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Nev. Yellow Cab, et al., v. Eighth Jud. Dist. Ct., 132 Nev. Adv. Op. 77 (Oct. 27, 2016).[1]

CONSTITUTIONAL LAW; MINIMUM WAGE; RETROACTIVITY

Summary

The Court, sitting *en banc*, considered a writ of mandamus challenging a district court order denying a motion dismiss and motion for summary judgment. The Court held that its previous decision in *Thomas v. Nevada Yellow Cab Corp.*[2] applied retroactively. As a result, the Minimum Wage Amendment (the "Amendment") to the Nevada Constitution passed by Nevada voters in 2006 included taxicab driver wages.

Facts and Procedural History

Nevada has exempted taxicab drivers from minimum wage requirements since the 1970s.[3] In 2004 and 2006, Nevada voters approved an amendment to the Nevada Constitution that set new minimum wage standards but failed to expressly repeal the taxicab exemption provision. Prior to the 2006 election, the Nevada Attorney General's Office released an opinion stating that the amendment would also repeal exemptions to taxicab companies.[4] However, in 2009, the federal district court of Nevada held that the Amendment had not repealed the exemption provisions and therefore dismissed a group of drivers' claim for unpaid wages from a limousine company.[5] In 2014, this Court disagreed stating that the Amendment had "impliedly repealed" the minimum wage exemptions in NRS § 608.250(2)(e) thereby ordering the companies to pay the taxicab drivers the minimum wage.[6]

In two subsequent district court class actions, several taxi cab drivers sought to recover unpaid wages dating back to the effective date of the amendment from the Nevada Yellow Cab Corporation, Nevada Star Cab Corporation, and Boulder Cab, Inc. (collectively, the taxicab companies). The taxicab companies filed motions to dismiss and for summary judgment arguing that the court's holding in *Thomas* applied prospectively, not retroactively. The courts denied the motions and the taxicab companies filed writ of mandamus petitions with the Nevada Supreme Court raising the same arguments.[7]

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[1] By Beatriz Aguirre.

[2] 130 Nev., Adv. Op. 52, 32 P.3d 518 (2014) (finding that the 2006 Minimum Wage Amendment to Nevada Constitution "impliedly repealed" NEV. REV. STAT. § 608.250(2)(e)'s exemption of minimum wage requirements for industries, such as taxicab companies); *see also* NEV. CONST. art. 15 § 16 (2015).

[3] NEV. REV. STAT. § 608.250 was amended in the 1970s to specifically exempt taxicab companies from paying taxicab drivers the state minimum wage.

[4] 05-04 Op. Att'y Gen. 12, 21 (2005).

[5] *See* Lucas v. Bell Tans, No. 2:15-cv-01792-RCJ-RJ, 2009 WL 2424557, at *8 (D. Nev. June, 24, 2009), *abrogation recognized in* Thurmond v. Presidential Limousine, No. 2:15-cv-01066-MMD-PAL, 2016 WL 632222 (D. Nev. February 17, 2016).

[6] *See* Thomas v. Nevada Yellow Cab, 130 Nev., Adv. Op. 52, 32 P.3d 518, 522 (2014).

[7] The court consolidated the writ petitions under NRAP 3(b).

Discussion

A. Writ of Mandamus

The court exercises its direction to provide writ relief under "circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition."[8] The Court justified its departure from the traditional appellate procedure by stating that five cases raising similar "important legal issue[s] in need of clarification" had been filed in Clark County.[9] Further, the Court's review would promote sound judicial economy particularly because the decision would impact employees statewide.[10]

B. The Nevada Constitution's minimum wage requirements became effective on the day the Amendment was enacted

The taxicab companies argued that the United States Supreme Court and this Court's precedent instructed that the *Thomas* decision should have applied prospectively to avoid "inequitable results" in paying back wages to taxicab drivers for work prior to the *Thomas* opinion.[11] The taxicab companies argued that they could not have "predicted" that the Amendment had repealed the taxicab minimum wage exemptions because the issue was so ambiguous. Further, they argued that even this court was not in unanimous agreement that the Amendment had repealed the exemptions, and the federal court in *Lucas* had reached a completely different result.[12]

(i) United State Supreme Court retroactivity precedent regarding civil laws on direct appeal

In *Chevron,* the United States Supreme Court determined that state law remedies apply to civil claims and used a three-part factor test to determine whether the relief would apply retroactively.[13] This court adopted the factors in *Breithaupt*. However, more recent Supreme

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[8] Cote H v. Eighth Jud. Dist. Ct., 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (footnote and internal quotations omitted); *See also* Int'l Game Tech., Inc., v. Second Jud. Dist. Ct., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *See, generally*, NEV. REV. STAT. § 34.160 (2015).

[9] Nev. Yellow Cab, et al., v. Eighth Jud. Dist. Ct., 132 Nev. Adv. Op. 77, 6 (Oct. 27, 2016).

[10] *Id*.

[11] *See* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Breithaupt v. USAA Property & Cas. Ins. Co., 110 Nev. 31, 867 P.2d 402 (1994).

[12] *See Lucas*, No. 2:15-cv-01792-RCJ-RJ, 2009 WL 2424557, at *8 (D. Nev. June, 24, 2009).

[13] 404 U.S. 97 (1971) (considering state law remedies in Rodrigue v. Aetna Cas. & Surety Co., 395 U.S. 352 (1969). The three factors set out in *Chevron Oil* include; (1) "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the court must 'weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation;' and (3) courts consider whether retroactive application 'could produce substantial inequitable results.'" *Breithaupt* at 35.

Court jurisprudence has disavowed the factor test when considering federal civil claims.[14] In a plurality opinion, the Supreme Court determined that it was an "error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so."[15]

(ii) The Chevron Oil Factors are inapplicable in this case

The Nevada Supreme Court determined that the taxicab companies' arguments failed because they presupposed that the Court would be "creating the law" in *Thomas* as opposed to "declaring what it already is."[16] Further, the Nevada Constitution precludes the Court from having the "quintessential legal prerogative to make rules of law retroactive or prospective as [they] see fit."[17] In that regard, the Court held that when they "interpret a constitutional amendment and conclude that it impliedly repeals a statue, that decision applies retroactively to when the amendment was enacted regardless of the balance of equities."[18] Contrary to the taxicab companies' arguments, in *Thomas* the Court declared that the Amendment in 2006 had repealed the exemptions; the Court did not create the law in 2014 when it issued its opinion. [19]

The Court reexamined its adoption of the *Chevron Oil* factors in *Breithaupt* and said that it had not applied the state remedy retroactively there because the legislature had not expressed an intent to apply a heightened notice requirement retroactively.[20] In that regard, *Breithaupt* is distinguished from *Thomas*, because *Breithaupt* was concerned with whether a rule passed by statute should apply retroactively absent legislative history and *Thomas* dealt with the judicial interpretation of a constitutional amendment. The Court had previously held that unless the Legislature clearly manifests intent to apply a statute retroactively, the statute would apply prospectively. [21] Therefore, "it is not the duty of this court to determine whether rules adopted in statutory amendments apply retroactively based on equitable factors."[22]

Conclusion

The Court concluded that NRS 608.250(2)(e) was repealed by the Amendment in 2006 and applied retroactively, not prospectively from the 2014 *Thomas* decision. The Court further declined to apply its precedent purely prospectively when considering the effect of a constitutional amendment. The petitions for writ of mandamus were denied.

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[14] *See, e.g.*, Harper v. Va. Dep't of Taxation, 509 U.S. 86, 94-97 (1993); Am. Trucking Assn's, Inc., v. Smith, 496 U.S. 167, 218-24 (1990) (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ. dissenting and stating that the "limits on retroactivity in civil cases… are inappropriate.").
[15] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 540 (1991).
[16] Quoting J. Scalia in *Am. Trucking*, 496 U.S. at 201.
[17] *Harper*, 509 U.S. at 95; Separation of Powers Clause, NEV. CONST. art. 3 § 1 (2015).
[18] *Nev. Yellow Cab*, 132 Nev. Adv. Op. 77 at 11.
[19] *Id.* at 11–12.
[20] *Id.* at 12.
[21] *See* Pub. Emps. Benefits Program v. Las Vegas Metro Police Dep't, 124 Nev. 138, 154, 179 P.3d 52, 553 (2008).
[22] *Nev. Yellow Cab*, 132 Nev. Adv. Op. 77 at 13.