

1981

Cleo Morrill v. J & M Construction Co, Inc. and Fareld J. Christensen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

CLEO MORRILL,)	
)	
Plaintiff-Appellant)	
)	
vs.)	Case No. 17049
)	
J & M CONSTRUCTION COMPANY,)	
INC. and FARELD J. CHRISTENSEN,)	
)	
Defendants-Respondents)	

APPEAL FROM THE SUMMARY JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, UTAH
HONORABLE BRYANT H. CROFT, JUDGE

BRIEF OF APPELLANT

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STATEMENT OF FACTS

Appellant, as the natural mother of Ronald Gene Christensen, deceased, commenced this action to recover damages for the wrongful death of her son and alleged: (1) That on the 15th day of November, 1976, Ronald Gene Christensen was an employee of respondent J & M Construction Company, Inc., and was engaged in the digging of a sewer lateral trench for a residential structure being constructed on Lot 340, Raintree Village No. 3, Salt Lake County, Utah; (2) That during the construction of the sewer lateral, the walls of the trench collapsed burying Ronald Gene Christensen and causing his death (R.2,3). These allegations were admitted by respondents (R.6,7).

Appellant timely filed a Claim for Dependent's Benefits and/or Burial Benefits with the Industrial Commission of Utah (Exhibit D-1 to Appellant's Deposition); however, the Industrial Commission of Utah, by its Order under date of October 4, 1977, determined that appellant did not qualify as a dependent of Ronald Gene Christensen and that the statutory amount of \$15,600.00 be paid into the Special Fund for the use and benefit of the Special Fund. Additionally, it was ordered that the \$1,000.00 funeral allowance be paid. (Exhibit D-2 to Appellant's Deposition).

After appellant's claim for benefits under the Workmens

Compensation Act had been denied by the Industrial Commission of Utah because appellant failed to qualify as a dependent of the deceased, Ronald Gene Christensen, this action was commenced against the employer and co-employee of the deceased together with the land owner for whom the sewer lateral trench was being constructed. The land owner was dismissed from the proceedings (R.28,29) and on the 7th day of March, 1980, respondent filed Defendant's Motion for Summary Judgment (R.31) seeking judgment as a matter of law on the ground that appellant's claim was barred by the provisions of the Utah Workmens Compensation Act and specifically Section 35-1-60, Utah Code Annotated (1953, as amended). Respondent's motion was granted and the Order of Summary Judgment (R.45) dismissed appellant's complaint, no cause of action.

ARGUMENT

THE LOWER COURT ERRED IN DETERMINING THAT APPELLANT'S EXCLUSIVE REMEDY WAS THE WORKMENS COMPENSATION ACT WHERE IT HAD PREVIOUSLY BEEN DETERMINED BY THE INDUSTRIAL COMMISSION OF UTAH THAT PLAINTIFF WAS NOT A DEPENDENT OF THE DECEASED AND DID NOT QUALIFY FOR BENEFITS THEREUNDER.

The sole basis on which the lower court dismissed appellant's complaint for the wrongful death of her son was that the Workmens Compensation Act, Section 35-1-1 et seq Utah Code Annotated (1953, as amended), and specifically Section 35-1-60 Utah Code Annotated (1953, as amended), provides the exclusive remedy in

situations of death or injury to an employee while in the course of employment. Specifically, Section 35-1-60 Utah Code Annotated (1953, as amended), provides in part:

"The right to recover compensation...for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee."

The issue squarely presented to the Court is whether the above quoted section of the Workmens Compensation Act operates as the sole and exclusive remedy of an heir of a deceased employee who does not qualify for or receive benefits under the Workmens Compensation Act.

While appellant as the natural mother of Ronald Gene Christensen received a burial allowance in the amount of \$1,000.00 pursuant to the compulsory language of Section 35-1-68(2) Utah Code Annotated (1953, as amended), appellant's claim for additional benefits was denied by the Industrial Commission of Utah because appellant did not qualify as a dependent. It is statutorily

presumed that a dependent of a deceased employee is either a wife or child under the age of eighteen years unless physically or mentally incapacitated. (Section 35-1-71 Utah Code Annotated, 1953, as amended). All other resolutions of dependency are determined on an ad hoc basis. As the question related to appellant, her deceased son did not live with or contribute to the financial necessities of appellant. As stated in Farnsworth vs. Industrial Commission of Utah, 534 P.2d 897 (1975):

"By the expressed terms of Section 35-1-71, U.C.A. 1953, the subject matter of the statute concerns those persons who are 'dependent for support upon a deceased employee'. The case law of this state has consistently limited dependency to those fact situations wherein the deceased had contributed financial assistance or comparable assistance such as growing food, which was used in supporting the dependent."

The Court continued at 534 P.2d 899:

"To entitle plaintiff to compensation in this case, it must affirmatively be made to appear that at the time of the injury (1) plaintiff relied upon his son, in whole or in part, for his support and maintenance; (2) but had the son not been killed plaintiff would in all probability received some assistance from his son; (3) that it was reasonably necessary for the son to render his father some financial aid in order that the father might continue to live in a condition suitable and becoming to his station in life."

It was concluded at 534 P.2d 900:

"In the instant action, the assistance rendered by decedent to his father was not comparable to financial assistance to maintain him in his accustomed station in life. It was greater, it was the love, affection and

companionship of a dutiful child; and deserving of the highest commendation.

"Such assistance, as is shown, commendable as it is, does not establish dependency within the Workmens Compensation Act, the purpose of which is to provide compensation for the probable financial loss suffered by dependents on account of the death of the decedent."

Because of appellant's inability to qualify as a Workmens Compensation Act dependent, appellant, as the natural mother and heir of Ronald Gene Christensen, deceased, commenced this wrongful death action. By determining that appellant's "exclusive remedy" for the death of her son was the Workmens Compensation Act, even though appellant failed to qualify as a dependent for benefits thereunder, the lower court effectively deprived appellant of any legal recourse against the parties responsible for the death of Ronald Gene Christensen.

Such a broad and sweeping interpretation and application of the Utah Workmens Compensation Act and specifically Section 35-1-60, Utah Code Annotated (1953, as amended), unconstitutional deprives appellant of her legal redress for the wrongful death of her son contrary to the provisions of Article I, Section 11 of the Constitution of Utah which provides:

"All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or

counsel, any civil cause to which he is a party."

Appellant recognizes that this constitutional provision does not create new rights or remedies and that an action for personal injury at common law abated on the death of the injured person. Oliveras et al vs. Caribou-Four Corners, Inc. et al, 598 P.2d 1320 (1979). However, the adoption of the Wrongful Death Statute, Section 78-11-7, Utah Code Annotated (1953, as amended), vested in the heirs or personal representative for the benefit of the heirs, a cause of action for the death of a person caused by the wrongful act or neglect of another. Accordingly, a wrongful death cause of action has existed since statehood and legal redress of the heirs of a deceased is constitutionally guaranteed.

The unconstitutionality of restricting a nondependent heir's legal redress to the exclusive remedy provisions of Section 35-1-60, Utah Code Annotated (1953, as amended), is further emphasised by a consideration of Article XVI, Section 5 of the Constitution of Utah which provides:

"The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law."

This Court has recognized that the amendment to Article XVI, Section 5 of the Constitution of Utah effective January 1,

1921, was to assure that that Utah Workmens Compensation Act would not be found unconstitutional, Oliveras, et al vs. Caribou-Four Corners, Inc. et al, supra, and that the distinction between compensation benefits and wrongful death damages as provided by the respective statutes could be stated as:

"The intention of the acts, then, was to secure workmen and their dependents (not heirs or personal representatives) against becoming objects of charity by making reasonable compensation for calamities incidental to the employment, and to make human wastage in industry part of the cost of production. (Cases cited)

"Compensation is a concept wholly different from that of damages. Damages are based upon fault, are generally limited only by the findings and conscience of the jury, and in death cases are payable to heirs or personal representatives without regard to dependency. Compensation, on the other hand, generally has no relation to fault, is fixed or limited by statute, and is payable to dependents only." (Henrie vs. Rocky Mountain Packing Corporation, 113 Utah 415, 196 P.2d, 487 (1948), at 196 P.2d 493.

Having established the distinctive capability between the Utah Workmens Compensation Act and the wrongful death statute the question then becomes whether the "exclusive remedy" provision of Section 35-1-60, Utah Code Annotated (1953, as amended), as applied to nondependent heirs, complies with the constitutional mandate of Article XVI, Section 5 of the Constitution of Utah. In Oliveras, et al vs. Caribou-Four Corners, Inc. et al, supra, this Court held that the State Insurance Fund could not recover

compensation benefits received by the heirs as a result of a wrongful death proceeding where the heirs had received no workmens compensation benefits. It was stated at 598 P.2d 1325:

"Article XVI, Section 5, provides that 'the amount recoverable shall not be subject to any statutory limitation,' except where compensation 'is provided for by law.' This provision is not consistent with the statutory construction that would allow the Fund to invade the shares of nondependent heirs who received no compensation. The nondependent heirs received no compensation 'provided for by law'; therefore, their share is not subject to diminution."

"The amendment to Article XVI, Section 5, was intended to provide an alternative, and not a substitute, type remedy for death which, in part, replaced the damaged action protected by that provision..."

In concluding that a recovery by nondependent heirs in a wrongful death action was not susceptible to invasion by the State Insurance Fund for reimbursement of benefits paid under the Utah Workmens Compensation Act, this court stated at 598 P.2d 1325:

"If the contrary position were to prevail, heirs who had received no compensation award would be required to assist in financing the workmens compensation system, a result, as stated, which would raise serious constitutional difficulties. It is also consistent with the Wrongful Death Statute which vests the right of action in the 'heirs' or personal representatives."

The logical extension of this reasoning is that nondependent heirs who do not qualify or receive benefits under the Workmens Compensation Act are not precluded from instituting a wrongful death action against an employer who causes the death of an employee.

The only limitation or exception to the constitutional right to recover damages for injuries resulting in death is, "...where compensation for injuries resulting in death is provided for by law". However, when no compensation is received by an heir because of the heir's inability to qualify as a dependent, there has been no compliance with the constitutional exception and legal redress by way of a wrongful death action is constitutionally protected.

CONCLUSION

A nondependent heir who receives no benefits under the Workmens Compensation Act is not restricted to the exclusive remedy provided in Section 35-1-60, Utah Code Annotated (1953, as amended), and the Order of Summary Judgment dismissing appellee's complaint should be reversed and this matter remanded to the Third Judicial District Court in and for Salt Lake County, State of Utah, for a wrongful death trial on the merits.

Respectfully submitted this 24 day of February, 1981.



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