1969

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 : Brief In Support Of Petition For Rehearing

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DON GERALD WILLIAMS; JAMES ALLEN SCOTT; JEANETTE WALTON, Administratrix of the Estate of ROBERT WALTON, Deceased; BOYD SIMMONS; ANGELO MELO; WAULSTINE McNEELEY and WILLIAM J. ROEDEL,

Plaintiffs and Respondents

vs.

UTAH STATE DEPARTMENT OF FINANCE as Administrator of the STATE INSURANCE FUND,

Defendant and Appellant.

Case No.

11753

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Petitioners, with the hopeful expectation that the court will grant their petition and afford them the privilege of appearing *amicus curiae* in this matter, have prepared this brief in support of the Petitions for Rehearing that have been filed by the plaintiffs herein. This brief will develop the reasons for rehearing or clarification set forth in said petition.

STATEMENT OF THE CASE

The plaintiffs obtained a summary judgment, based upon stipulated facts, from the trial court which rendered

a memorandum decision that held that the case of *Worthen* v. *Shurtleff & Andrews,* 19 Utah 2d 80, 426 P. 2d 223 (1967), was controlling rather than the case of *McConnell* v. *Comm'r of Fin.,* 13 Utah 2d 395, 375 P. 2d 394 (1962). This decision was reversed by this Court, holding that the *Worthen* case would not be applied retroactively and that the *McConnell* decision was controlling. Plaintiffs-respondents have filed Petitions for Rehearing seeking a reversal of this Court's opinion and affirmance of the district court judgment. Because the present opinion of this Court is the first holding in this State with respect to the important rule of retroactivity of judicial decisions, and its effect, therefore, may be profound, petitioners join in seeking a rehearing and reversal or a clarification of the holding of the Court.

STATEMENT OF POSITION

In 1942, the Utah Legislature enacted Section 35-1-62, *Utah Code Annotated,* 1953, which provides as follows:

> When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representatives may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustees of the cause of action against the third party and may bring and maintain the action

> either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission.
>
> If any recovery is obtained against such third person it shall be disbursed as follows:
>
> (1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear.
>
> (2) The person liable for compensation payments shall be reimbursed in full for all payments made.
>
> (3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

In October, 1962, the Utah Supreme Court in *McConnell* v. *Comm'r of Fin., supra,* first discussed the effect of Section 35-1-62. The essential facts in *McConnell* were as follows:

(1) Plaintiff, while in the course and scope of his employment was injured.

(2) The State Insurance Fund, as workmen's compensation carrier, paid compensation to plaintiff.

(3) Plaintiff recovered damages from the third-party tortfeasor.

(4) Plaintiff reimbursed the State Insurance Fund for workmen's compensation paid.

(5) Plaintiff commenced an action against the State Insurance Fund (Commission of Finance) to recover back attorney's fees from the State Insurance Fund.

(6) The trial court awarded plaintiff summary judgment, and the Utah Supreme Court reversed, holding as follows:

> With relation to the disbursement of the proceeds in a recovery against a third party, the first subsection of the statute gives a first priority to the payment of costs, including attorney's fees, of the action. These expenses are to be apportioned among the *parties*.
>
> The second subsection gives a second priority to the reimbursement in full to the insurance carrier made by it in way of compensation to the injured employee.
>
> * * * in the instant case, the State Insurance Fund was not a *party* to the action and did not incur any legal expenses.
>
> * * * If the 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, the Court's.)

In April of 1967, the Utah Supreme Court decided *Worthen* v. *Shurtleff & Andrews, supra.* There the following facts appear:

(1) Plaintiff was injured in the course of his employment.

(2) Plaintiff received compensation from the State Insurance Fund.

(3) Plaintiff commenced an action against the third-party tortfeasor, which case was settled and in which case, plaintiff recovered his damages.

(4) The State Insurance Fund was then ordered into the case for a determination as to how the recovery should be disbursed, and to show cause why it should not be required to bear its share of the attorney's fees.

(5) The trial court awarded to plaintiff attorney's fees as to the amount of reimbursement, and the Utah Supreme Court affirmed, holding as follows:

> Where each of the parties [the injured employee and the insurance carrier] has the right to bring the action [against the third-party tortfeasor] and one takes the initiative and obtains a recovery for the benefit of both, it is only fair that each bear his share of the expenses necessarily incurred in doing so. * * * In providing that if recovery is obtained against the third party the expenses including attorney's fees shall be charged "proportionately against the *parties* as their *interests* may appear," it is to be noted that those terms could not apply to the two parties in the original action (plaintiff Worthen and defendant Shurtleff and Andrews) because Worthen receives from Shurtleff and Andrews who have no further interest in it after paying it over. Therefore, the only possible "parties" who have "interests" in the money are Worthen and The State Insurance Fund (the latter being entitled to reimbursement.) * * *
> * * * When a statute undertakes an allo-

> cation of funds, the sequence in which it does so should be regarded as having some significance. * * * If we do as the statute says and make the allocation provided in paragraph (1) first, that is, charging the recovery with the costs and attorney's fees in proportion to the interests of the parties, the disbursement stated first is made first, and has priority over the provision for disbursement which follows in paragraph (2). Then the reimbursement to the insurer is made from the funds remaining and to extent possible after the first requirement for disbursement is complied with. This application of the statute can be reconciled with the requirement that the insurer be "reimbursed in full" by regarding that phrase simply meaning reimbursement for its full share after the prior requirement of the statute is fulfilled, and the insurer cannot be compelled to take less than its proportionate share in any compromise or settlement arranged by others. (Emphasis, the Court's.)

Following the *Worthen* decision, a number of cases with similar facts were filed against the Utah State Department of Finance, as Administrator of the State Insurance Fund. The plaintiffs were compensation recipients who had obtained recovery from third parties and who had repaid the Fund in full the compensation received but with a protest that the Fund should be required to pay its proportionate amount of the attorneys' fees that had been incurred in the successful action against the third party. These cases were all consolidated for trial and a decision favorable to plaintiffs rendered. This Court has now rendered an opinion reversing these plaintiffs' judgments in *Williams* v. *Utah State Dep't of Fin.*, Appeal No. 11753.

The pertinent and essential facts were set forth in the opinion as follows:

> Each plaintiff 1) suffered on-the-job injuries, 2) received compensation from the Fund under the Workmen's Compensation Act (Title 35-1, U. C. A. 1953) 3) sued and recovered judgment against third-party tortfeasors, 4) paid the costs and attorneys' fees incident thereto, 5) returned to the Fund amounts they had received therefrom, 6) but under protest, after refusal of the administrators of the Fund to share in such expenses, 7) all of which occurred *before* this court's decision in Worthen v. Shurtleff, which required those administering the Fund to share such expenses in a similar case, but 8) *after* the then subsisting governing case of *McConnell* v. *Comm. of Finance* was decided by this court, which case was overruled in a three to two decision in the Worthen case, insofar as it was inconsistent with the latter decision.

The Court concluded:

> That Worthen v. Shurtleff should not be applied retroactively so as to permit the plaintiffs here to recover part of their costs and attorneys' fees incident to their independent actions against third-party tortfeasors.

Another case was filed, following *Worthen,* by two Salt Lake legal firms in the United States District Court against an insurance carrier which had written certain workmen's compensation coverage. These lawyers had successfully handled a number of wrongful death actions on behalf of the heirs of certain workmen who had been killed in the course of their employment. The heirs had received compensation awards against the insurance carrier as de-

pendents of the dead workers and had been paid a part of such award when the recovery was effected from the third-party wrongdoer. All of the compensation that had been received was repaid from the recovery and the lawyers only charged attorneys' fees on that part of the recovery which was in excess of the total compensation that had been awarded. This legal charge was made with the understanding that counsels' efforts had not been required by nor had they established any part of the compensation award which the clients had obtained by operation of state law. The suit was filed against the insurance carrier by these attorneys seeking a reasonable fee for their recovery of the amount of the compensation that had been paid and the release of further unpaid amounts by reason of the provisions of Section 35-1-62 *Utah Code Annotated,* 1953. The *Williams* decision, while expressly limited to the facts involved in those particular cases, could arguably be urged for the proposition that even under the different circumstances of this federal suit, recovery should be denied on a theory that the *Worthen* decision can only operate on claims accruing after the entry of such decision.

ARGUMENT

POINT I.

THE COURT HAS NOT APPLIED THE CORRECT RULE AS TO THE RETROACTIVITY OF OVERRULING DECISIONS.

Appellant, Utah State Department of Finance, as Administrator of the State Insurance Fund, acknowledged in its brief that "the majority of state courts have held that

decisions will be applied retroactively" but then criticizes such holdings on the ground that the courts had followed the erroneous philosophy that they only interpreted law and didn't create it and that an overruled decision "should be treated as if it never was" (Appellant's Brief pp. 4 & 5).

Whether the legal writers relied upon by appellant for the conclusions were correct in their observations is open to question. A careful reading of many of the cases concerned with the question of whether to apply the rule of an overruling decision retroactively or only prospectively reveals that the great majority of these cases held for a retroactive application for the sake of uniformity and equal treatment unless legal relations were affected that had been entered into in reliance on the overruled decision. Such cases created an exception to the general rule of retroactivity because to give a retroactive application in such circumstances would be contrary to the understanding and reliance of the parties involved and produce unjust and inequitable results.

The following quote from appellants' brief, setting forth the so-called Austinian view that is relied on by the appellant, acknowledges this general rule and exception:

> Austin maintained the judges do, in fact do something more than discover law; they make it, in many instances. He advocated that rather than be erased by a later decision, an over-ruled decision is to be considered a juridical fact and cases decided under it and relations entered into in reliance on it are not to be disturbed. (Appellant's Brief p. 6.)

It is submitted that in the cases involved in this appeal there are no relations entered into in reliance on the *McConnell* decision nor do they involve any cases decided under *McConnell* any more than did the *Worthen* case.

Here, as in *Worthen,* the simple facts are that the compensation recipient hired counsel and expended costs in seeking a recovery from a third person, which recovery, by statute, had to include the interests and claims of the compensation carrier. Such carrier was thus enabled to sit back and let someone else expend the time, money, and effort on its behalf to obtain for it a full recovery with no obligation for such service and recovery.

The State Insurance Fund did not enter into legal relations, change its position or otherwise rely on the *McConnell* case to its detriment. The relationships and actions of the parties in proceedings seeking recovery from a third party pursuant to the provisions of Section 35-1-62 remain the same whether the *McConnell* decision or the *Worthen* decision is applied except as to equitable sharing in fees and costs. The only detriment and inequity involved is in the continued application of the *McConnell* decision after it has been determined that the legislative interpretation contained therein was erroneous.

Appellant's contention that, by the decision in the *McConnell* case, this court "created" the law rather than "interpreted" it is clearly spurious. It cannot be denied that courts can "create" law. The considerable criticism of the recent past against the Supreme Court of the United States for this practice graphically establishes this fact.

There is, however, no basis for the contention of appellant that law was "created" by this Court in the *McConnell* case, for the Court was there merely interpreting the intention of the legislature in passing Section 35-1-62 *Utah Code Annotated,* 1953. This *Williams* decision, however, does subject this court to the criticism of "creating" law by "judicial legislation" for it in effect legislates a difference in the application of the statute during the period of time between the decision in the *McConnell* case and the one in the *Worthen* case. This court in *Worthen* again interpreted the legislative intent, concluded *McConnell* was erroneous, and thereby reversed the effect of the same statute as to the recovery of attorney's fees from the compensation carrier. Unless there are compelling reasons to the contrary, this statute should be applied uniformly and in a non-discriminatory manner.

It is readily acknowledged that while the rule of retroactivity is firmly entrenched as a basic premise of our judicial system, it is not without certain exceptions which are as well founded as the rule itself. The danger of the oversimplification of such exceptions is neatly pointed out by the appellant in its brief where it quotes authoritatively from American Jurisprudence in support of the sweeping proposition that "the overruling of a judicial construction of a statute will not be given retroactive effect. . . ." (Appellant's brief page 5.) The utilization by appellant of this American Jurisprudence quote also points out the danger of "black letter" legal conclusions from treatises which oversimplify or overstate the nuances of fairly complicated legal propositions. Indeed, the American Jurisprudence

oversimplification is neither a full nor an accurate reflection of the law, nor does it purport to be, for the footnote to the section cited by appellant refers to a comment note in 85 *A. L. R.* 262 in which it is stated:

> The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. To this the courts have established the exception that, where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. . . . The true rule in such cases is held to be to give a change of judicial construction in respect to a statute *the same effect in its operation on contracts and existing contract rights* that would be given to a legislative repeal or amendment; that is to say, make it prospective, but not retroactive. (Emphasis Added.)

The point is thus made clear that it is not because the change of judicial construction involved a statute that required the application of an exception to the general rule of retroactive application, but rather, because there were contracts or contract rights that would be invalidated or impaired unless such overruling decisions were given prospective effect only. Such an exception would apply not only to overruling decisions involving statutory interpretations but to any overruling decision where retroactive application would subject persons who have justifiably relied

on the overruled decision to substantial unfairness or undue hardship.

The case of *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145 (1932), relied on by the appellant, supports this rule. The Supreme Court there held at page 365, 287 U. S.:

> A state in defining the limits of adherance to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382, 44 S. Ct. 197, supra), that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. [Citing cases.] * * * The alternative is the same whether the subject of the new decision is common law [Citing cases.] or statute. [Citing cases.] The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. (Emphasis, the Court's.)

This case involved a suit between a carrier and a shipper for recovery of excess tariff charges. Because the carrier and shipper were presumed to have bargained on the basis of existing law including the judicial construction placed on a statute, the Supreme Court of Montana provided that its new rules with respect to such suits should operate prospectively only. Justice Cardozo in the decision did not speak favorably of the Austinian approach as claimed by appel-

lant but merely concluded that the highest court of the state may make a choice for itself whether the new rule shall operate prospectively or retroactively, whether the subject of the new decision is common law or the construction of the statute.

For a number of other cases which likewise provide for prospective application only where retroactive application would effect rights contracted or established in reliance on the prior decision, see the following cases.: *Kelley* v. *Rhoads,* 7 Wyo. 237, 51 P. 593 (1898); *State* v. *Jones,* 44 N. M. 623, 107 P. 2d 324 (1940); *Oklahoma County* v. *Queen City Lodge No.* 197, *I.O.O.F.,* 195 Okla. 131, 156 P. 2d 340 (1945); *Linn County* v. *Rozelle,* 177 Ore. 245, 162 P. 2d 150 (1945); *Arizona State Tax Comm'n* v. *Ensign,* 75 Ariz. 376, 257 P. 2d 392 (1953); *Forster Shipbuilding Co.* v. *Los Angeles County,* 54 Cal. 2d 45, 6 Cal. Rptr. 24, 353 P. 2d 736 (1960); *State ex rel. Wash. State Fin. Comm.* v. *Martin,* 62 Wash. 2d 645, 384 P. 2d 833 (1963).

It is respectively submitted that unless this Court can determine and find that the appellant had obtained vested rights in reliance on *McConnell* which would be invalidated or impaired by the retroactive application of the *Worthen* decision, or that appellant would be otherwise inequitably harmed if retroactive effect were given to *Worthen,* or that the rule in *Worthen* can be fairly and adequately effectuated without applying it retroactively, or that the administration of justice would be unduly burdened by retroactive application, the decision should be given retroactive effect.

POINT II.

ALLOWING RECOVERY IN THE WORTHEN CASE AND DENYING RECOVERY HERE DEFEATS THE LEGISLATIVE INTENT AND IS ARBITRARY, DISCRIMINATORY, AND UNJUST.

The only differences in the facts of the *Worthen* case and the cases at bar are that the plaintiff in *Worthen* obtained a favorable decision from this court before the claims of the plaintiffs in the other cases reached this court, and that plaintiff in *Worthen* refused to pay the State Insurance Fund before obtaining such a decision while the plaintiffs here paid the Fund under protest. These distinctions do not logically support a favorable result to the plaintiff in the *Worthen* case and an unfavorable one to the plaintiffs in these cases on a basis of denying retroactive effect to the *Worthen* decision.

We have pointed out under Point I that the facts of the cases involved in this *Williams* decision do not come within any of the recognized exceptions to the general rule of retroactive application of overruling decisions. Even, however, if such facts did come within an exception to this general rule and therefore require prospective effect only, such prospective treatment should have been expressly provided for in the *Worthen* decision together with a denial of recovery to the plaintiff in that case. In other words, consistency and uniformity require that only those cases with claims arising after such decision was rendered should have the benefit of the overruling decision.

If the Court authorizes, as it did in *Worthen,* recovery for a claim which arose prior to the overruling decision, there is neither logic nor justice in denying recovery to other similar claims. Justice demands the equal treatment of indistinguishable claims and a uniformity in the dispensaton of a rule of law.

The propriety of departing from the general rule of retroactivity by laying down a new rule to apply prospectively after a given date has been vigorously attacked by Judge Robert Von Moschzisker of Pennsylvania in an article in 37 *Harvard Law Review.* He says at page 426:

> Such a method would not only be plain and outright legislation by the courts, but must prove quite ineffectual as a practical remedy, since parties would, in all probability, be unwilling to attack by litigation points already settled, when a new ruling would alter the law only prospectively, and could not be applied to their dispute. Furthermore, our judicial system would have to undergo a decidedly questionable change before judges would be willing to apply one rule of law to the case before them, and lay down an opposite one by which they and their successors should be bound in the future. Under our existing system the latter attempted ruling could be nothing more than dicta.

This quote points up another problem inherent in the *Williams* decision and that is that the Court, despite its statement to the contrary, has engaged in "judicial legislation". Section 35-1-62 was enacted in 1945. In October 1962 the *McConnell* case was decided, interpreting this statute and concluding that the legislature intended to give the

compensation carrier a full recovery of compensation payments made by it without incurring any obligation for legal services rendered and costs expended to accomplish this result on its behalf. In April 1967 the *Worthen* case again reviewed this same statute and then interpreted the legislative intent to be exactly contrary to the previous holding by deciding that the compensation carrier was obligated to pay a reasonable fee for such services. Thus the *Williams* decision, in denying a retroactive effect to the *Worthen* case and in effect denying that the legislative intent was the same during all of the period of time from the enactment of the section in 1945 to the present, constitutes "judicial legislation" in which this court expressly stated that it did not wish to engage.

POINT III.

THE CONFLICTING DECISIONS FOUND IN THE WORTHEN AND WILLIAMS CASES CONSTITUTE A DENIAL TO THE PLAINTIFFS OF THEIR CONSTITUTIONAL RIGHTS TO A UNIFORM OPERATION AND EQUAL PROTECTION OF LAW.

There are two significant provisions of the Utah Constitution which we submit are applicable in this case. They are:

1. 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 governments as the public welfare may require."

2. Article I, Section 24: "All laws of the general nature shall have uniform operation."

It has been repeatedly pointed out that there are no valid differences or distinctions between the plaintiff in the *Worthen* case and the plaintiffs here which would affect the application of the concept of retroactivity. To apply different rules to the same causes denies uniform operation of the law of this State and the equal protection of the law to this citizens of this State because such decisions are discriminatory, arbitrary and unreasonable and therefore unconstitutional under the express provisions of the Utah Constitution.

This Court, in *State* v. *Mason,* 94 Utah 501, 78 P. 2d 920 (1938), stated the rule as follows:

> 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.* (Emphasis added.)

The *Worthen* decision was obviously intended to give a correct judicial interpretation to the legislative intent in passing Section 35-1-62. This case held that one of the legislative purposes to be accomplished by this section was to require compensation carriers to bear a full proportionate share of the legal expenses involved in effecting a recovery from a third party. This interpretation is obviously just and equitable, and there is no reasonable basis for absolving some compensation carriers of this obligation merely because a recovery was effected during a period of time when an erroneous judicial interpretation of this section was outstanding.

The *McConnell* case defeated the legislative purpose and intent of equally distributing the expense in effectuating a recovery between the injured worker or his heirs and the compensation carrier in third-party cases. Now that this has been overruled and the controlling section correctly interpreted, all injured workers or their heirs whose claims are not barred by the applicable statute of limitations should have the same right to recover the fees or costs expended by them that are allocable to the compensation carrier's interests. The desirability of such a result is even clearer in the case where an attorney directly sues the compensation carrier for his fees in representing the compensation carrier's interests where he has not attempted to effect any collection of such fees, on the carrier's part of the recovery, from the injured workman or his heirs.

The case of *Toronto, et ux.* v. *Sheffield, et al.*, 118 Utah 462, 222 P. 2d 594 (1950), is enlightening and per-

suasive on the necessity for uniformity and equal protection of law. This case involved an act of the legislature which distinguished between real estate sold for delinquent taxes before 1939 and similar sales made after 1939. In holding such distinctions unconstitutional, this Court stated at page 599, 222 P. 2d:

> Our State Constitution, Article I, 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 newer 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.

See also the following cases in which the Utah Supreme Court has held legislative acts to be violative of the uniform operation of law required of the Utah Constitution: *State* v. *Bayer*, 34 Utah 257, 97 P. 2d 129 (1908); *Salt Lake City* v. *Utah Power & Light*, 45 Utah 50, 142 P. 1067 (1914); *State* v. *Holtgreve*, 58 Utah 563, 200 P. 894 (1921), *aff'd*, 285 U. S. 105, 76 L. Ed. 643, 52 S. Ct. 273; *Gronlund* v. *Salt Lake City*, 113 Utah 284, 194 P. 2d 464 (1948); *Justice* v. *Standard Gilsonite Co.*, 12 Utah 2d 357, 366 P. 2d 974 (1961); and *Backman* v. *Salt Lake County*, 13 Utah 2d 412, 375 P. 2d 756 (1962).

The Fourteenth Amendment to the United States Constitution is likewise violated by the decision in the *Williams* case as a denial to the plaintffs of "equal protection of the laws." The equal protection clause, of course, covers all forms of governmental action whether legislative, judicial or executive. It protects citizens against unequal treatment by reason of arbitrary distinctions and differences. Because there are no real logical distinctions between the cases involved in the *Williams* appeal and the *Worthen* case with respect to the issue of retroactivity, the adverse *Williams* decision constitutes a denial of equal protection of laws. See *Walters* v. *City of St. Louis*, 347 U. S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (Mo. 1954), and *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

POINT IV.

IF THIS COURT SHOULD DETERMINE TO FIND AGAINST PLAINTIFFS, SAID DETERMINATION SHOULD NOT BE ON THE BASIS OF REJECTING RETROACTIVITY.

This Court has pointed out in its majority opinion that said opinion should be confined to the "particular circumstances of the instant cases." Indeed it has gone so far as to say "this is not to say that there cannot be decisions that have retroactive effect in a given set of circumstances." In addition, the special concurrence of Mr. Justice Ellett indicates that other factors present in the instant cases may very well have influenced the Court in arriving at its ultimate decision. As a matter of fact, we suspect that the principle enunciated in the case of *Baugh* v. *Darley*, 112 Utah 1, 184 P. 2d 335 (1947), may have had a greater influence in bringing about the ultimate decision than the concept of retroactivity.

Section 35-1-62 provides that from any third-party recovery "the reasonable expense of the action, including attorney's fees, should be *paid* and *charged* proportionately against the parties as their interests may appear." Any claim for attorney's fees would enure to counsel rendering the service and would be charged against the share of the proceeds recovered by the defendant Insurance Fund.

The payment by the plaintiffs to their attorneys of an attorney's fee on the portion of the recovery from the third party which fully satisfied the compensation award and thus made the State Insurance Fund whole would be gratuitous and officious. The *Restatement of Restitution*, Section 2, sets forth the rule that "a person who officiously confers a benefit upon another is not entitled to restitution therefor." See also 17 *C. J. S.* "Contracts" Section 6 at page 573. The *Restatement of Restitution*, Section 1 (b)

at page 12, defines a "benefit" in the context of quasi contract or unjust enrichment as follows:

> b. What constitutes a benefit. A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, *performs services* beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. (Emphasis added.)

In *Baugh* v. *Darley, supra,* plaintiff sought restitution for alleged unjust enrichment conferred upon defendant by reason of efforts expended by him in procuring a purchaser for defendant's land, the possession of which the plaintiffs held under an oral agreement to sell to plaintiff. The court stated:

> The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. Restatement of Restitution, Sec. 1, comment c. Services officiously or gratuitously furnished are not recoverable. Restatement of Restitution, Sec. 2. Nor are services performed by the plaintiff for his own advantage, and from which the defendant benefits incidentally, recoverable. See Restatement of Restitution, Sec. 40, comment c; and Sec. 41 (a) (i).

See also *Chandler* v. *Wash. Toll Bridge Authority,* 17 Wash. 2d 591, 137 P. 2d 97 (1943); Cf. *Stein* v. *Simpson,* 37 Cal. Rptr. 2d 79, 230 P. 2d 816 (1951); *Brown* v. *Thornton,* 150 Mont. 150, 432 P. 2d 386 (1967); *Osborne* v. *Boeing Airplane Co.,* 309 F. 2d 99 (9th Cir., 1962).

We submit that this Honorable Court should have a

fresh opportunity to reconsider its decision against the plaintiffs and if, after such reconsideration, it is still satisfied that they should not recover, it should decide whether such adverse ruling would be better premised on the basis of the *Baugh* case rather than on the denial of retroactivity with its inequitable and unconstitutional implications.

We come back once again to the fundamental concept that the legislative intent was to allow attorneys to recover fees on compensation awards required by statute to be recovered in third-party cases and that a denial of retroactive recovery plainly and simply constitutes an unnecessary broadcast of injustice throughout the state.

CONCLUSION

We respectfully submit that this Honorable Court should grant our Petition to appear amicus curiae and should grant a rehearing for the following reasons:

First, this Court has clearly pronounced the legislative intent when Section 35-1-62 was passed into law in the year 1945. That legislative intent was to eliminate free rides for compensation carriers in third-party cases. The statute, thusly interpreted, has eliminated injustice and made each interested party bear its share of attorneys' fees and costs. There is absolutely no defensible reason why this injustice should be perpetrated not only on the seven here, but upon other similarly situated litigants throughout the state.

Second, to allow recovery to the first litigant to reach the courtroom, *Worthen*, and deny it to all others similarly

situated, constitutes judicial discrimination between classes equally entitled to the benefits of statute. It is our position that this decision would constitute a violation of "uniform operation" of laws and "equal protection and benefit" of laws contrary to the Utah Constitution. The same decision would likewise violate the "equal protection of laws" provision of the United States Constitution.

And, third, if the majority of this Honorable Court has reasons other than an outright refusal to allow retroactive application of the *Worthen* interpretation, as would seem to be the case in view of the special concurrence and careful language in the majority opinion confining same to the facts of the seven cases now before the Court, then the Bench and Bar should be so advised so that obvious injustice stemming from the concept of denied retroactive application of the *Worthen* interpretation can be eliminated from Utah law.

Respectfully submitted,

DAVID K. WATKISS

ROBERT S. CAMPBELL, JR.