is not within the bounds of fairness or judicial wisdom to do so without allowing the parties the opportunity to provide the light that opposing argument can bring to the interpretation and application of such additional references.

In particular, where the Court, as in this instance, (i) applies and adopts reasoning from a dissent in a case decided in the Supreme Court of another jurisdiction, which opinion is not, of course, precedent in that jurisdiction;[1] (ii) bases its rationale for such application and adoption upon, what this petitioner believes can be shown to be an erroneous

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[1]The Court appears to place heavy reliance upon the reasoning and arguments advanced by Justice Dore in the dissenting portion of his concurring and dissenting opinion in the Washington State Supreme Court case of State Department of Revenue v. Puget Sound Power, 103 Wash. 2d 501, 694 P.2d 7, 13-16 (1985). More importantly, the dissent is made in the face of a majority and, therefore, binding legal conclusion for the State of Washington, which actually is in agreement with (a) the position of petitioner, (b) the conclusions of the trial court in the case at bar and (c) the conclusions of this Court in the decision overruled by the opinion from which Petitioner is now taking exception.

assessment of the law in effect (which error this Court, by adoption, shares); (iii) by such application and adoption,

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[1]continued:

In Puget Sound, the State sought utility deposits and dividends paid on deposits under Washington's Uniform Unclaimed Property Act which was amended in 1979 to include Section 16.

That Court's majority said:

> The Washington Legislature enacted the Uniform Disposition of Unclaimed Property Act in 1955. The measure is an almost exact duplicate of the model UPA. 8A U.L.A. 223 (1983). Significantly, the model UPA has a section which provides that periods of limitations shall not be a bar to the state's right to the property. UPA § 16, 8A U.L.A. 257 (1983). The Washington Legislature chose not to include that provision when it enacted Washington's UPA. The Department twice tried unsuccessfully to amend the UPA, first to provide access to certain abandoned property before the owner's statute of limitations had run, and then to add § 16 of the model UPA. Unable to convince the Legislature, the Department finally adopted its own rule in 1968 which closely paralleled UPA § 16. This court struck down the regulation as being beyond the rulemaking power of the agency. Pacific Northwest Bell Tel. Co. v. Department of Rev., 78 Wash.2d 961, 481 P.2d 556 (1971). Finally, in 1979 the Legislature enacted RCW 63.28.225 which is a codification of UPA § 16.
>
> * * *
>
> The Department cites cases from other jurisdictions which have refused to permit statutes of limitations to preclude the state's right to abandoned property. However, reliance to those cases is mistaken. . . . The Supreme Judicial Court of Massachusetts interpreted a provision of its abandoned property act to require reporting of abandoned property even after the owners' rights had ceased. Treasurer

overturns not only the decision of the trial court, but its own well-reasoned precedent from a prior case; and further, and more

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[1]continued:

> and Receiver General v. John Hancock Must. Life Ins. Co., 388 Mass. 410, 446 N.E.2d 1376 (1983). However, there the court was interpreting a substantially different abandoned property scheme and specific statutory language which does not appear in our UPA. Although the sentiment the court expresses appears relevant, the factual differences in the cases make it unpersuasive in this situation.
>
> The California legislature adopted an abandoned property statute similar to Washington's in 1959. Cal. Civ. Proc. Code §§ 1500-1527 (West 1982). Their statute, however, included a provision, similar to § 16 of the model UPA, which requires an abandoned property report despite the availability of a limitations defense against the owner. While deciding a holder's statute of limitations defense to a claim by the state, the California Supreme Court took pains to clarify that the statute applied only to claims on which the statute of limitations had run between the holder and the owner after the effective date of the statute. Douglas Aircraft Co., Inc. v. Cranston, 58 Cal.2d 462, 466, 374 P.2d 819, 24 Cal. Rptr. 851 (1962). The analysis supports Puget's position that prior to Washington's adoption of RCW 63.28.225, the limitations defense available against the owner was applicable against the Department as well.
>
> * * *
>
> [6] Based on the legislative history of the UPA and our prior case law, we find that the Department had no greater right to the utility deposits abandoned between 1955 and 1979 than did the owners. Since the owners' rights were extinguished after 6 years, the Department has no right to those deposits presumed abandoned after 7 years. (Emphasis added)

importantly, (iv) by so doing, engages in what this petitioner can only conclude is impermissible "judicial legislation"; further argument and briefing afforded by a rehearing is clearly justified. Indeed, justice mandates such opportunity for both parties in the interest of avoiding the establishment of precedent which petitioner believes that the Court, after due reconsideration, would not wish to be established for this jurisdiction or any other jurisdiction.

SUMMARY OF ARGUMENT

I. The assertion of the author of the dissenting opinion in the Washington State Supreme Court case and in other cases cited by the Court, that allowing application of the statute of limitations provision would "virtually nullify" the State's Unclaimed Property Act, is erroneous. Accordingly, the adoption of that assertion as a valid conclusion and basis for reasoning by the Court in this case is also erroneous.

II. If the State's Unclaimed Property Act is, in fact, not eviscerated by the application of a statute of limitations exception, then the Court's attempt to circumvent the application of that exception is impermissible "judicial legislation" and may,

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[1]continued:

Utah's history of the Uniform Act is substantially the same as Washington's except Washington included Section 16 in 1979 and Utah did not include it until July 1, 1983.

in fact, be in contravention of the actual intent of the Legislature.

III. The modified derivative rights rule announced by the Court in this case does not have a basis in reason, is without discernible standards for application and is, in any event, misapplied with respect to this case.

ARGUMENT

I. THE ASSERTION OF THE AUTHOR OF THE DISSENTING OPINION IN THE WASHINGTON STATE SUPREME COURT CASE AND IN OTHER CASES CITED BY THE COURT, THAT ALLOWING APPLICATION OF THE STATUTE OF LIMITATIONS PROVISION WOULD VIRTUALLY NULLIFY THE STATE'S UNCLAIMED PROPERTY ACT IS ERRONEOUS. ACCORDINGLY, THE ADOPTION OF THAT ASSERTION AS A VALID CONCLUSION AND AS A BASIS FOR REASONING BY THE COURT IN THIS CASE IS ALSO ERRONEOUS.

The Court, in its opinion, gives considerable attention to the assertion of Justice Dore, dissenting in the Puget Sound decision, that the Washington State Supreme Court's prior decision in Pacific Northwest Bell Telephone Co. v. Department of Revenue, 78 Wash.2d 961 and 481 P.2d 556 (1971) (en banc) (also relied upon by this Court in its decision in State ex rel Baker) "virtually nullified this state's unclaimed property act." Supra at 14. In Northwest Bell, the Washington Supreme Court had, as did this court in State ex rel Baker, concluded that where the state legislature had failed to enact section 16 of the model Uniform Disposition of Unclaimed Property Act (the "Uniform Act")

(providing that the intervention of a statute of limitations could not be asserted against the State with respect to reporting or turnover of unclaimed property to the State), the holder of unclaimed property could assert a statute of limitations defense to reporting and transfer to the State. Justice Dore takes great pains to detail the manner in which the Northwest Bell decision "nullifies" the Washington State Unclaimed Property Act. Justice Dore carefully recites the "abandonment" periods applicable to each category of property which was covered by Washington's unclaimed property act (prior to the enactment of Uniform Act § 16) and then asserts (without any detailed analysis), that the applicable periods in every instance, are longer than the statute of limitations for such property. Justice Dore then concludes that the consequences of Northwest Bell are "to effectively repeal the Act." This Court apparently buys into that reasoning wholeheartedly. This Court, citing similar language in other cases, repeatedly makes reference to the "frustration of the public purposes of the Act" and "the absurd result" which arises from allowing the statute of limitations to be a barrier to the reporting and turnover rules of this State's unclaimed property law.[2]

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[2]References in this argument to Utah's unclaimed property law are to the Utah version of the Uniform Disposition of Unclaimed Property Act, prior to the 1983 amendments. The 1983 Amendments, as previously indicated, adopted a form of the Uniform Act, § 16 (See Utah Code Ann. § 78-44-30(1) (1953 as amended)).

Petitioner contends, however, that such reliance is wholly misplaced. A review of the unclaimed property act provisions governing the periods required for the presumption of abandonment as compared to the applicable statute of limitations rules of this state (both common law and statutory) yield a conclusion substantially different from that of Justice Dore. The State's unclaimed property law is not, in fact, eviscerated by this Court's holding in State ex rel Baker. Analysis will lead to the discovery that the commencement of the period necessary to presume abandonment does not, in all cases, coincide with the date on which a "cause of action accrues" under applicable doctrines of State statutory and common law. A significant example is to be found in the area of certificates of deposit. The seven year presumption of abandonment period for a certificate of deposit commences from the "date it is payable" or from "the date of issuance if it is payable on demand." Section 70A-3-122 of this State's Uniform Commercial Code in subsection (2) provides:

> "A cause of action against the obligor of a demand or time certificate of deposit accrues upon demand, but demand on a time certificate of deposit may not be made until on or after the date of maturity."

Utah Code Ann. Section 70A-3-122(2) (1953, as amended). Clearly, with respect to a demand certificate of deposit, there is potential for the abandonment period to run before the applicable statute of limitations since the abandonment period commences

running on the date of issuance and the statute of limitations period will only begin to run upon demand.

Likewise, in the area of bank deposits (see Section 78-44-2 of the Utah Disposition of Unclaimed Property Act pre-1983 amendment) - an area of substantial potential funds and property for the State - no cause of action against the depository financial institution would accrue until some demand for withdrawal of the funds is made by the depositor. Absent such a demand or request, then no cause of action accrues and the statute of limitations does not begin running. In the meantime, the abandonment period commences running at any moment after there is an expression of interest in the account (activity in the account, correspondence relative to the account, or any other indication of interest in the account). Presumably then, the 12 year period with respect to any such account will run since the last deposit in a savings account or the last withdrawal. In this case, by definition, when a 12 year period has run without any such manifestation of interest (including, therefore, a demand for withdrawal), no statute of limitations defense would be available. There are other substantial examples of this same argument to be found in a review of this state's unclaimed property act (as in effect without the benefit of Section 16 of the Uniform Act). Accordingly, the conclusion of Justice Dore in dissent in the Puget Sound case clearly is without substance or meaning in this State (whatever might be its validity with respect to the relationship of

Washington's version of unclaimed property law and applicable statute of limitations rules for that state).

It is, therefore, also clear error on the part of this Court to adopt the Justice Dore conclusion and apply it in this case and in this State. The said conclusion, as demonstrated without equivocation by the above examples, is not borne out by the state of the law here.

II. IF THE STATE'S UNCLAIMED PROPERTY ACT IS, IN FACT, NOT EVISCERATED BY THE APPLICATION OF A STATUTE OF LIMITATIONS EXCEPTION, THEN THE COURT'S ATTEMPT TO CIRCUMVENT THE APPLICATION OF THAT EXCEPTION IS IMPERMISSIBLE "JUDICIAL LEGISLATION" AND MAY, IN FACT, BE IN CONTRAVENTION OF THE ACTUAL INTENT OF THE LEGISLATURE.

Since the statute of limitations exception recognized by the Court in State ex rel Baker does not, in fact, "virtually nullify" this State's unclaimed property laws; and, since it is also not absurd to conclude that the legislature's omission of Section 16 of the Uniform Act was meant to allow for preservation of a right repeatedly recognized by this Court as a substantial and valued vested property right (i.e., the rights obtained or involved in the expiration of the applicable statute of limitations period), Petitioner believes that it is beyond the authority and prerogative of this Court to circumvent the impact of the legislature's actions and inactions. (The Court is referred to the cases cited in its own opinion and in the Petitioner's brief for confirmation of the substantial and material deference paid to rights arising with respect to statute of limitations provisions.) Indeed, such activity is likely

defeating the real intention of the legislature, i.e. the preservation of the statute of limitations defenses and exceptions to the unclaimed property rules while still providing for substantial and meaningful applications of the unclaimed property laws.

The Court cites in its opinion, the reasoning of the Supreme Judicial Court of Massachusetts in Treasurer and Receiver General v. John Hancock Mutual Life Insurance Co., 388 Mass. 410, 446 N.E.2d 1376 (1983). In that case, the Massachusetts court cites an earlier decision in which it states that "An intention to enact a barren and ineffective provision is not lightly to be imputed to the legislature." A necessary corollary of that provision must be that where the act of the legislature has any substantive application, "irrationality or foolishness" in the omission of some other substantive or material portion of the same legislation should also "not lightly . . . be imputed to the legislature." Indeed, time-honored, well-reasoned, and rationally imposed rules of judicial restraint surrounding the infringement of the legislative purview, should be violated only where, in fact, the "barren nature of legislative activity" is clearly manifest by the absence of any material applicability of a given piece of legislation. Further, even in such instances in which judicial interpretation can be utilized to preserve some "meaning" for legislative pronouncements, such interpretation should be applied rationally and with careful avoidance of tortured construction and baseless assertions. This case is not one which

involves such clearly "barren enactments". Further, petitioner respectfully submits, and will hereafter demonstrate, that even if such were the case, the rationale and rules pronounced by the Court to provide the asserted missing substance to the subject legislation are not much more than arbitrary assertions without any stated foundation in reason.

III. THE MODIFIED DERIVATIVE RIGHTS RULE ANNOUNCED BY THE COURT IN THIS CASE IS ANNOUNCED WITHOUT ANY STATED BASIS IN REASON AND IS WITHOUT DISCERNIBLE STANDARDS FOR APPLICATION AND IS, IN ANY EVENT, MISAPPLIED WITH RESPECT TO THIS CASE.

Even assuming there is a need for the Court to "rescue" the legislature from the embarrassment of a meaningless and "barren" enactment (which petitioner has clearly shown is not the case here), the modified derivative rights rule proposed in the Court's opinion, is, upon close examination, nothing more than an arbitrary pronouncement. This Court in State ex rel Baker, without qualification or equivocation, adopted the view that the rights of the State under its unclaimed property act are "derivative." In short, the State must stand in the shoes of the "owner" of the property which is the subject of the unclaimed property law. It is apparent that there are substantial constitutional issues bound up in the Court's adoption of the derivative rights rule. However, time and space do not allow elaboration of the same at this point in time.

In the opinion of the Court in the case at bar, without any apparent attempt to explain the rationale for the adoption of the same (except to say that the effect of such adoption is to

"save" the unclaimed property law from nullification and except for citation to another court's similar and apparently arbitrary adoption of the same), the Court adopts a modification of the derivative rights rule. That modification states that (a) the state's rights are derivative only to "substantive" rights, as opposed to procedural rights, and (b) that the statute of limitations is a "procedural" right. As pointed out above, this bald "pronouncement" is made in reliance upon a citation to the similar conclusion reached by the Supreme Courts of Alabama and Pennsylvania (reference is made to the Court's opinion for the citations to the same). Again, except for asserting the need to avoid the embarrassing admission that the legislature enacted "barren" legislation, in neither of these cited cases does the court making the decision state any rational basis for the imposition of the rule. If there is independent and substantive rationale and reason (in experience or otherwise) for the imposition of such rules, none are cited either by the referenced courts or by this Court. If in fact, the imposition of such rules has foundation in reason and logic (derived from policy, precedent, statute, or otherwise), none appears. Petitioner submits that the legitimacy of the rule of law in this State and in this country is threatened by the pronouncement of rules, the only stated justification for which, are the conclusions which the announcing court has deemed and pronounced desirable. While there may be, in fact, rational and logical underpinnings for the

Court's stated rule, they remain unspoken in the opinion promulgated by the Court.

Petitioner is particularly concerned by the absence of stated reasoning for the adoption of of the second element of the modified derivative rights rule. As pointed out above, the rights derived by parties through assertion of the statute of limitations have traditionally and consistently been placed in the category of vested property rights. The apparently gratuitous assertion in the case at bar that they are "procedural" (whatever that means) is disconcerting and potentially disruptive to existing law in a wide scope of circumstances wholly unrelated to the statute at issue here. In light of the significance of such a pronouncement, if the Court still believes it necessary to attempt a preservation of the unclaimed property act by assertion of such rules, it is appropriate and necessary to allow all parties to brief and reargue the subject case on such issues before the Court adopts the same as the rules applicable in this State.

CONCLUSION

The petitioner respectfully submits, that the foregoing more than sufficiently justifies a rehearing in this matter. Clear error in conclusions about the effect and status of the subject law has occurred. Accordingly, petitioner requests that rehearing be granted and that opportunity be provided to all parties for rebriefing and argument.

DATED this 29th day of January, 1987.

RAY, QUINNEY & NEBEKER

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L. Ridd Larson

Attorneys for Petitioner

RULE 35 CERTIFICATE

Counsel for petitioner hereby certifies that this petition is presented in good faith and not for delay.

L. Ridd Larson

L. RIDD LARSON

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 1987, four (4) true and correct copies of the foregoing Petition For Rehearing were mailed, first-class, postage prepaid to the following:

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