1967

Bruce T. Worthen v. Shurtleff and Andrews, Inc. v. The Department of Finance, Successor of the Commission of Finance, Administrator of the State Insurance Fund : Petition For Rehearing and Brief In Support Thereof

IN THE SUPREME COURT OF THE STATE OF UTAH

BRUCE T. WORTHEN,
Plaintiff-Respondent,

vs.

SHURTLEFF and ANDREWS, INC.,
a corporation,
Defendant,

vs.

THE DEPARTMENT OF FINANCE,
Successor of The Commission of
Finance, Administrator of The
State Insurance Fund,
Intervenor and Appellant.

Case No.
10651

Petition for Rehearing And Brief in Support Thereof

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TABLE OF CONTENTS

Cases Cited

Texts Cited

Attorney General Opinion

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Case No. 10651

Petition for Rehearing

Intervenor and Appellant respectfully petitions the Court for Rehearing in the above entitled case for the reason that the holding of the Court failed to consider material issues that should have been decided.

Dated this 28th day of April, 1967.

ROBERT D. MOORE
Attorney for Intervenor and Appellant

Brief in Support of Petition for Rehearing

It appears clear that the effect of the majority decision in this case was to overrule the prior Utah case of *McConnell* v. *Commission of Finance,* 13 U.2d 395, 375 P.2d 394. This Court stated "we have so concluded cognizant of McConnell, 13 U.2d 395, 375 P.2d 394, in which the insurance carrier was not made a party, but insofar as this case may be inconsistent with McConnell, that case is overruled." It should be noted that in drafting the Stipulation which was entered into by the parties at the District Court level, that the parties studiously set forth the same fact situation as was present in the McConnell case. It is respectfully suggested, therefore, that no distinctions can be made between the McConnell case and the present decision of this Court.

The purpose of this Petition is not to rehash the arguments heretofore submitted by the parties, but rather to ask for an amplification of certain problems that are presented by the overruling of the McConnell case. It is, however, respectfully urged that the above entitled case is in error. The Intervenor and Appellant calls attention to *2 Larson Workman's Compensation Law* (1961), Sec. 74.32 which points out that the McConnell case sustains the majority of holdings of sister states in regard to the problem of distribution of the proceeds of a third party action.

The initial problem presented is the effect of the language of the McConnell case, wherein the Court discussed sub-section 2 of 35-1-62 U.C.A. 1953, as amended, which provides, in part, as follows: " . . . (2) the person liable for compensation payments shall be reimbursed in full for all payment made." The Court concluded as follows:

> "Furthermore, subsection (2) requires that the insurance carrier be reimbursed in *full,* providing, of course, the amount of recovery is sufficient to do so after payment of the legal expenses, including attorney's fees. If plaintiff were right in his contention that an insurance carrier is liable for its proportionate share of the costs and fees, then an insurance carrier would never be reimbursed in full." (Emphasis supplied in Court opinion)

Based upon this language, it was felt that the State Insurace Fund has a statutory right to reimbursement, in full, when the amount recovered is sufficient to pay legal expenses, and also to provide for total reimbursement. Therefore, it appeared clear that the Department of Finance did not have authority to compromise subrogation claims against third parties. It is respectfully submitted that the present case leaves open this question by its effect of overruling the McConnell case in total. The State Insurance Fund is frankly at a loss in now determining whether or not it has authority to compromise claims which may be beneficial to its interest in a third party law suit. This issue is not academic in light of an opinion given by the Attorney General on the 3rd day of March, 1965 (Opinion No. 65-015) wherein the Attorney General, relying in part upon the McConnell

case, states that the Department of Finance does not have authority to compromise subrogation claims and holds that in the situation where there are sufficient funds for the Insurance Fund to be paid *in full,* that they have no authority to make such compromise. In fact, the Attorney General advised that since the funds of the State Insurance Fund are not public funds, but rather trust funds, that "those administering the Fund might well be held liable personally for the amount compromised." It is, therefore, requested that this Petition be granted in order that the question of whether or not the Director of Finance may compromise subrogation claims against third parties may be answered.

The Court, in its majority decision in this case, is helpful in settling the issue of the question of the reasonableness of attorney fees by holding that the Trial Court, in this particular case, approved the contingent fee as being reasonable. We respectfully suggest, however, that there are additional unanswered questions that should be resolved. For example, based upon the McConnell case attorneys have paid, in many instances, the proportionate fee chargable to the Insurance Fund under protest. The question presented then is whether or not the Fund is required to refund the fees thus paid since the McConnell case. Secondly, agreements with counsel have been reached based upon the McConnell case which are now pending. The issue presented, therefore, is whether or not the Fund is liable for such fees since in its agreement with counsel it made particular reference to the McConnell case.

Another issue which has been presented since the Worthen case has been decided, is whether or not the Insurance Fund is liable for the payment of attorney fees based upon the total award made to an applicant or rather a percentage based upon what has actually been paid to an aplicant. For example, a widow may have received an award of Sixteen-Thousand Dollars ($16,000) which is to be paid over a number of years. At the time of the settlement, pursuant to the provisions of the award, only Ten-Thousand Dollars ($10,000) has been paid. The question presented, therefore, is whether or not the Insurance Fund is liable for twenty-five percent (25%) of the Ten-Thousand Dollars or twenty-five percent of the Sixteen-Thousand Dollars.

The Intervenor and Appellant recognize that this Court is not inclined, and rightly so, to set forth decisions in the nature of a declaratory decision. It is the position of Intervenor and Appellant, however, that when certain consequences naturally flow from a decision that is subseqeuntly over-ruled, that this request is not improper in order to avoid superfluous litigation. Therefore, Intervenor and Appellant respectfully asks direction from the Court in light of the holding of this case.

Respectfully submitted,

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