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Don Gerald Williams v. Utah State Department of Finance and James Allen Scott, By and Through His Guardian Ad Litem, Erma Lee Scott v. Utah State Department of Finance, As Administrator of the State Insurance Fund and Jeanette Walton, Administratrix of the Estate Of Robert Walton v. Utah State Department of Finance and Boyd Simmons v. Utah State Department of Finance and Angelo Melo, Waulstine Mcneely and William J. Roedel v. Utah State Department of Finance : Petition Of Plaintiffs-Respondents For Rehearing and Brief In Support Thereof

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IN THE SUPREME [illegible]
of the
STATE OF [illegible]

DON GERALD WILLIAMS, [illegible]

vs.

UTAH STATE DEPART[illegible]
an Administrator of the [illegible]

JAMES ALLEN [illegible]
Guardian Ad Litem, [illegible]

vs.

UTAH STATE [illegible]
an Administrator [illegible]

[illegible]

vs.

UTAH [illegible]

[illegible]

vs.

UTAH [illegible]

[illegible]

vs.

UTAH [illegible]
an Administrator [illegible]

Petition of [illegible]
and [illegible]

Appeal from [illegible]
Third District Court [illegible]
Hon. Bryant [illegible]

RICHARD J. LEEDY
263 South Second East
Salt Lake City, Utah
Attorney for Defendant-Respondent

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
DISPOSITION ON APPEAL	2
RELIEF SOUGHT ON PETITION FOR REHEARING	2
PETITION FOR REHEARING	2
STATEMENT OF FACTS	2
ARGUMENT	4
POINT I. A REHEARING SHOULD BE GRANTED SO THAT COUNSEL FOR PLAINTIFFS WILLIAMS, SCOTT, MELO, McNEELEY, AND ROEDEL CAN MAKE THEIR ORAL ARGUMENT.	4
POINT II. THIS COURT HAS ALLOWED RETROACTIVE RECOVERY IN WORTHEN AND DENIED RETROACTIVE RECOVERY IN THE CASES AT BAR. THIS DECISION, IF ALLOWED TO STAND, WOULD RESULT IN UNJUST AND UNNECESSARY DISCRIMINATION AND WOULD ALSO RESULT IN DENIAL TO PLAINTIFFS OF THEIR STATUTORY RIGHT TO HAVE THE COMPENSATION CARRIER PAY ITS FAIR SHARE OF THE ATTORNEY'S FEES AND. COSTS.	4-7
POINT III. THIS COURT HAS JUDICIALLY ALTERED THE ENACTMENT DATE OF SECTION 35-1-62 TO THE PREJUDICE OF PLAINTIFFS.	7-8
POINT IV. THIS COURT, BY ALLOWING RETROACTIVE RECOVERY IN WORTHEN AND DENYING RETROACTIVE RECOVERY IN THE CASES AT BAR, HAS DENIED PLAINTIFFS THEIR RIGHT TO EQUAL PROTECTION OF LAWS CONTRARY TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.	8-12
POINT V. THIS COURT, BY ALLOWING RETROACTIVE RECOVERY IN WORTHEN AND DENYING RETROACTIVE IN THE CASES AT BAR HAS DENIED PLAINTIFFS THEIR RIGHT TO "UNIFORM OPERATION" OF LAWS UNDER ARTICLE I, SECTION 2 and ARTICLE I, SECTION 24 OF THE UTAH CONSTITUTION.	13-18
POINT VI. THE INSTANT DECISION IS INCONSISTENT WITH WORTHEN VS. SHURTLEFF.	18-24

TABLE OF CONTENTS—(Cont.)

Page

POINT VII. WORTHEN VS. SHURTLEFF, 19 UTAH 2d 80 SHOULD BE APPLIED CONSISTENT WITH ITS OWN FACTS. 24-26

CONCLUSION 26-27

CASES CITED

Abrahamsen vs. Board of Review of Industrial Commission, (1955) 3 U. 2d 289, 283 P. 2d 213 15

Buford vs. Lonergran, 6 Utah 301, 22 Pac. 164, Affirmed, 148 U. S. 581, 37 L. Ed. 569 24

Blackman vs. City Court of S.L.C. (1934) 86 U. 541, 38 P.2d 725. 14

Carter vs. State Tax Commisison, (1939) 98 U. 96, 96 P. 2d 727 15

Garrett Freight Lines, Inc. vs. State Tax Commission, (1943) 103 U. 390, 135 P.2d 523 15

Gronlund vs. Salt Lake City (1948) 113 U. 284, 194 P.2d 464 15

Hansen vs. Public Employees Retirement System Board of Administrators (1952) 122 U. 44, 246 P.2d 591 15

Illinois Glass Company vs. Chicago Telegraph Company, 85 NE 200 21

Justice vs. Standard Gilsonite Co. (1961) 12 U.2d 257, 366 P.2d 974. 15

McConnell vs. Commissioner of Finance, 13 Utah 2d 395, 375 Pac. 2d 394 19

McMillan vs. Richards, Calif. 70 Am. Dec. 655 22

Patterick vs. Carbon Water Conservancy District (1944) 106 U. 55, 145 P. 2d 503 15

Salt Lake City vs. Utah Power and Light (1941) 45 U. 50, 142 P. 1067 14

Shelley vs. Kraemer (1948) 334 U. S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 9

State vs. Bayer (1908) 34 U. 257, 97 P. 129 14

State vs. Haltgreve (1921) 58 U. 563, 200 P. 894, aff'd. 285 U.S. 105, 76 L.Ed. 643, 52 S.Ct. 273 14

State vs. J.B.&R.E. Walker, Inc. (1941) 100 U. 523, 116 P.2d 766 15

State vs. Packer Corp. (1931) 77 U. 500, 297 P. 1013 14

State vs. Mason, (1938) 94 Utah 501, 78 P.2d 920 14

TABLE OF CONTENTS—(Cont.)

Page

Sugarhouse Mercantile Co. vs. Salt Lake County et al. (1950) 119 Utah 234, 225 P.2d 1050. 18
Toronto et. ux. vs. Sheffield et al. (1950) 118 U. 460, 222 P.2d 594 16
Tygesen vs. Magna Water Co. (1950) 119 U. 274, 226 P.2d 127 15
Untermyer vs. State Tax Commission (1942) 102 U. 214, 129 P.2d 881 15
Wallberg vs. Utah Public Welfare Commission (1949) 115 U. 242, 203 P.2d 935 15
Walters vs. City of St. Louis (Mo. 1954) 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 8-11
Worthen vs. Shurtleff, 19 Utah 2d 80, 426 Pac., 2d 223 .... 18, 19, 20 21
Yick Wo. vs. Hopkins (1886) 118 U.S. 356, 373-374, 6 S.Ct. 1064, 30 L.Ed. 220 9

STATUTES CITED

Utah Code Annotated, 1945, Sec. 35-1-62 .... 4, 7

TEXTS CITED

40 Am Jur "Payments," Art. 185, pp. 842 22
10 ALR 3d 1371, "Overruling Decisions" 25
Utah Constitution, Art. I, Sec. 2 13
Utah Constitution, Art. I, Sec. 24 .... 13, 17
U. S. Constitution, 14th Amendment 8

IN THE SUPREME COURT
of the
STATE OF UTAH

DON GERALD WILLIAMS,
Plaintiff-Respondent,
vs.
UTAH STATE DEPARTMENT OF FINANCE,
as Administrator of the State Insurance Fund,
Defendant-Appellant,

JAMES ALLEN SCOTT, by and through his Guardian Ad Litem, Erma Lee Scott,
Plaintiff-Respondent,
vs.
UTAH STATE DEPARTMENT OF FINANCE,
as Administrator of the State Insurance Fund,
Defendant-Appellant,

JEANETTE WALTON, Administratrix of the Estate of Robert Waton, Deceased,
Plaintiff-Respondent,
vs.
UTAH STATE DEPARTMENT OF FINANCE,
as Administrator of the State Insurance Fund,
Defendant-Appellant,

BOYD SIMMONS,
Plaintiff-Respondent,
vs.
UTAH STATE DEPARTMENT OF FINANCE,
as Administrator of the State Insurance Fund,
Defendant-Appellant,

ANGELO MELO, WAULSTINE McNEELY and WILLIAM J. ROEDEL,
Plaintiffs-Respondents,
vs.
UTAH STATE DEPARTMENT OF FINANCE,
as Administrator of the State Insurance Fund,
Defendant-Appellant.

Case No. 11753

Petition of Plaintiffs-Respondents for Rehearing and Brief in Support Thereof

---

NATURE OF THE CASE

Plaintiffs seek judgment requiring the State Insurance Fund to bear its share proportionately as its in-

terest appears, of attorneys' fees and costs incurred by plaintiffs in recovering from third parties, sums paid to or for plaintiffs by the Fund for medical and hospital expenses and for compensation for injuries occasioned by on-the-job accidents caused by such third parties.

DISPOSITION IN LOWER COURT

Plaintiffs received Summary Judgment by Memorandum Decision based upon agreed facts. Defendants appealed.

DISPOSITION ON APPEAL

The Supreme Court reversed.

RELIEF SOUGHT ON PETITION FOR REHEARING

Plaintiffs-respondents seek rehearing and affirmation of the District Court judgment and a determination that costs as well as attorney fees are reimbursable.

STATEMENT OF FACTS

The Supreme Court Decision states the facts.

PETITION FOR REHEARING

Plaintiffs-respondents petition the Court for a rehearing for the following reasons:

POINT I

A REHEARING SHOULD BE GRANTED SO THAT COUNSEL FOR PLAINTIFFS WILLIAMS, SCOTT, MELO, McNEELEY, AND ROEDEL CAN MAKE THEIR ORAL ARGUMENT.

POINT II

THIS COURT HAS ALLOWED RETROACTIVE RECOVERY IN WORTHEN AND DENIED RETROACTIVE RECOVERY IN THE CASES AT BAR. THIS DECISION, IF ALLOWED TO STAND, WOULD RESULT IN UNJUST AND UNNECESSARY DISCRIMINATION AND WOULD ALSO RESULT IN DENIAL TO PLAINTIFFS OF THEIR STATUTORY RIGHT TO HAVE THE COMPENSATION CARRIER PAY ITS FAIR SHARE OF THE ATTORNEY'S FEES AND COSTS.

POINT III

THE COURT HAS JUDICIALLY ALTERED THE ENACTMENT DATE OF SECTION 35-1-62 TO THE PREJUDICE OF PLAINTIFFS.

POINT IV

THIS COURT, BY ALLOWING RETROACTIVE RECOVERY IN WORTHEN AND DENYING RETROACTIVE RECOVERY IN THE CASES AT BAR, HAS DENIED PLAINTIFFS THEIR RIGHT TO EQUAL PROTECTION OF LAWS CONTRARY TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

POINT V

THIS COURT, BY ALLOWING RETROACTIVE RECOVERY IN WORTHEN AND DENYING RETROACTIVE RECOVERY IN THE CASES AT BAR HAS DENIED PLAINTIFFS THEIR RIGHT TO "UNIFORM OPERATION" OF LAWS UNDER ARTICLE I, SECTION 2 AND ARTICLE I, SECTION 24 OF THE UTAH CONSTITUTION.

POINT VI

THE INSTANT DECISION IS INCONSISTENT WITH WORTHEN VS. SHURTLEFF.

POINT VII

WORTHEN VS. SHURTLEFF, 19 UTAH 2d 80 SHOULD BE APPLIED CONSITENT WITH ITS OWN FACTS.

ARGUMENT

POINT I

A REHEARING SHOULD BE GRANTED SO THAT COUNSEL FOR PLAINTIFFS WILLIAMS, SCOTT, MELO, McNEELEY, AND ROEDEL CAN MAKE THEIR ORAL ARGUMENT.

Counsel of record for the above named Plaintiffs are Gayle Dean Hunt and Dwight L. King. Through apparent clerical error, they were never notified of the date of oral argument. It is possible the notice meant for them was placed in an envelope addressed to Richard Leedy, attorney for Defendant and Appellant, because a check with Mr. Leedy reveals that he has an indistinct memory of receiving two notices.

Because of the importance of the issues here involved and because counsel for the above named Plaintiffs feel very deeply that they should be allowed to fully argue the issues raised by this petition and by their original brief, we respectfully request this Honorable Court to grant a rehearing.

POINT II

THIS COURT HAS ALLOWED RETROACTIVE RECOVERY IN WORTHEN AND DENIED RETROACTIVE RECOVERY IN THE CASES AT BAR. THIS DECISION, IF ALLOWED TO STAND, WOULD RESULT IN UNJUST AND UNNECESSARY DISCRIMINATION AND WOULD ALSO RESULT IN DENIAL TO PLAINTIFFS OF THEIR STATUTORY RIGHT TO HAVE THE COMPENSATION CARRIER PAY ITS FAIR SHARE OF THE ATTORNEY'S FEES AND COSTS.

The Utah State Legislature enacted Utah Code Annotated 35-1-62 into law in the year 1945. The construction placed on that statute presumably followed the

present Worthen construction until October 24, 1962 when this Court decided the McConnell case. On April 3, 1967 this Court in Worthen held the McConnell interpretation was incorrect. Now this Court reaffirms the Worthen interpretation but denies recovery to the plaintiffs. Why does this Court allow recovery in Worthen and deny recovery here? We submit that the plaintiffs are entitled to a definitive answer consistent with the simple dictates of justice.

This Court, by allowing recovery in Worthen and denying it here has adopted the "first man to the courtroom" test in determining whether to apply retroactive or prospective effect to a later interpretation of a statute. In Utah it is no longer a question of who has a just cause that determines the result. The question would now seem to be who is more effective at the art of being first to get his case on a court calendar. For example:

(1) A and B are injured on the same day in industrial accidents. They file their cases on the same day. The clerk places A's case on the trial calendar first. A recovers. B comes to court, through no fault of his own, on the following day. B cannot recover because of this court's present holding as to retroactivity.

(2) A is injured in an industrial accident *before* B. A files his case *before* B. In the clerk's shuffling of cases B's case goes to trial first. Under the present ruling *B* recovers and A doesn't.

The race to the courtroom shouldn't determine who receives the benefits of this statute. The statute itself should determine who benefits by it. Let us bear in mind that this Court has now twice decided that Sec. 35-1-62 was meant by the legislature to allow recovery to persons situated in the position of plaintiffs. Assume Worthen didn't exist. We have seven plaintiffs presently before the Court. Suppose Scott had reached the courtroom first, should the other six fail? How about Melo? How about Roedel? Yet such is the position in which the Court and consequently the trial bench and bar find themselves in view of the decision in this case. If justice demanded a departure from logic, that would be one thing. But here justice demands a return to logic. The legislature intended from the date it passed Section 35-1-62 into law that compensation carriers bear their share of attorney's fees and costs in third party cases. This statute as thusly interpreted unquestionably coincides with justice. It can hardly be argued as an abstract concept of fairness that compensation carriers should be allowed free rides. The McConnell decision was based on a highly technical language interpretation and by allowing the compensation carrier a free ride and requiring someone else to pay for that ride caused and brought about a long line of unjust results. Why, then, should not this injustice be limited by giving retroactive effect to this Court's present interpretation of the statute? Why should Worthen recover and these plaintiffs be denied recovery? If there had been no Worthen case, one of these plaintiffs would have recovered. We be-

lieve this Honorable Court should grant a rehearing so that these matters can be fully argued.

POINT III

THE COURT HAS JUDICIALLY ALTERED THE ENACTMENT DATE OF SECTION 35-1-62 TO THE PREJUDICE OF PLAINTIFFS.

As heretofore pointed out, Section 35-1-62 was enacted into law in the year 1945. This Court has held in Worthen and also in the cases at Bar that said statute requires compensation carriers to pay their share of attorney's fees and costs in third party cases. In view of this interpretation, we must conclude that the legislative intent has continued to be the same from 1945 to the present and that that intent is to not allow any free rides on the part of compensation carriers in third party cases. During the period of time between McConnell and Worthen this Court is presumed to have followed McConnell. This was because of a technical interpretation, not because the result was fair because quite obviously it wasn't. Now, that interpretation has been modified so that it coincides with justice. But this Court, by denying retroactive effect to its decision, has modified the effective date of Section 35-1-62, which was determined by the legislature to be 1945 and has said that between October 24, 1962 and April 3, 1967, except for one case, the Worthen case, this statute will be inapplicable. This Court has said in refusing to give retroactive effect to the Worthen decision that to do so "would amount to judicial legislation." We agree that our appel-

late courts should not judicially legislate. Our position is that to slice a piece of time out of the period during which a statute exists on the books as a valid law and by judicial fiat to say that that statute will not be enforced and recognized as the law of the land during said piece of time, constitutes judicial legislation and violates fundamental concepts of separation of powers in a democratic form of govenment.

POINT IV

THIS COURT, BY ALLOWING RETROACTIVE RECOVERY IN WORTHEN AND DENYING RETROACTIVE RECOVERY IN THE CASES AT BAR, HAS DENIED PLAINTIFFS THEIR RIGHT TO EQUAL PROTECTION OF LAWS CONTRARY TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fourteenth Amendment to the United States Constitution insofar as material here reads as follows:

> "No State shall make or enforce any law . . . nor deny to any person within its jurisdiction the equal protection of the laws."

While it is true that equal protection of laws does not require absolute equality of treatment in all situations, it does protect citizens against unequal treatment by resort to purely arbitrary and nebulous classifications or differences. This has been explained in several United States Supreme Court cases.

In *Walters vs. City of St. Louis* (Mo. 1954) 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660, the Court stated:

> "Equal protection does not require identity of treatment. It only requires that classification

> rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification as to be wholly arbitrary. Cf. Dominion Hotel Inc. v. State of Arizona, 249 U.S. 412, 57 S.Ct. 772, 81 L.Ed 1193; New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 58 S.Ct. 721, 82 L.Ed. 1024; Skinner v. State of Oklahoma ex. rel. Williamson, 316 U.S. 535, 62 S.Ct. 110, 86 L.Ed. 1655. 'In its discretion it may tax all, or it may tax one or some, taking care to accord to all in the same class equality of rights.' Southwestern Oil Co. v. State of Texas, 217 U.S. 114, 121, 30 S.Ct. 496, 54 L.Ed. 688."

The Supreme Court of the United States has also made it very clear that the equal protection clause is directed to every form of state action, whether legislative, executive or judicial.

See *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 373-374, 6 S.Ct. 1064, 30 L.Ed. 220, where the Court stated:

> "* * * Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

In *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, the Court emphasized that State Court actions come within the equal protection of laws provi-

sion of the United States Constitution. There the Court stated:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government."

We take the position that allowing retroactive recovery in Worthen and denying retroactive recovery in the seven cases now before the Court constitutes a denial of equal protection of laws for the reason that there is simply no substantive distinction between the cases which should allow inequality of treatment. As heretofore pointed out, the distinction this Court has fastened onto is that the winner of the race to the courtroom recovers and the losers don't. This is true regardless of which accident happened first and regardless of which case is filed first. In a sense, a deputy county clerk really decides who wins when he jockeys the cases onto the court calendar. Does this kind of distinction satisfy the requirement of equal protection of laws? We respectfully submit that the seven plaintiffs now before the

Court are entitled to a definitive answer.

We do not contend that a court cannot apply a new decision prospectively. Courts have often done this under different circumstances than exist in the cases at Bar on the theory that the new distinction amounts to new law. This theory does not hold up here for reasons discussed at Points II and III in this brief. But even if this Court were to decide on a prospective application of a new interpretation of Section 35-1-62, it could not give retroactive recovery to Worthen, allow that decision to become final, and then refuse the same treatment to the seven plaintiffs here without violating the equal protection of laws concept.

We take the position that an Appellate Court, if it is to comply with the requirement of equal protection of laws in applying a new decision prospectively, must come within one or the other of three distinct categories.

First, it could adopte the rule that no case which had been *finally determined* would come under the new decision. This is the basis which the Supreme Court of the United States has used in recent cases involving such matters of exclusion of evidence, violation of the right to counsel, etc. See for example *Walters v. City of St. Louis, Mo.,* supra.

The cases at Bar do not come within any such possible distinction. They weren't even filed and most certainly were not finally determined at the time Worthen was given retroactive effect by this Court.

Second, it could adopt the rule that no case would be given the benefit of the new decision. This could be a reasonable breaking off point providing all litigants were treated alike. But here Worthen was given retroactive effect and the cases at Bar were *filed* after Worthen. Consequently, the Court here is laboring under a total disability to make date of filing the determining factor.

Third, it could adopt the rule that the new decision would apply only to transactions which occurred subsequent to the new decision. But here again a Court cannot apply the new decision to the circumstances of the case before it and then refuse to apply the new decision to other cases coming before it under substantially the same circumstances without violating the equal protection of laws concept. In addition, the transactions in each of the cases at Bar occurred *after* the transaction in Worthen.

Worthen recovered his attorney's fees but the Plaintiffs here have been denied recovery although their causes of action arose under substantially the same circumstances. The attempted division of Worthen and the seven cases at Bar into different categories is tenuous and lacking in substance. This Court has made fish of one and foul of another. Equal justice demands equal treatment. We respectfully request this Honorable Court to allow us a rehearing on this important constitutional question.

POINT V

THIS COURT, BY ALLOWING RETROACTIVE RECOVERY IN WORTHEN AND DENYING RETROACTIVE RECOVERY IN THE CASES AT BAR HAS DENIED PLAINTIFFS THEIR RIGHT TO "UNIFORM OPERATION" OF LAWS UNDER ARTICLE I, SECTION 2 AND ARTICLE I, SECTION 24 OF THE UTAH CONSTITUTION.

In Point IV of our brief we have called attention to the fact that Plaintiffs have been deprived of their right to equal protection of laws contrary to the Fourteenth Amendment to the United States Constitution. The Utah State Supreme Court has made it clear that interpretations of provisions of the United States Constitution by the United States Supreme Court are highly persuasive in connection with interpretations of similar provisions of the Utah Constitution. See *Untermyer v. State Tax Commission* (1942) 102 Utah 214, 129 P.2d 881. The provisions of the Utah Constitution applicable here are as follows:

Constitution of Utah, Article I, Section 2.

> "All political power is inherent in the people; and all free governments are founded on their authority for *their equal protection and benefit*, and they have the right to alter or reform their government as the public welfare may require." (Italics ours)

The other provision of the Utah Constitution applicable here is Constitution of Utah, Article I, Section 24.

> "All laws of a general nature shall have uniform operation."

The most frequently cited case setting forth the test of whether an arm of State Government violates the equal protection of laws requirement is *State v. Mason,* (1938) 94 Utah 501, 78 P.2d 920, where the Court states:

> "It is only where some persons or transactions excluded from the operation of the law are as to the subject matter of the law in no differentiable class from those included in its operation that the law is discriminatory in the sense of being arbitrary and unconstitutional. If a reasonable basis to differentiate those included from those excluded from its operation can be found, it must be held constitutional."
>
> "* * * a classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded from its operation, *provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act.*"

Other cases discussing the rule of law as it pertains to equal protection of laws under the Utah Constitution are as follows:

State v. Bayer (1908) 34 U. 257, 97 P. 129;

Salt Lake City v. Utah Power and Light (1914) 45 U. 50, 142 P. 1067;

State v. Haltgreve (1921) 58 U. 563, 200 P. 894, aff'd. 285 U.S. 105, 76 L.Ed. 643, 52 S.Ct. 273;

State v. Packer Corp. (1931) 77 U. 500, 297 P. 1013;

Blackman v. City Court of S.L.C. (1934) 86 U. 541, 38 P.2d 725;

Carter v. State Tax Commission, (1939) 98 U. 96, 96 P.2d 727;

State v. J.B.&R.E. Walker, Inc. (1941) 100 U. 523, 116 P.2d 766;

Untermyer v. State Tax Commission (1942) 102 U. 214, 129 P.2d 881;

Garrett Freight Lines, Inc. v. State Tax Commission (1943) 103 U. 390, 135 P.2d 523;

Patterick v. Carbon Water Conservancy District (1944) 106 U. 55, 145 P.2d 503;

Gronlund v. Salt Lake City (1948) 113 U. 284, 194 P.2d 464;

Wallberg v. Utah Public Welfare Commission (1949) 115 U. 242, 203 P.2d 935;

Tygesen v. Magna Water Co. (1950) 119 U. 274, 226 P.2d 127;

Hansen v. Public Employees Retirement System Board of Administrators (1952) 122 U. 44, 246 P.2d 591;

Abrahamsen v. Board of Review of Industrial Commission (1955) 3 U.2d 289, 283 P.2d 213; and

Justice v. Standard Gilsonite Co. (1961) 12 U.2d 257, 366 P.2d 974.

As can be seen the basic test of whether a classification is unreasonable or arbitrary is whether said classification "bears a reasonable relationship to the purposes to be accomplished by the act."

Turning to the case at Bar, the legislative purpose to be accomplished by Section 35-1-62 was to equitably distribute the burden of paying attorneys' fees and costs between the injured party and the compensation carrier in third party cases. The intent was that said purpose be carried out following the effective date of 1945. It was the McConnell case that defeated that purpose.

The judicial purpose of the Utah Supreme Court in deciding the reverse McConnell was to erase an incorrect decision and place in harmony once again the legisaltive and judicial meaning of the statute. We submit that there is absolutely no reasonable relationship between the attempted classification of litigants by applying the "first man to the courtroom" test and the legislative and judicial purpose to be accomplished by the act. There is no basic reason consistent with that purpose for giving some compensation carriers a free ride and not others. Justice demands an opposite result.

In Toronto et ux. v. Sheffield et al. (1950) 118 U. 460, 222 P.2d 594, action was commenced by Toronto against Sheffield to quiet title. The Trial Court entered judgment for Plaintiff, thus sustaining Plaintiff's claim that a certain four year Statute of Limitations barred the defense set up by Defendant. Defendant appealed on the basis that said four year Statute of Limitations enacted in 1939, which barred actions for recovery of real estate which had been sold for delinquent taxes after 1939 but did not bar such actions for sales made before

1939, was unconstitutional. The Supreme Court of Utah sustained Defendant's contention and reversed, stating:

> "Our state Constitution, Article 1, Section 24 provides that 'all laws of a general nature shall have uniform operation.' And Section 1 of the Fourteenth Amendment to the federal constitution forbids any state to 'deny to any person within its jurisdiction the equal protection of the laws'
> * * *
>
> Here, there is no basis whatever for the distinction made. The conditions surrounding the sale to the county under (statute) since the 1939 amendment and the objects and purposes thereof are exactly the same as those of (earlier and similar statute) prior to that amendment. *The only factual difference whatever is a slight change in the procedure and the fact that the sale made under the former statute must have been made before the one under the present statute and therefore deals with a claim which is more stale.* Certainly that fact would not justify the distinction of barring the new claims while not barring the older ones. *We therefore conclude that this differentiation between these two classes of sales bears no reasonable relation to the purposes to be accomplished by this act and therefore hold that the discrimination against persons who as plaintiffs here purchased tax titles transferred to the county under the statute in effect prior to the 1939 amendment is arbitrary and unreasonable and therefore is unconstitutional.*"

The analogy between Toronto and the cases at Bar is obvious. In Toronto the legislature lifted the sales made *before* 1939 out of the act, set them aside, and

treated them differently. Why? Only because they were "more stale" than the later cases. But this difference, the Court said, "bears no reasonable relation to the purposes to be accomplished by this act." The Court went on to say that the act was discriminatory and therefore unconstitutional.

Here we have a judicial decision that does the same thing as did the legislative decision in Toronto. Here the Court has applied a judicial interpretation to Worthen, thus accomplishing the legislative intent to have the compensation carrier pay its share of attorney's fees and costs, but has denied that same interpretation to plaintiffs in the case at bar, thus defeating the selfsame legislative intent. It is clear that because the "race to the courtroom" classification "bears no reasonable relation to the purposes to be accomplished" either by the legislature or by the judicial decision now under scrutiny, said decision is "arbitrary and unreasonable and therefore is unconstitutional."

See also *Sugarhouse Mercantile Co. v. Salt Lake County et al.* (1950) 119 Utah 234, 225 P.2d 1050, to the same effect.

POINT VI
THE INSTANT DECISION IS INCONSISTENT WITH WORTHEN VS. SHURTLEFF.

The decision in *Worthen vs. Shurtleff* compels a decision for plaintiffs in the instant case. This court, on similar facts in *Worthen vs. Shurtleff,* 19 Utah 2d 80, 426 Pac. 2d 223, ruled against the Utah State Depart-

ment of Finance as administrator of the State Insurance Fund and ruled that the State Insurance Fund should pay its share of costs and attorney's fees.

In *Worthen vs. Shurtleff,* the accident was December 2, 1964, the Court order requiring payment by the Insurance Fund May 25, 1966 and the Supreme Court decision April 3, 1967. In the Walton, Simmons, Williams, Scott, Melo, McNeeley and Roedel cases, the accidents were variously from April 27, 1962 to February 20, 1964, the payments under protest variously from October 27, 1964 to January 1967, the suits filed for recovery against the Insurance Fund from October 21, 1968 to April 30, 1969 and the Supreme Court decision, the instant decision, January 29, 1970.

The only conceivable way for the Supreme Court to hold as it did is to find that *Worthen vs. Shurtleff* created a new cause of action, created at the time of the enactment of the statute, Section 35-1-62, Utah Code Annotated 1953, but eliminated or suspended in 1962 by *McConnell vs. Commissioner of Finance*, 13 Utah 2d 395, 375 Pac. 2d 394. But the inconsistency in that position is that *Worthen vs. Shurtleff* found, on its own facts, a cause of action to have existed since either the District Court Order requiring contribution March 25, 1966 or from the date services were rendered, the benefit of which the Fund enjoyed, sometime between the date of accident December 2, 1964 and date of said Order March 25, 1966.

Had the instant cases been filed and argued simultaneously with *Worthen vs. Shurtleff,* would their facts not have compelled the same result? Obviously, yes. The instant cases are similar in all crucial respects to *Worthen vs. Shurtleff* and on the same principles must be decided the same way.

Indeed, had the *Worthen vs. Shurtleff* case and these cases come on before this Court the same day, as they might well have done, the payments in all five cases under protest to the Fund having been made in the 30-month period prior to the April 3, 1967 *Worthen vs. Shurtleff* decision, and had the *Worthen vs. Shurtleff* case been setlled on the Courthouse steps or before decision, the same arguments which sustained the *Worthen vs. Shurtleff* decision would have compelled a similar decision here.

But, let us examine the cases for essential differences. For that purpose, crucial dates are set forth as follows:

(See chart on Page 23)

It is essential to ask when did the cause of action arise? *Worthen vs. Shurtleff,* itself, of necessity, recognizes a cause of action to have arisen at an earlier date than its April 3, 1967 decision date. If then, the cause of action arose by the Insurance Fund's refusal to pay and if a four year statute of limitation is applicable, as the lower court ruled, then these cases almost have to be decided the same way as the *Worthen vs. Shurtleff* case.

The lower court's ruling as to the four year statute of limitations reads as follows:

> "I am also of the opinion that the four year statute of limitations of Sec. 78-12-25 UCA 1953 applies since I consider that the action is based upon a contract for services rendered rather than an action for a liability created by statute Sec. 78-12-26 (three year statute) or against an officer who is a tax collector, Sec. 78-12-31 (six month statute.)"

If a three year statute of limitation should be applied, Williams, Scott, Melo, McNeeley and Roedel would fail, however Walton and Simmons still coud not possibly fail under the same reasoning of the *Worthen vs. Shurtleff* case.

Further examination of the case will reveal that the only essential differences between the instant cases and *Worthen vs. Shurtleff* is that in the *Worthen vs. Shurtleff* case the plaintiff refused payment altogether and in the instant cases, the Insurance Fund was paid under protest.

Plaintiffs should not have to depend upon their protest to preserve their rights to recover back the payment as money had and received by the Insurance Fund and to which it was not entitled or, for money owed for compensation for services rendered. However, it is well established that when payment is made under protest, the protest preserves the rights of the protester.

A protest is unnecessary where it would be useless, *Illinois Glass Company vs. Chicago Telegraph Company,*

85 NE 200. It is evidence of compulsion and unwillingness to pay and notice to the person to whom the payment is made that the person paying does not acquiesce in the illegal demand and thereby surrender up any right he may have to recover back the money. *McMillan vs. Richards*, Calif. 70 Am. Dec. 655.

Especially should this be so where the person making payment is at a disadanvtage in assertion of his legal rights at the time of payment, and in such instance the party ought to be allowed, as noted in 40 Am. Jur., "Payments," Art. 185, pp. 842, to "assert his supposed right on reasonably equal terms," by making payment and bringing suit later.

Name of Case	*Date of Accident*	*Date of Payment Under Protest*	*Date Suit Filed* Order	*Date of Supreme Court Decision*
McConnell vs. Commissioner of Finance				Oct. 24, 1962
Worthen vs. Shurtleff	Dec. 2, 1964	Paid into court Mar. 18, 1966	Mar. 25, 1966	Apr. 3, 1967
Walton vs. Utah State Department of Finance	Apr. 27, 1962	Dec. 24, 1966	Jan. 20, 1969	Jan. 29, 1969
Simmons vs. Utah State Department of Finance	Apr. 27, 1962	January 1967	Jan. 20, 1969	Jan. 29, 1969
Williams vs. Utah State Department of Finance	Jan. 15, 1963	Oct. 27, 1964	Oct. 21, 1968	Jan. 29, 1969
Scott vs. Utah State Department of Finance	Mar. 6, 1962	Jan. 4, 1965	Nov. 15, 1968	Jan. 29, 1969
Melo, McNeely, and Roedel vs. Utah State Department of Finance	Feb. 20, 1964	Jan. 5, 1966	Apr. 30, 1969	Jan. 29, 1969

In *Buford vs. Lonergan,* 6 Utah 301, 22 Pac. 164, Affirmed, 148 U. S. 581, 37 L. Ed 569, the Utah court sustained by the Supreme Court of the United States, held that party making payment less than voluntary and under protest was able to recover back the excess money paid even through all parties were in possession of all the facts.

In that case, before the day of delivery of cattle purchased, plaintiffs paid a large part of the price but the defendant refused to deliver the cattle until the full balance of the alleged price was paid, whereupon plaintiffs paid it under protest, claiming theright to deduct the price of cattle allegedly not delivered. The court said, page 308:

> "Plaintiffs were compelled to either pay this demand or seek redress by tedious and expensive litigation, the property hostile to plaintiff's interest and liable to deterioration and loss. Payment under such circumstances was not a voluntary payment, and, being made under duress, may be recovered back; and the fact that it was made with knowledge of all the facts makes no difference."

POINT VII

WORTHEN VS. SHURTLEFF, 19 UTAH 2d 80 SHOULD BE APPLIED CONSITENT WITH ITS OWN FACTS.

The Court, in the instant case, said:

> ". . . Since the construction of a statute in the light of existing judicial interpretation(the McConnell case) is the precise issue here, we think

> and hold that, espousing such fiction here simply would amount to judicial legislation . . ."

We submit that this court has, in this instance, done what it seeks to generally avoid, i.e., judicially legislate, in that, as pointed out earlier, it changes the effective date of a statute and it applies on-again, off-again the obligation of the Insurance Fund to pay its own expenses as if the statute itself had changed.

There are those cases where an overruling decision should be given only prospective effect but we submit that this is not such a case involving, as it does, only simple issues of debtor and creditor. As stated in numerous cases, in 10 ALR 3rd 1371, the general rule is that a judicial overruling of a precedent has both prospective and retroactive effect unless the overruling decision declares that it shall have only prospective effect. We agree the judicial overruling of a precedent should not be given retroactive effect where to do so would unfairly interfere with vested rights, contractual rights, domestic rights, boundary lines, public buildings already constructed, changes of position made in reliance upon the legislative interpretation: bonded indebtedness incurred based directly upon an interpretation, or other cases wheer the positions of parties have changed in reliance upon the interpretation. It is respectfully submitted that any such exceptions to the accepted general rule of retroactivity has no application in these cases because the plaintiffs and defendant never entered into any contracts of any kind except by implication and because the rights

and obligations between them arise out of a contribution principle as enunciated by the terms of the Utah statute, and where no one has been, or could be inconvenienced by reliance upon the interpretation overruled.

CONCLUSION

We are aware of the fact that petitions for rehearing are not often granted. This is because ordinarily counsel for the respective parties have been heard, and the issues have been fully met by the Court.

The cases at Bar present a different situation. As a result of clerical error counsel for five of the Plaintiffs has not been heard. Of greater importance is the fact that this Honorable Court's opinion gives rise to serious questions involving whether justice has been done, and whether the opinion itself is Constitutional. Most of these questions have never been presented because they are the offspring of the opinion itself.

First, this Court's adoption of the "first man to the courtroom" test of retroactivity has defeated the legislative intent to require compensation carriers to bear their share of attorney's fees and costs in third party cases. There is absolutely no legal necessity for this Court to judicially cause such an unjust result in the very face of a contrary legislative intent.

Second, this Court's adoption of the "first man to the courtroom" test amounts to judicial legislation inasmuch as its effect is to lift a piece of time between 1962 and 1967 out of the effective period of Section 35-1-62

and to give compensation carriers free rides during that time, contrary to the legislative intent. It is our position that this Honorable Court should not tamper with the effective date of a statute.

Third, this Honorable Court, by allowing retroactive recovery in Worthen and denying it here as denied Plaintiff their right to equal protection of laws contrary to the United States Constitution. The division of Worthen and the cases at Bar into separate classifications on the basis of the "first man" to the courtroom" test is wholly arbitrary and discriminatory.

Fourth, plaintiffs have likewise been denied "equal protection and benefit" and "uniform operation" of laws contrary to the Utah Constitution by adoption of the "first man to the courtroom" test.

In conclusion we respectfully submit that Plaintiffs should be granted a rehearing in the interest of basic justice.

Respectfully submitted,

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