1988

Madsen v. Prudential Federal Savings & Loan Assoiation : Unknown

Utah Supreme Court

Robert J. DeBry; Robert J. Debry & Associates.
Joseph J. Palmer; Reid E. Lewis; Moyle & Draper; Attorneys for Defendants.

Robert J. DeBry & Associates
Attorneys at Law
The Woodlands — Suite 500
4001 South 700 East
Salt Lake City, Utah 84107
801 262-8915

860148

July 20, 1988

FILED
JUL 21 1988
Clerk, Supreme Court, Utah

Geoffrey J. Butler
Clerk of the Court
UTAH SUPREME COURT
322 State Capitol Building
Salt Lake City, Utah 84114

Dear Mr. Butler:

RE: Madsen v. Prudential
Case No. 860148

As permitted by Rule 24(j), Rules of the Utah Supreme Court, the appellant (Madsen) herewith files this memorandum of newly uncovered authority. Please distribute copies of this letter to members of the Court.

The first case relates to Points III and IV of the Reply Brief of Appellant. The next five cases relate to Point V of the Brief of Appellant. As a convenience to the Court, appellant has, without argument, included the operative language from each case.

In Re Cement and Concrete Antitrust Litigation, 515 F. Supp. 1078 (1981) [cited with approval in Liljeberg v. Health Services Acquisition Corp., _____ U.S. _____, 56 L.W. 4637, 4641 n.9]:

> Given the number of participants in a large class action, it is not an easy matter to determine whether a per se conflict exists. In normal litigation, a judge can simply compare his families' holdings with the names on the caption to the complaint. In a complex multi-district class action, the litigation may be well underway before a comprehensive class list can be compiled. To switch judges in mid-stream not only

> wastes judicial time and energy, but can constitute a substantial administrative burden. I question whether such a result should be occasioned per se "however small" a judge's financial interest.

* * *

Fischer v. Knuck, 497 So. 2d 240 (Fla. 1986):

> Further, the asserted bias and prejudice did not "dawn on" petitioner until she suffered an adverse ruling by the judge. In these circumstances, the motion was not timely filed and the judge had authority to reduce his ruling to writing subsequent to the motion for disqualification.

People v. Avol, 238 Cal. Rptr. 45, 192 Cal. App. 3d Supp. (1987):

> A party should not be permitted to gamble upon obtaining a favorable decision from one judge and then, if disappointed, be allowed an appeal to assert an erroneous failure to disqualify without having previously made a proper showing.

In Re City of Detroit, 828 F.2d 1160 (6th Cir. 1987):

> Timeliness is a factor that obviously merits consideration by a court that is trying to determine whether a judge is truly biased or a litigant is merely trying to avoid an impending adverse decision.

Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986):

> Counsel, knowing the facts, claimed to support a §455(a) recusal for appearance of partiality may not lie in wait, raising the recusal motion only after learning the Court's ruling on the merits.

Ricci v. Key Bancshares of Maine, 111 F.R.D. 369 (D. Main 1986):

> Correlative with the principle that such motions must be filed at the earliest opportunity . . . is the even more important principle. . . that one cannot first try the merits, and if unsuccessful, fall back on recusal. . .
>
> A judge cannot be acceptable if he finds in your favor, but unqualified when he finds against you. This is classic heads-I-win, tails-you-lose.

Sincerely,

ROBERT J. DEBRY

RJD/ek
cc: Joseph Palmer
Peter Billings