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Leonard Meads v. Richard C. Dibblee and Merill B. Colton : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

Rich & Strong; Counsel for Defendant and Respondent;

Case No. 9080

IN THE SUPREME COURT

of the

STATE OF UTAH

LEONARD MEADS,
Plaintiff and Appellant,

—vs.—

RICHARD C. DIBBLEE, Administrator of the estate of JOHN RICHARD SALMON, Deceased, and MERRILL B. COLTON,
Defendants and Respondents.

PETITION FOR RE-HEARING AND BRIEF IN SUPPORT THEREOF

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PETITION FOR REHEARING

Comes now Richard C. Dibblee, administrator of the estate of John Richard Salmon, deceased, defendant and respondent in the above-captioned matter, and pursuant to Rule 76 (e) of the Utah Rules of Civil Procedure, petitions the above-entitled court for a re-hearing of the case on the following grounds and for the following reasons, to-wit:

1. That the court in deciding the case did so by judicial legislation without support in fact or law for so doing.

2. That the court erred in interpreting Section 78-11-12 Utah Code Annotated.

3. That the decision of the court is wholly inconsistent with and cannot be reconciled with the court's previous holdings under the same statute.

STATEMENT OF POINTS

POINT I.

THE COURT IN DECIDING THE CASE DID SO BY JUDICIAL LEGISLATION WITHOUT SUPPORT IN FACT OR LAW FOR SO DOING.

POINT II.

THE COURT ERRED IN INTERPRETING SECTION 78-11-12 UTAH CODE ANNOTATED.

POINT III.

THE DECISION OF THE COURT IS WHOLLY INCONSISTENT WITH AND CANNOT BE RECONCILED WITH THE COURT'S PREVIOUS HOLDINGS UNDER THE SAME STATUTE.

BRIEF IN SUPPORT OF PETITION

Since all of the points are inter-related, they will be argued together. The majority opinion is based upon an analysis of Section 78-11-12 Utah Code Annotated. In reaching its result the majority opinion found it necessary to break down the second section of one sentence of the statute into five subdivisions and then to rearrange and rewrite the subdivisions to read in an entirely different manner than the statute itself. The grammatical gymnastics clearly indicates that the court resorted to judicial legislation. If the Legislature had intended the statute to read as rearranged and set forth in the majority

opinion, it would have so worded the statute. Furthermore, in rearranging and rewriting the statute, the majority opinion wholly ignores the first portion of the sentence which simply states that "causes of action arising out of physical injury to the person or death *** shall not abate upon the death of the wrongdoer." These words become absolutely meaningless in view of the majority opinion. If the Legislature had intended the result achieved in the majority opinion, it would have been wholly unnecessary to make any statement about causes of action not abating. It could have written a statute along the lines as rearranged by the court in the majority opinion. This it did not do. If we are to give effect to the first portion of the sentence and not disregard it, the second half of the sentence, as indicated by Judge Henroid in his dissenting opinion, merely indicates who the parties plaintiff may be depending upon the facts prevailing and the applicability of the statute thereto. Only in this way can the whole statute be given its proper meaning.

The majority opinion then goes on to state that if there is any ambiguity in the statute, it should be resolved in favor of common sense, and thereby requires a decision in favor of the plaintiff. This reasoning requires careful analysis. Is it common sense to hold that the first portion of one sentence of a statute deprives a person of a right, and that the second portion of the same sentence gives it back to him?

In the case of *Fretz v. Anderson,* 5 Utah (2d) 290,

300 Pac. (2d) 642, this same statute was thoroughly and completely analyzed. The opinion in that case was written by one of the Judges who has concurred in the majority opinion in the present case. The opinion was unanimous. The Judge writing the opinion in the present case and the other Judge concurring therein both participated in the Fretz case and concurred in that opinion. We assume that the court in that case applied the same common sense rule of which it now speaks. In that case the court had no trouble with the language of the statute. It considered the whole statute. In fact the whole statute, and not merely the first portion thereof, is clearly set forth in the opinion. At that time the court felt that the statute was clear. Its only conclusion after considering the statute in its entirety was "the cause of action cannot arise at a time beyond the life of the tort feasor." We assume that it was applying common sense when it reached the result which it did. In that case it was not determined whether the tort feasor had died before the plaintiff's accident. The court reversed the case, granting a new trial in order that the parties could muster their evidence on this one missing phase of the accident, stating:

> "**** The matter should be submitted to the jury with an explanation that if they believe from all of the facts and circumstances disclosed by the evidence that the deceased survived the first accident, then the cause of action survived and, other factors necessary to the plaintiff's cause being present, the plaintiff could recover; on the other hand, *if from all of the facts and circumstances*

> *disclosed by the evidence they do not believe that the deceased survived the first collision then the plaintiff could not recover.*" (Italics ours)

In the present case we have the circumstance which was missing in the Fretz case. It was clearly conceded in the majority opinion that Ellen's cause of action did not come into existence until after the tort feasor was dead, the majority opinion stating: "John having died before Ellen, there was no liability to perpetuate against him upon her death which would not abate under the provisions of 78-11-12."

Common sense to us would seem to require that the court which unanimously decided the Fretz case would have to find in our favor in the present case. In fact, it is amazing to us that the Judge who wrote and the Judges who concurred in the decision in the Fretz case could now write and concur in the decision in the present case. Neither the Judge who wrote the opinion nor the Judges concurring therein had any difficulty in construing the entire statute at that time. Between the decisions of the two cases there has been no amendment or change in the statute. Is it common sense to find a statute clear and to require an interpretation one way in one case and then require an entirely different interpretation in another case? We submit that a statute which has not been changed or amended cannot as a matter of common sense at one time be found to clearly require a decision one way and at another time compel a decision in exactly the opposite direction. This is neither common sense nor logic. If what the court says in the present opinion is

right, then what it said in the Fretz case was wrong. If the plaintiff in the present action can maintain the suit, then the plaintiff in the Fretz case should have been able to have maintained the suit. The decision in the present case leaves the status of the law in this state as interpreted by this court in confusion. The two cases cannot be reconciled. These two cases illustrate the trouble into which a court gets and the confusion which arises when a court makes judicial legislation. If a statute calls for varying interpretations at different times, then something must be the matter with the statute itself. If so, it is up to the Legislature and not for the courts to correct this condition.

Although the majority opinion may reach a desirable result, this is no ground or justification for the court by judicial legislation to realize that result.

As indicated by this court in the case of *Brown v. Wightman*, 47 Utah 31, 151 Pac. 366:

> "While the common-law rule is a harsh one, and its enforcement in this case is peculiarly unjust, we nevertheless can see no way of escaping it. The right and power, as well as the duty, of creating rights and to provide remedies, lies with the Legislature, and not with the courts. Courts can only protect and enforce existing rights, and they may do that only in accordance with established and known remedies."

The argument of harshness or unintentional omission is not enough. The Legislature is the only one who can correct the deficiency.

CONCLUSION

We respectfully submit that the petition for rehearing should be granted because it is apparent that the court has resorted to judicial legislation in reaching its result and that the decision when properly analyzed is not based upon the common sense construction of which the court speaks.

Respectfully submitted,

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