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Case No. 11753

BRIEF IN OPPOSITION TO REHEARING

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STATEMENT OF CASE

The Utah Supreme Court held on the original decision in this case that *Worthen vs. Shurtleff and Andrews,* 19 Utah P. 2d 223, should not be applied retro-

actively to govern cases that occurred prior to the decision in *Worthen.* Respondents and amicus curiae have petitioned for rehearing.

DECISION ON ORIGINAL HEARING

The Utah Supreme Court held that the decision in *Worthen v. Shurtleff and Andrews,* 19 Utah P. 2d 223, should not be applied retroactively to govern cases that occurred prior to the decision in *Worthen.*

STATEMENT OF FACTS

The appellants agree with the statement of facts contained in the original decision in this case and the original brief.

ARGUMENT

POINT I

THERE IS NO MERIT TO PETITIONERS' PRIMARY ARGUMENTS FOR REHEARING: i.e., THAT THE INSTANT DECISION IS UNFAIR; ILLOGICAL; DISCRIMINATORY, ARBITRARY, AND UNJUST; DENIES THE RESPONDENTS EQUAL PROTECTION OF THE LAW; AND DENIES THE RESPONDENTS UNIFORM OPERATION OF THE LAW.

The respondents and amicus curiae have urged many "points" in their briefs for granting a rehearing. They have argued primarily that the decision in the instant case is: (1) unfair; (2) illogical; (3) discriminatory, arbitrary and unjust; (4) denies the respondents equal protection of the law; and (5) denies the respondents uniform operation of the law. The theory underlying all the points is the philosophy, first promulgated by Socrates, that persons in equal situations should be treated equally. They argue that the respondents in this case are similarly situated to plaintiff Worthen in the case of *Worthen v. Shurtleff and Andrew,* 19 Utah P. 2d 223. Thus, they urge that to apply different law to the respondents would be unfair, illogical, discriminatory, arbitrary and unjust; and it denies the respondents equal protection and uniform operation of the law. In this reply brief, appellant will treat all these points together as the same rationale and law applies.

Inasmuch as none of these points was raised prior to the petition for rehearing, the court should refuse to consider them. See *People v. Tidwell,* 5 Utah 88, 12 Pac. 638; *Harrison v. Harker,* 44 Utah 541, 142 Pac. 716; *Swanson v. Sims,* 51 Utah 485, 170 Pac. 744; *Dahlquist v. Denver & R.G.R. Co.,* 52 Utah 438, 174 Pac. 833; *Pingree National Bank of Ogden v. Weber County,* 54 Utah 599, 183 Pac. 334; *Western Securities Co. v. Silver King Cousd Min. Co.,* 57 Utah 88, 192 Pac. 664; e.g.; *In re Lowe's Estate,* 68 Utah 49, 249 Pac. 128.

Although new points may not be urged for the first time on rehearing, see cases cited, *supra,* respondent is not content to rely on this general rule for denial of rehearing but desires to go further and point out the fallacy underlying petitioners' rationale.

Petitioners urge that the refusal to apply the *Worthen* case retroactively denies their constitutional rights — the right to equal protection of the law and the right to uniform oeration of the law. However, in the same brief, petitioners cite *Great Northern R. Co. v. The Sunburst Oil & Refining Co.,* 287 U.S. 358 in which the United States Supreme Court held that the retroactive question does not raise a constitutional issue. See also *Tehan v. the U.S. ex, rel, Shott,* 382 U.S. 406. Mr. Justice Cardoza in the *Sunburst* case, *supra,* stated:

> "This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal. We think the federal constitution has no voice upon the subject. A state is defining the limits of adherence 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. . . . As applied to each transaction we may say of the earlier decision that it has not been overruled at all, . . . that transactions arising in the future will be governed by different rule. . . . The alternative

> is the same whether the subject of the decision is common law or statute. The choice for any state may be determined by the judicial philosophy of judges of her courts. . . .

Mr. Justice Cardoza's rationale was recently affirmed in United States Supreme Court in the case of *Linkletter v. Walker,* 381 U.S. 618 wherein Mr. Justice Clark stated:

> "We believe that the constitution neither prohibits nor requires retrospective effect. . . .
>
> [W]e are neither required to apply nor prohibited from applying decisions retroactively . . . we but apply the wisdom of Justice Homes — that the life of the law has not been logic, it has been experience."

The briefs urging rehearing, although short on authority are lengthy on argument and analogies, i.e., petitioners argue that the present decision makes the outcome of a case depend upon "a race to the court house" or upon some deputy clerk's "jockeying" the court calendar. It is difficult, however, to see the applicability of petitioners' argument in view of the lengh of time — years — they waited to present their claims in the instant case. But petitioners argue that since they are in essentially the same position as Worthen it is unfair, discriminatory, arbitrary, and unjust to give different results to them than to Worthen, just because Worthen presented his

claim first. However, this argument is a two-edged sword. For example, the compensation carrier in the *Worthen* case was in the identical situation as the State Insurance Fund in *McConnell v. Commission of Finance,* 13 Utah 2d 395, 375 P. 2d 394. Under petitioners' rationale, *Worthen* must have been improperly decided as it applied different law to two similarly situated insurance carriers and, thus, was discriminatory, unfair, arbitrary, etc. (See Mr. Justice Henroid's dissent in the *Worthen* case.) The logical result of petitioners' rationale is that there could never be overruling precedent inasmuch as every case overruling another case applies different law to the same facts. Following petitioners' rationale further, since plaintiff McConnell in the *McConnell* case is in the same position as Worthen and the respondents herein, he should now be allowed recovery. Thus, petitioners' rationale not only prevents growth in the law and the overruling of erroneous precedent, but also does away with the doctrine of res judicata.

Although petitioners' rationale (persons in equal situations should be treated equally) is emotionally appealing, it is rather naive. It only looks to one interest of the law; i.e., equity. However, the law has other, equally important interests. The law must grow; it must meet the exigencies of the times; and must also overrule erroneous decisions. While the law should attempt to treat persons in equal positions equally, it must also be

stable, predictable and final. As Rosco Pound stated: "Law must be stable, yet it cannot stand still." *Interpretations of Legal Histories,* (1923) page 1. Sometimes these important legal goals conflict, such as when precedent is overruled. The courts cannot allow the goal of stability to prevent correction of erroneous precedent. Yet, when precedent is overruled, courts cannot allow the goal urged by petitioners, to disrupt justifiable expectations and relations entered into in reliance on the earlier precedent. Thus it is necessary to compromise the goals urged by petitioners with the goals of stability, predictability, and finality. A proper manner in which to balance these conflicting interests, as pointed out in earlier brief and done by the Supreme Court in the instant case is to reverse a case but refuse to apply the new doctrine retroactively. This has been the suggested procedure of Austin, Cardoza, Traynor and Bodenheimer. It has been approved and even recommended by the United States Supreme Court, the Utah Supreme Court in the instant case, and other state and federal courts. (See authorities cited in brief on original hearing.)

POINT II

PETITIONERS ARGUMENTS THAT THE INSTANT CASE IMPROPERLY APPLIED THE LAW OF LIMITED RETROACTIVITY ARE WITHOUT MERIT.

Petitioners urge that the Supreme Court erred in the instant case in applying the rule against retroactive effect of overruling precedent. They urge that the

Worthen case, in effect, applied the law retroactively since the facts in the *Worthen* case occurred prior to the decision. Thus, they argue that the *Worthen* decision had, in effect, retroactive effect, and, therefore, the decision in *Worthen* must also be applied to them. If petitioners mean that the Supreme Court did not legislate in *Worthen,* i.e., applied law to fact, not just to govern future situations, then they are correct. No doubt, each case decided by a court is, in a sense, retroactive inasmuch as courts must decide cases on particular fact situations that occurred. However, such logic does not dictate that the court must apply the new law to fact situations that occurred prior to the decision. As pointed out in earlier quotations from Mr. Justice Cardoza, the state courts are at liberty to determine the prospective, retroactive or limited retroactive effect their decisions will have. Again, he stated:

> "A state in defining the limits of adherence to precedent may make a choice for itself between the principal 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. . . . As applied to each transaction we may say of the earlier decision that it has not been overruled at all, . . . that transactions arising in the future will be governed by a different rule."

Sunburst case, *supra.*

Some of respondents argue that the doctrine of limited retroactivity was improperly applied to them as the facts in their cases occurred subsequent to the facts in *Worthen.* However, that is unimportant as may be seen from the quotation above. Moreover the cut-off usually used by state court when applying the doctrine of limited retroactivity is the date of the decision. If the facts in the case occurred prior to the date of the overruling decision then the old law is applicable. (See the cases cited in the brief on the original appeal.) Similar cases have arisen with respect to the retroactivity of decisions doing away with governmental immunity. For example, in *Holytz v. Milwaukee,* 17 Wis. 2d 21, 115 N.W. 2d 618 the Wisconsin Supreme Court abolished the doctrine of governmental imunimty from tort liability. However, in *Marshall v. Greenbay,* 18 Wis. 2d 496, 118 N.W. 2d 715, the *Holytz rule* was not applied retroactively although the *Marshall* case was pending in the lower court on the date the *Holytz* case was decided. See also *Terry v. Mount Zion Community United School District,* 30 Ill. app. 2d 307, 174 N.E. 2d 701.

The gist of the decisions in both the original brief and this brief is that the state court may determine for itself the amount of retroactive effect an overruling precedent will have, and, thus, there is no mandatory legal requirements Consequently, the instant decision could not have erroneously applied the law. Moreover,

the manner in which the court in the instant case limited the retroactive effect of *Worthen* is the general way courts have done in the past, i.e., *Worthen* is controlling on all cases with facts arising after the date of its decision and *McConnell* controls cases with facts occurring prior to the *Worthen* case. Such limited retroactivity protects justifiable expectations and the legal goals of stability, predictability, and finality while allowing the law to grow and correct erroneous decisions.

Respectfully submitted:

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