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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 : Respondents' Brief On Rehearing

IN THE SUPRE
OF THE STATE

DON GERALD WILLIAMS,
Plaintiff,

vs.

UTAH STATE DEPARTME
as Administrator of the
Defendant

JAMES ALLEN SCOTT,
Guardian Ad Litem,
Plaintiff

vs.

UTAH STATE DEPART
as Administrator of the
Defendant

JEANETTE WALDO,
Estate of Robert
Plaintiff

vs.

UTAH STATE DEPART
as Administrator
Defendant

BOYD SIMMONS,
Plaintiff

vs.

UTAH STATE DEPART
as Administrator
Defendant

ANGELO MELO,
WILLIAM F.
Plaintiff

vs.

UTAH STATE DEP
as Administrator
Defendant

RESPONDENTS.

Appeal from the Jud
County for
Hon. Bryan

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

GA
Coun
Salt
DWIG
2121 S
Salt Lake
Attorney
Respondents

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JAMES ALLEN SCOTT, by and through his Guardian Ad Litem, Erma Lee Scott,
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Plaintiff,
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Case No. 11753

RESPONDENTS' BRIEF ON REHEARING

STATEMENT OF CASE

This Petition for Rehearing is related specifically to the Jeanette Walton and Boyd Simmons cases and involves the question of whether those two cases involving claims arising *after* the claim in Worthen should be denied the benefit of Worthen.

DECISION ON ORIGINAL HEARING

This Honorable Court reversed *all* of the consolidated cases by applying to them the rule of *McConnel v. Commission of Finance*, 13 Utah 2d 395, 375 P.2d 94 (1962).

RELIEF SOUGHT ON REHEARING

Your Petitioners seek to have the Court reconsider its decision as it applies to the particular circumstances in the Walton and Simmons cases and to reconsider the legally significant cut-off date.

STATEMENT OF FACTS

The Trial Court consolidated several cases for appeal involving similar questions of law. Unfortunately, however, the dates with respect to each of these cases were different. This Court in making its decision may not have fully understood the set of circumstances in the Walton case and the Simmons case, whose claims both arose after the claim in Worthen. To avoid any confusion with respect to the dates of legal significance, Petitioners have enclosed on the last page of this Brief, a critical Time Path Schedule comparing the important dates of Worthen with those of Walton and Simmons.

The claim in Worthen arose on March 18, 1966, the date the tortfeasor's carrier paid the settlement check into Court, in trust, pending the outcome of the dispute. Thereafter, the Insurance Fund (which wasn't a party) voluntarily intervened to settle the

dispute. On March 25, 1966, the District Court in Worthen, ordered the Insurance Fund to pay its proportionate share of the attorney fee. It was that March 25, 1966 Court Order which this Court in Worthen affirmed on April 3, 1967.

In Walton, the plaintiff received a Judgment in the Federal District Court on November 22, 1964. That decision was appealed to the Circuit Court of Appeals which on August 31, 1966, affirmed the Judgment. On December 21, 1966, plaintiff paid the Insurance Fund under protest. Plaintiff thereafter on January 20, 1969, filed suit against the Fund to collect the amount paid under protest.

In Simmons, the plaintiff received a settlement in the latter part of January, 1967. On January 31, 1967, the plaintiff paid the Insurance Fund under protest, and on January 20, 1969, filed suit against the Fund to collect the amount paid.

The right of the State Insurance Fund to be reimbursed at all is entirely dependent on; (1) there being a settlement or a final Judgment; and, (2) a fund created out of such settlement or judgment. Those two conditions came into existance in Worthen on March 18, 1966, in Walton on December 21, 1966, and in Simmons on January 31, 1967. According to Judge Croft's Memorandum Decision of June 27, 1969, the above dates for Walton and Simmons would constitute the date upon which the claim arose and the Statute of Limitations would begin to run.

ARGUMENT

POINT ONE

THE COURT SHOULD RECONSIDER THE LEGALLY SIGNIFICANT CUT-OFF DATE.

Strictly speaking a "prospective opinion" is one in which the new rule of law applies to future cases only and not even to the case before the Court. The April 3, 1967 Worthen decision was not a "prospective opinion" but had "limited retroactive effect" because it was applied to the parties in that case on a claim which arose on March 18, 1966.

It was unclear, however, the extent to which the Worthen decision should be given retroactive effect with respect to claims such as in the Walton and Simmons cases which arose after the claim in Worthen and which were not even the subject of litigation until after the Worthen decision was announced.

Appellant in his brief has erroneously contended that the Supreme Court has "looked with favor in having prospective application only." In determining whether to apply an overruling decision retroactively in such situations the Supreme Court has not discarded applying its decisions retroactively. In the most recent decisions, the Court has applied "limited retroactive effect" to the overruling decisions as the Court did in Worthen. Instead of arbitrarily applying the date of the overruling decision as the cut-off date, the Supreme Court has

applied different cut-off dates with respect to those events which occurred prior to any announcement of a new rule or where litigation of such events was not commenced until after the announcement of a new rule.

The Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 20 Led 2d 1231 (1968), held that the new rule in *American Tobacco Co. v. United States*, 328 U.S. 781, 90 Led 1575 (1946), was applicable to that case where litigation began after the date of the American Tobacco decision, but involved conduct which had occurred prior thereto. The Court emphasized that there was no such justifiable reliance as would warrant the American Tobacco decision to have prospective effect only.

The Supreme Court in *Cipriano v. Hauma*, 395 U.S. 701, 23 Led 2d 647 (1969), announced the new rule to the effect that it was unconstitutional to limit the righ to vote in elections for approval of the issuance of municipal utility bonds tc just property taxpayers. The Court applied the new rule to the parties in that case and further extended the "limited retroactive effect" by stating that the new rule would apply only where, under state law, the time for challenging the election results had not expired, or in cases which were brought within the time specified by state law for challenging the election and which were not yet final.

The Supreme Court in*Lear, Inc. v. Adkins*, 395 U.S. 653, 23 Led 2d 610 (1969), likewise announced a new rule by repudiating the doctrine that a patent

licensee was estopped to challenge the validity of a patent. The Court rejected the contention that the new rule should not be retroactively applied to contracts concluded before the decision was announced.

Court have likewise in a number of tax cases involving taxable events which occurred before the time of an overruling decision, held that the overruling decision should be applied retroactively so as to result in the imposition of taxes to an extent which would not have been permitted while the overruling case had not yet been overruled.*Sunray Oil Co. v. Commissioner*, 147 F 2d 962 (10th Cir. 1945); Cert. den. 325 U.S. 861, 89 Led 1982; *Massaglia v. Commissioner*, 286 F 2d 258 (10th Cir. 1961); *Legg's Estate v. Commissioner*, 114 F. 2d 760 (4th Cir. 1940).

The State Courts have likewise been flexible in arriving at different cut-off dates based upon the particular circumstances of each case. The Utah Supreme Court in *Hamilton v. Salt Lake County Sewerage Improvement District No. 1*, 15 Utah 2d 216, 390 P 2d 235 (1964) gave "limited retroactive effect" to that decision. In order to alleviate any fears the amicus had in that case the Court indicated that Hamilton would not effect "similar cases" where the issuance of bonds had become fait accompli and the time for protest under Utah Code Ann. § 17-6-3.11 (1953 as amended) had expired. In effect the Court was applying that decision retroactively for those cases not yet barred by the above Statute of Limitations.

In *Stone v. Arizona Highway Commission,* 93 Arizona 384, 381 P. 2d 107 (1963) the Court in a case involving a wrongful death action abolished the doctrine of governmental immunity from tort liability and applied that new doctrine to the facts in that case. In doing so, the Court not only abolished the doctrine as to that case but also expressly abolished it as to all pending cases, those not yet filed, those which were not barred by the Statute of Limitations, and as to all further causes of action.

In *Scheele v. City of Anchorage,* Alaska, 385 P 2d 582 (1963) the Trial Court granted Summary Judgment for the City on grounds of governmental immunity. The plaintiff in that case appealed contending that the Court should have applied the prior decision of *Fairbanks v. Schaible,* 357 P 2d 201, retroactively to him despite the fact that the events which gave rise to his claim occurred before the Fairbanks decision was handed down. The Supreme Court accepted that argument and held the new rule of law applied to those events which occurred before Fairbanks was handed down, as well as all other pending cases, those not yet filed and not barred by the Statute of Limitations.

It doesn't seem fair or logical to still approve of *Worthen,* but yet apply *McConnel* to Walton and Simmons whose claims both arose almost six (6) months after the claim in Worthen and which weren't even the subject of litigation until after Worthen. This Court should discard the arbitrary cut-off date of the Worthen decision. The Courts present decision won't even reward the litigant who

wins the race to the Courthouse since it is possible one might have his case heard first but decided after a case which was heard later. Prospective limitation of Worthen will retard judicial efficiency. It will force judges to apply simultaneously two different rules — one of them acknowledged to be "wrong" — to claims which arose at similar points in time. We ask the Court to consider the following problems which the Court's present decision creates: In Worthen, this Court on April 3, 1967, affirmed the District Court's March 25, 1966 decision setting forth a new rule. In the future when District Courts apply new rules which are appealed, must they await until that decision is affirmed to apply that new rule to other cases? If not, won't those cases to which the District Court subsequently applies the new rule be reversed in the event this Court as in Worthen applies the new law only the overruling case itself and not to cases arising thereafter?

POINT TWO

THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 24 OF THE UTAH CONSTITUTION REQUIRE THAT THOSE CASES SIMILARLY SITUATED RECEIVE EQUAL TREATMENT.

Where a law is not being applied equally to those governed by that law, the above constitutional provisions require that any such disparity in treatment be reasonable. In application this means (1) the classification must be a rational one bearing some reasonable relationship to the object of the legisla-

tion, and (2) that all persons within the classes established must be treated equally. In determining whether the above constitutional provisions have been violated the test is not the form in which the state power has been applied but by whatever forms, whether such power has in fact been exercised unfairly.

The Supreme Court in *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) made it quite clear that not only must a statute be non-discriminatory, but it must also be applied in a non-discriminatory manner. In that case, a statute provided that laundries in wooden buildings—as distinguished from brick or stone buildings —could not be carried on without a license. The classification itself appeared impartial and not unreasonable, but in application the licensing authority consistently refused licenses to Chinese applicants and granted licenses to non-Chinese. Since the statute was being applied with an "unequal hand" it was held to be in violation of the federal "equal protection clause."

It is a fundamental requirement in our law that like cases should receive like treatment, that there should be no discrimination between one litigant and another except based upon some relevant differentiating fact. This value of equality appears to be at the heart of our notions of justice. Equality of treatment to those similarly situated demands that this Court which on April 3, 1967, applied the Worthen rule to a claim arising on March 18, 1966, apply that same new rule to Walton and Simmons whose claims arose after the claim in Worthen.

POINT THREE

THE CONCURRING OPINION IS IN ERROR SINCE IT IS BASED ON A NEW DEFENSE NOT EVEN ASSERTED BY APPELLANT AT TRIAL OR EVEN ON APPEAL.

The concurring opinion is based on a defense which was never presented by the Appellant at either the Trial Court level or on this appeal and should therefore not be followed. This Court in *Teamsters Local Union No. 222 v. W. S. Hatch Co.*, 20 Utah 2d, 226; 436 P 2d 790 (1968) faced this identical defense which was urged for the first time on appeal and rejected it summarily as being too late. In the Hatch case, the dissenting opinion urged unsuccessfully that the Court should adopt the law as set forth in 40 Am. Jur. § 155, as follows:

> **"Payments which are voluntarily made cannot be recovered, but recovery may be had of payments made as the result of duress, fraud, mistake, or failure of consideration. In fact, it has been said that these are the only grounds upon which a suit to recover back money paid may be maintained."**

Not onlyi s the above referred to law being urged too late, it in fact does permit recovery as a result of duress, mistake, or failure of consideration. Had the above defense been timely asserted the evidence would have established that Respondents payments were not "voluntarily" made but instead were coerced by the State Insurance Fund in return

for its agreement to endorse the settlement check on which it was named a co-payee. The above common law statement is likewise not applicable for the reason that Respondents claims are based on a specific statutory right ~~or~~ AND not a contractual right.

WHEREFORE, we respectfully petition this Honorable Court to reconsider its decision as it applies to the special facts in Walton and Simmons whose claims arose after the claim in Worthen.

Dated this 3rd day of March, 1970.

Respectfully submitted,

FORD G. SCALLEY

Attorney for Petitioners
Jeanette Walton and
Boyd Simmons

404 Kearns Building
Salt Lake City, Utah 84101

TIME PATH COMPARISONS OF WORTHEN, WALTON, AND SIMMONS

WORTHEN			Accident suit filed Feb. 15, 1965		* Settlement and payment into Court Mar. 18, 1966		District Court ordered Insurance Fund to pay attorney fee Mar. 25, 1966		Appeal to Supreme Court		Supreme Court affirmed District Court Order Apr. 3, 1967	
WALTON	Wrongful death suit filed Federal District Court Feb. 11, 1964	Judgment obtained Nov. 22, 1964		Appeal to Circuit Court				Circuit Court affirmed Judgment on Aug. 31, 1966	*Payment under protest to Fund Dec. 21, 1966			Suit filed against Fund Jan. 20, 1969
SIMMONS				Accident suit filed Federol District Court Mar. 30, 1965						*Settlement ond payment to Fund under protest Jan. 31, 1967		Suit filed against Fund Jan. 20, 1969

* Date when claim arose in each case.