1983

Donnita Tuom, Widow of Daniel Tuom v. Duane Hall Trucking, State Insurance Fund and Industrial Commission of Utah : Supplement To Brief of Respondents

IN THE SUPREME COURT

OF THE STATE OF UTAH

DONNITA TUOM, Widow of DANIEL TUOM,	:	
Petitioner,	:	Supreme Court No. 19162
vs.	:	
DUANE HALL TRUCKING, STATE INSURANCE FUND, and INDUSTRIAL COMMISSION OF UTAH,	:	
Respondents.	:	

SUPPLEMENT TO BRIEF OF RESPONDENTS

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SUPPLEMENT TO BRIEF OF RESPONDENTS

WRIT OF REVIEW FROM THE INDUSTRIAL COMMISSION

Respondents respectfully request this Honorable Court to consider the following as supplemental to, and elucidation of, their Brief on Appeal.

ARGUMENT

POINT I

UTAH CODE ANNOTATED SECTION 35-1-68 AND SECTION 35-1-71 ARE CONTEMPORANEOUS PRONOUNCEMENTS OF THE LEGISLATURE WHICH DO NOT CONFLICT AND SHOULD BE INTERPRETED CONSISTENTLY.

On page 8 of their Brief on Appeal, respondents state:

> If, as petitioner argues, an inconsistency exists between subsections 71(2) and 68, respondents agree judicial construction

> should give greater weight to the more recent and more specific pronouncement of the legislature.
> . . . Such construction favors Section 35-1-71(2), not subsection 68. Subsection 71(2) was amended in 1979, as was subsection 68; therefore, the more specific pronouncement between the two should prevail. Subsection 71(2) goes beyond 68 by requiring cohabitation, and thus it is the more specific.

Respondents reiterate that the legislature amended both subsections at issue here in 1979. However, our review of chapter 138, Laws of Utah, 1979, has persuaded us that any argument for the inconsistency of the two subsections cannot stand. As the attached pages, appendix A, from Laws of Utah, 1979, show, the legislature considered sections 35-1-68 and 35-1-71 together and amended them in conjunction. Contrary to petitioner's assertion, on page 10 of her brief, that section 35-1-71(2) is "redundant" and "was not modified to be consistent with the conclusive presumption provided by Section 35-1-68," section 35-1-71(2) was modified specifically in order to facilitate the functioning of Section 35-1-68. Before the 1979 amendments, the language found in the present Section 35-1-68(2)(b)(i) was designated, simply, Section 35-1-68(2). Of necessity, therefore, there was no reference to it in former Section 35-1-71. When the legislature redesignated former Section 35-1-68(2) as Section 35-1-68(2)(b)(i), it also revised former Section 35-1-71 to refer precisely to Section 35-1-68(2)(b)(i). Section 35-1-71(2) states:

> <u>For purposes of payments to be made under subsection (2)(b)(i) of Section 35-1-68,</u> a surviving husband or wife shall be presumed to be wholly dependent upon a spouse with whom he or she lived at the time of the

employee's death. (emphasis added)

Payments to be made under Section 35-1-68(2)(b)(i) are those which a "wholly dependent" person is to receive. Therefore, read together, sections 35-1-68(2)(b)(i) and 35-1-71(2) require the Commission to presume that a spouse who lived with an employee at the time he or she died was wholly dependent on the employee and entitled to the payments designated in Section 35-1-68(2)(b)(i). At the same time the legislature revised 35-1-71(2), it added "(iv)" to Section 35-1-68(2)(b). The effect of "(iv)" is to include in 35-1-68 a six year period during which the Commission must presume that a spouse who is determined to be a "wholly dependent person," because of the presumption defined in Section 35-1-71(2), continues to be a wholly dependent person. There is no inconsistency between section 35-1-71(2) and 35-1-68(2)(b)(iv). Subsection 35-1-71(2) directs the Commission to presume that a surviving husband or wife was wholly dependent on a spouse with whom he or she lived at the time of the employee's death. Section 35-1-68(2)(b)(iv) directs the Commission to presume that once determined wholly dependent, a spouse continues to be wholly dependent for six years.

CONCLUSION

Petitioner, on page 11 of her brief, submits that "judicial construction of legislative acts should give greater weight to the more specific pronouncement of the legislature." The history of sections 35-1-68 and 35-1-71, traced in Chapter 138, Laws of Utah, 1979, shows that the subsections involved were amended

contemporaneously. Between the two, there is no "more recent pronouncement." Respondents submit that, as this Court has advised in Snyder v. Clune, 15 Utah 2d 254, 390 P.3d 915 (1964), (attached as appendix B), a statute should not be construed or applied to produce incongruous results which were never intended by the legislature. It is possible and reasonable to read the sections of the statute at issue as consistent with one another. The Administrative Law Judge found them compatible, construed them harmoniously, and reached his decision. There is a reasonable basis for his ratiocination. Therefore, respondents respectfully request this Court to affirm the order of the Commission.

DATED THIS 13 Day of October, 1983.

BLACK & MOORE

BY James R. Black
JAMES R. BLACK

BY Wendy B. Moseley
WENDY B. MOSELEY

Appendix A

LAWS OF UTAH
1979

REGULAR SESSION

The loss or permanent and complete loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section and no tentative finding of permanent total disability shall be required in such instances; in all other cases, however, and where there has been rehabilitation effected but where there is some loss of bodily function, the award shall be based upon partial permanent disability.

In no case shall the employer or the insurance carrier be required to pay compensation for any combination of disabilities of any kind as provided in sections 35-1-65, 351-66 and this section, including loss of function, in excess of 85% of the state average weekly wage at the time of the injury per week for 312 weeks.

Section 3. Section amended.

Section 35-1-68, Utah Code Annotated 1953, as amended by Chapter 57, Laws of Utah 1955, as amended by Chapter 62, Laws of Utah 1957, as amended by Chapter 55, Laws of Utah 1959, as amended by Chapter 71, Laws of Utah 1961, as amended by Chapter 49, Laws of Utah 1963, as amended by Chapter 68, Laws of Utah 1965, as amended by Chapter 65, Laws of Utah 1967, as amended by Chapter 86, Laws of Utah 1969, as amended by Chapter 76, Laws of Utah 1971, as amended by Chapter 67, Laws of Utah 1973, as amended by Chapter 101, Laws of Utah 1975, as amended by Chapters 151 and 156, Laws of Utah 1977, is amended to read:

35-1-68. Second injury fund created—Purpose—Funding—Injury causing death—Filing claim within one year—Payment into fund when no dependents—Payment to dependents—Presumptions of dependency—Payment to partially dependent persons—Effect of remarriage.

(1) There is created a second injury fund for the purpose of making payments in accordance with the provisions of chapters 1 and 2 of this title. This fund shall succeed to all monies heretofore held in that fund designated as the "special fund" or the "combined injury fund" and whenever reference is made elsewhere in this code to the "special fund" or the "combined injury fund" that reference shall be deemed to be to the second injury fund. The state treasurer shall be the custodian of the second injury fund and the commission shall direct its distribution. Reasonable administration assistance may be paid from the proceeds of that fund. The attorney general shall appoint a member of his staff to represent the second injury fund in all proceedings brought to enforce claims against it.

(2) In case injury causes death within the period of six years from the date of the accident, the employer or insurance carrier shall pay the burial expenses of the deceased as provided in section 35-1-81, and further benefits in the amounts and to the persons as follows:

~~(1) If there are no dependents, the employer and insurance carrier shall pay into the state treasury the sum of $15,600. Any claim for compensation must be filed with the commission within one year from the date of death of the deceased, and, if at the end of one year from the date of death of the deceased, no claim for compensation shall have been filed with the commission, the said sum of $15,600 shall be paid at that time into the state trea-~~

~~sury by the employer or the insurance carrier. This payment shall be reduced by the amount of any weekly compensation payments paid to or due the deceased between the date of the accident and his death. Such payment shall be held in a special fund for the purposes provided in this title, the state treasurer shall be the custodian of such special fund, and the commission shall direct the distribution thereof. If the commission has reasonably determined that there are no dependents of the deceased, it may order the employer or insurance carrier to pay into the state treasury the sum specified in this subsection to be held in that special fund for a period of one year from the death of the deceased. Any claim filed within that year for which an award is made by the commission shall be paid out of the sum deposited by the employer or insurance carrier before any further claim may be asserted against the employer or insurance carrier.~~

(a) If the commission has made a determination that there are no dependents of the deceased, it may, prior to a lapse of one year from the date of death of a deceased employee, issue a temporary order for the employer or insurance carrier to pay into the second injury fund the sum of $18,720. The $18,720 shall be reduced by the amount of any weekly compensation payments paid to or due the deceased between the date of the accident and death. Should a dependency claim be filed subsequent to the issuance of such an order and, thereafter, a determination of dependency is made by the commission, the award shall first be paid out of the sum deposited for credit to the second injury fund by the employer or insurance carrier before any further claim may be asserted against the employer or insurance carrier. In the event no dependency claim is filed within one year from the date of death, the commission's temporary order shall become permanent and final. If no temporary order has been issued and no claim for dependency has been filed within one year from the date of death, the commission may issue a permanent order at any time requiring the carrier or employer to pay $18,720 into the second injury fund. Any claim for compensation by a dependent must be filed with the commission within one year from the date of death of the deceased.

(b) (i) If there are wholly dependent persons at the time of the death, the payment by the employer or insurance carrier shall be 66 2/3% of the decedent's average weekly wage at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent minor child under the age of eighteen years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 85% of the state average weekly wage at the time of the injury per week, to continue during dependency for the remainder of the period between the date of the death and not to exceed six years or 312 weeks after the date of the injury.

(ii) The weekly payment to wholly dependent persons during dependency following the expiration of the first six-year period described in subsection (b)(i) shall be an amount equal to the weekly benefits paid to those wholly dependent persons during that initial six-year period, reduced by 50% of any weekly federal social security death benefits paid to those wholly dependent persons.

(iii) The issue of dependency shall be subject to review by the commission at the end of the initial six-year period and annually thereafter. If in any such review it is determined that, under the facts and circumstances existing at that time, the applicant is no longer a wholly dependent person, the applicant may be considered a partly dependent or non-dependent person and shall be paid such benefits as the commission may determine pursuant to subsection (2)(c)(ii).

(iv) For purposes of any dependency determination, a surviving spouse of a deceased employee shall be conclusively presumed to be wholly dependent for a six-year period from the date of death of the employee. This presumption shall not apply after the initial six-year period and, in determining the then existing annual income of the surviving spouse, the commission shall exclude 50% of any federal social security death benefits received by that surviving spouse.

~~(3)~~ (c) (i) If there are partly dependent persons at the time of the death, the payment shall be 66 2/3% of the decedent's average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week, to continue during dependency for the remainder of the period between the date of death and not to exceed six years or 312 weeks after the date of injury as the commission in each case may determine and shall not amount to more than a maximum of ~~[$15,600]~~ $18,720. The benefits provided for in this subsection shall be in keeping with the circumstances and conditions of dependency existing at the date of injury, and any amount awarded by the commission under this subsection must be consistent with the general provisions of this title.

(ii) Benefits to persons determined to be partly dependent pursuant to subsection (2)(b)(iii) shall be determined by the commission in keeping with the circumstances and conditions of dependency existing at the time of the dependency review and may be paid in a weekly amount not exceeding the maximum weekly rate that partly dependent person would receive if wholly dependent.

(iii) Payments under this section shall be paid to such persons during their dependency by the employer or insurance carrier.

~~(4)~~ (d) If there are wholly dependent persons and also partly dependent persons at the time of death, the commission may apportion the benefits as it deems just and equitable; provided, that the total benefits awarded to all parties concerned shall not exceed the maximum provided for by law. ~~[Following the period during which the employer or its insurance carrier is required to pay benefits under this act, there shall be paid to such persons, during the period of their dependency, out of the special fund provided for in subsection (1), the same benefits as paid by the employer or its insurance carrier, as provided in subsection (2) and (3). The issue of dependency shall be reviewed at the time application is made for additional benefits from the special fund.~~]

~~(5) The commission shall order that there be paid to such dependents, as provided in subsections (2) and (3), benefits at the rate of 66 2/3% of the deceased's average weekly wages at the time of the injury, but not more than a maximum of 85% of the state average weekly wage at the time of~~

~~the injury per week and not less than a minimum of $15 per week, out of that special fund provided for in subsection (1) and for that period of time beginning with the time that the payments to be made by the employer or its insurance carrier terminate and ending upon the termination of said dependency.~~]

[~~(6)~~] (e) If there are wholly or partly dependent persons at the time of death and the total amount of the awards paid by the employer or its insurance carrier to said dependents, prior to the termination of dependency, including any remarriage settlement, does not exceed [~~$15,600~~] $18,720, the employer or its insurance carrier shall pay the difference between the amount paid and the sum of [~~$15,600~~] $18,720 into the [~~special~~] second injury fund provided for in subsection (1).

Section 4. Section amended.

Section 35-1-71, Utah Code Annotated 1953, as amended by Chapter 151, Laws of Utah 1971, is amended to read:

35-1-71. Dependents—Presumptions—Determinations.

The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

~~(1) A husband or wife upon a spouse with whom that individual lives at the time of the death.~~]

[~~(2)~~] (1) Children under the age of eighteen years or over such age, if physically or mentally incapacitated[,] and dependent upon the parent, with whom they are living at the time of the death of such parent, or who is legally bound for their support.

(2) For purposes of payments to be made under subsection (2)(b)(i) of section 35-1-68, a surviving husband or wife shall be presumed to be wholly dependent upon a spouse with whom he or she lived at the time of the employee's death.

In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury [~~resulting in the~~] or death of such employee, except for purposes of dependency reviews pursuant to subsection (2)(b)(iii) of section 35-1-68. [~~But no~~] No person shall be considered as a dependent unless he or she is a member of the family of the deceased employee, or bears [~~to him~~] the relation of husband or wife, lineal descendant, ancestor, or brother or sister. The word "child" as used in this title shall include a posthumous child, and a child legally adopted prior to the injury. Half brothers and half sisters shall be included in the words "brother or sister" as above used.

Section 5. Section amended.

Section 35-1-74, Utah Code Annotated 1953, as amended by Chapter 57, Laws of Utah 1955, as amended by Chapter 55, Laws of Utah 1959, as amended by Chapter 71, Laws of Utah 1961, as amended by Chapter 49, Laws of Utah 1963, as amended by Chapter 68, Laws of Utah 1965, as amended by Chapters 151 and 156, Laws of Utah 1977, is amended to read:

Appendix B

390 P.2d 915

Gertrude H. SNYDER, Plaintiff and Respondent,

v.

Robert James CLUNE and Roy M. Stokes, Defendants and Appellants.

No. 9936.

Supreme Court of Utah.

April 8, 1964.

Automobile accident case. The Fourth District Court, Utah County, Joseph E. Nelson, J., refused to dismiss, and defendant took an intermediate appeal. The Supreme Court, Crockett, J., held that nonresident motorists were not absent from state, so as to toll limitations, where, although they left state immediately after accident and remained without state, they had agent, in person of Secretary of State, upon whom process could have been served.

Dismissed.

1. Statutes ⇐181(2)

Statutes should not be applied to lead to incongruous results which were never intended.

2. Statutes ⇐184, 214, 223.1

Statute should be considered in light of its background and purpose sought to be accomplished together with other aspects of law which have bearing on problem.

3. Limitation of Actions ⇐85(2)

Objective of statute providing that limitations are tolled if defendant departs from state was to prevent defendant from depriving plaintiff of opportunity of suing him while absenting himself from state during limitation period. U.C.A.1953, 78-12-35.

4. Limitation of Actions ⇐87(6)

Nonresident motorists were not absent from state, so as to toll limitations, where, although they left state immediately after accident and remained without state, they had agent, in person of Secretary of State, upon whom process could have been served. U.C.A.1953, 16-10-111, 41-12-8, 78-12-35; Rules of Civil Procedure, rule 4(e) (1).

5. Courts ⇐87

When reason for rule is gone, rule should vanish with it.

Hanson & Garrett, Salt Lake City, for appellants.

Hugh Vernon Wentz, Provo, for respondent.

CROCKETT, Justice:

Defendants petitioned for and were granted an intermediate appeal to challenge the trial court's refusal to dismiss this action for personal injuries on the

ground that it was barred by the statute of limitations.

The injuries resulted from an automobile collision near Springville in Utah County, on December 14, 1958. Our statute of limitations on torts actions is four years.[1] It was not until four years and three days after the accident, on December 17, 1962, that plaintiff commenced this action.

To avoid the statute of limitations, plaintiff avers that the defendants, who are residents of California, returned there immediately after the accident, where they have since remained. She cites and relies on Sec. 78-12-35, U.C.A.1953:

> "If when a cause of action accrues against a person when he is out of the state, the action may be commenced within the term herein limited after his return to the state; and *if after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.*" (Emphasis added.)

[1, 2] It is to be conceded that upon a superficial look at the above section, ignoring all other considerations, its literal wording might seem to indicate that where a defendant departs from the state after a cause of action arises, the time of his absence should not be counted as part of the time of limitation. But statutes of necessity must state their objectives in general language. It is not always possible to foresee and prescribe in precise detail for all situations to which they might apply. Attempts to give them universal and literal application frequently lead to incongruous results which were never intended. When it is obvious that this is so, the statute should not be so applied. In order to give a statute its true meaning and significance it should be considered in the light of its background and the purpose sought to be accomplished, together with other aspects of the law which have a bearing on the problem involved.

[3-5] It is obvious that the objective of the statute above quoted was to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation.[2] In connection with the plaintiff's contention it is necessary to also consider our nonresident motorist act, Sec. 41-12-8, U.C.A.1953, which was enacted in 1943, (S.L.U.1943, Ch. 68, Sec. 12). It authorizes service upon a nonresident of the state by serving the Secretary of State. The effect of this is to constitute the Secretary of State as the agent of a nonresident motorist to receive process for him. Further pertinent to this problem is Rule

1. Sec. 78-12-25, U.C.A.1953.
2. For authorities on this subject, see 34 Am.Jur. 177, Limitation of Action, Sec. 221. Cf. Clawson v. Boston Acme Mines Development Co., 72 Utah 137, 269 P. 147, 59 A.L.R. 1318 (1928).

4(e) (1) U.R.C.P., which states that personal service may be made upon a defendant " * * * by delivering a copy to *an agent authorized by appointment or by law* to receive service of process." (Emphasis added.) The defendants thus had an agent within the state upon whom process could have been served for them, and they were thus not "absent" from the state in the sense contemplated by the statute, that is, unavailable for the service of process. Therefore, the plaintiff was not prevented from commencing her action at any time she desired. That being so, there exists no reason for tolling the running of the statute. When the reason for the rule is gone, the rule should vanish with it. Appropos is the statement of Justice Holmes:

> "It is revolting to have no better reason for a rule than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[3]

Under the interpretation and application of our statute contended for by the plaintiff, that the defendants' absence from the state tolled the running of the statute of limitations, an action against a nonresident motorist would practically never be outlawed. A purported claim could rest in suspense and an action could be commenced 10, 20 or any number of years after its origin, even though the plaintiff could have sued and served process any time he desired. It seems to us that such a result would comport with neither reason nor justice. Nor would it harmonize with the policy of the law of allowing a reasonable time for the bringing of an action, but of providing a definite limitation of time in which it must be brought or the matter put at rest.

We are aware that some courts have taken the contrary view,[4] but with due deference to them, it is our opinion that for the reasons we have hereinabove expressed, the view which is sounder and better considered is that followed by the greater number of jurisdictions,[5] that where the plaintiff could have pursued her remedy at any time she desired, she was obliged to commence her action within the statute of limitations or it is barred.[6]

3. Oliver Wendell Holmes, The Path of the Law, 10 Harv.L.Rev. 457, 469.

4. See Bode v. Flynn, 243 Wis. 509, 252 N.W. 284, 91 A.L.R. 180, and other cases collated in 91 A.L.R. 180 (1934), see also Annot. 17 A.L.R.2d 502 at 506 et seq. (1951).

5. See cases in the A.L.R. annotations referred to in footnote 4 above.

6. An analogous situation exists with respect to nonresident corporations. They must designate process agents, or service may be made on the Secretary of State. See 16-10-111, U.C.A.1953. It is held that so long as they are amenable to process the statute of limitations runs. See Clawson v. Boston Acme Mines Development Co., footnote 2 above.

Other points raised have been considered and are deemed to be without merit. The action should be dismissed, and it is so ordered. No costs awarded.

HENRIOD, C. J., and McDONOUGH, CALLISTER and WADE, JJ., concur.

391 P.2d 290

Meredith PAGE, Plaintiff and Appellant,

v.

UTAH HOME FIRE INSURANCE COMPANY, a Utah corporation, Defendant and Respondent.

No. 9902.

Supreme Court of Utah.

April 9, 1964.

Action on $10,000 fire policy and on $20,000 fire policy. On the basis of the jury's findings, the Third District Court, Salt Lake County, Merrill C. Faux, J., entered judgment denying plaintiff recovery on either policy and thereafter granted a new trial as to the $10,000 policy. The plaintiff appealed and the defendant cross-appealed. The Supreme Court, McDonough, J., held that trial judge did not abuse his discretion when he ordered new trial as to $10,000 fire policy so that issue of failure of insurance company's agent to disclose material facts when he applied to company for $10,000 fire policy on his own property could be tried separately from issue of failure to disclose material facts with respect to $20,000 fire policy.

Affirmed and cause remanded.

1. Appeal and Error ⇨931(1)

Conflicting evidence was reviewed in light most favorable to finding against plaintiff-appellant.

2. Trial ⇨9(1)

It was proper to allow issue in case after pretrial conference and order, where plaintiff had ample opportunity to meet the issue in that three weeks before trial the court had granted motion to amend order to include issue.

3. Trial ⇨349(1)

The trial court did not err in submitting special interrogatories instead of general verdict as requested by plaintiff. Rules of Civil Procedure, rule 49(a).

4. Appeal and Error ⇨922

Jurors are presumed to be of ordinary intelligence.

5. Trial ⇨352(15)

Interrogatory as to whether insured knowingly failed to make full and honest disclosure of material facts to fire insurer was not vague and uncertain in that jury