

1979

# State of Utah v. Lester Romero : Brief of Respondent

Utah Supreme Court

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John Walsh; Attorney for the Appellant;

Stephen G. Schwendiman; Assistant Attorney General;

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## Recommended Citation

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STATE OF UTAH  
Director Assessor  
Administration  
Department of Public Safety

Plaintiff

-v-

LESTER ROMERO, a/k/a  
RALPH G. ROMERO,

Defendant - Appellant

---

BRIEF OF RESPONDENT

---

Appeal from the Judgment of the Third Judicial  
Court of Salt Lake County, the Honorable Judge  
Presiding.

---

ROBERT B. HANSEN  
Attorney General

STEPHEN G. SCHWENDLER  
Assistant Attorney General  
150 West North Temple  
Salt Lake City UT 84103  
Telephone: 533-7443

JOHN WALSH  
2870 South State Street  
Salt Lake City UT 84115  
Telephone: 486-9636

Attorneys for Respondent

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH, by and through )  
Director Assistance Payment )  
Administration, Utah State )  
Department of Social Service, )

Supreme Court No. 16551

Plaintiff - Respondent,

-v-

LESTER ROMERO, a/k/a )  
RALPH G. ROMERO, )

Defendant - Appellant.)

---

BRIEF OF RESPONDENT

---

Appeal from the Judgment of the Third Judicial District  
Court of Salt Lake County, the Honorable Dean Conder, Judge  
Presiding.

---

ROBERT B. HANSEN  
Attorney General

STEPHEN G. SCHWENDIMAN  
Assistant Attorney General  
150 West North Temple  
Salt Lake City UT 84103  
Telephone: 533-7443

Attorneys for Respondent

JOHN WALSH  
2870 South State Street  
Salt Lake City UT 84115  
Telephone: 486-9636

Attorney for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through  
Director Assistance Payment  
Administration, Utah State  
Department of Social Service,

Plaintiff-Respondent : Supreme Court No. 16551

-v-

LESTER ROMERO, a/k/a  
RALPH G. ROMERO,

Defendant-Appellant.

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by the State of Utah against the Defendant to recover public assistance payments fraudulently obtained by the Defendant.

DISPOSITION IN LOWER COURT

This case was heard by the trial court on its merits and the lower court granted judgment in favor of the plaintiff in the amount of \$11,981.21 with costs. (R.49). The trial court held that the judgment represented public assistance which the Defendant had fraudulently obtained by supplying false information to the State and by withholding material information with the intent to obtain public assistance to which he was not entitled. (R.49,50).

## RELIEF SOUGHT ON APPEAL

Respondent, State of Utah, seeks an affirmance of the trial court's decision.

## STATEMENT OF THE FACTS

Appellant applied for public assistance on February 11, 1969, and began to receive public assistance intermittently from February, 1969 through November, 1973. The total amount of public assistance paid by the State to the Appellant was Eleven Thousand Nine Hundred Eighty-one and 21/100 Dollars (\$11,981.21).

The State discontinued the assistance payments to Appellant when it had gathered evidence indicating that Appellant had made several misrepresentations on his application forms. The alleged misrepresentations included Appellant's annual income, his employment, his real property owned and transferred, and his wife's employment. As a result of the alleged misrepresentations, an attorney for the State, who is no longer employed by the State of Utah, filed a complaint to recover the assistance from Appellant on January 11, 1974. (R.2-3).

On April 5, 1974, the Appellant filed several discovery requests (R.6-15), and on July 18, 1978, an attorney for Respondent newly assigned to this matter answered the discovery requests. (R.23-31). Throughout the discovery period and during the trial of this case on its merits, Appellant never once raised the issue of Respondents delay in answering the



discovery requests and never requested that this case be set for trial. Thus, on September 15, 1978, Respondent requested a trial setting for this matter. (R.32).

On May 22, 1979, a pre-trial conference was held before Judge G. Hal Taylor, who concluded that no further continuance of this case would be granted unless a judge was not available, and that the defendant had sufficient notice of trial to (1) be ready to proceed, and (2) either have an attorney or be prepared to proceed pro se. (R.36). On June 13, 1979, the trial of this case on its merits was begun notwithstanding Appellant's request for a continuance, for the first time, on the morning of trial, in Judge Conder's chambers, the Defendant asked the court to dismiss the case for failure to prosecute and for laches. (R.79,84). The trial of this case was concluded on June 15, 1979 with the court ruling in favor of Respondent and granting judgment for Respondent in the amount of \$11,981.21 plus costs.

### ARGUMENT

#### POINT I

APPELLANT'S ARGUMENTS THAT WERE NOT RAISED IN THE PLEADINGS NOR PUT IN ISSUE AT THE TRIAL CANNOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

Arguments one through three of the Appellant's brief are now being presented to this court for the first time on appeal. These issues, the basis of Appellant's arguments, were never put in issue in any form through pleadings, motion, or at trial. These arguments are therefore improperly before this court and are not to be considered. The Utah Supreme Court has been

consistent in stating over the years that: "matters neither raised in the pleadings nor put in issue at trial cannot be considered for the first time on appeal." Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702, 704 (1971). See also, Park City Utah Corp. v. Ensign Co., 586 P.2d 450 (1978), Edgar v. Wagner, 572 P.2d 405 and others to numerous to cite.

The main basis for this confirmed position of the court is that the Supreme Court's jurisdiction with the exception of extraordinary writs, is appellate only. State v. Kinder, 14 Utah 2d 199, 381 P.2d 82 (1963); and Utah Const. art. VIII §4. Regarding this position, this court has said:

"The essential criterion of 'appellate jurisdiction' is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted in an acted upon by some other court, whose judgment or proceedings are to be revised. . . The jurisdiction to consider and decide causes de novo is in its essence 'original jurisdiction.'" State v. Johnson, 100 Utah 316, 114 P.2d 1034, 1037 (1941).

Thus, the trial court's purpose is to frame the issues and render a decision on appropriate evidence presented to it, while the appellate court's purpose is to review those matters which the trial court has already decided and ruled on and not rule on matters not raised at the lower level.

If this Court was to consider the Appellant's first three arguments, it would be assuming original jurisdiction in the present case. In other words, the Supreme Court would be deciding issues that were never acted on nor decided by the District court.

Such a position by the Court would place in jeopardy the District court's jurisdiction in civil matters, and the right to have matters tried by the lower court. To preserve this jurisdiction, and to ensure that matters are raised in the lower court where they should be, the Utah Supreme Court has stated in Park City Utah Corp. v. Ensign Co., 586 P.2d 446, 450 (1978).

"Where a party neither raises an issue in its pleadings nor presents it to the trial court, the issue cannot be considered for the first time on appeal."

Respondents would further like to point out to the court that parties cannot lead or allow the trial court to error at the trial level, and then if a satisfactory result is not achieved, raise these new matters on appeal if they were not to their liking below. Respondents do not believe there was error, but even if it could be so construed, feel that the Utah Supreme court has spoken: In Ludlow v. Colorado Animal By-Products Co. 104 Utah 221, 137 P.2d 347 (1943), the court stated:

"A party who takes a position which either leads a court into error or by conduct approves the error committed by the court, cannot later take advantage of such error in procedure."

It is clear from the entire record, that the conduct of Appellant allowed, consented, or acquiesced in the actions of the court -- moving ahead and holding trial on the issues -- without saying anything by way of objection. To declare now that Appellant's claims are valid and that error existed is an "after-the-fact" argument which must be rejected as being without basis. This "after thought" approach claims prejudice,"

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when in fact no such prejudice existed or has been shown.

## POINT II

SINCE NO MOTION WAS MADE AT THE TRIAL LEVEL CONCERNING RESPONDENT'S DISCOVERY ANSWERS, THE TRIAL COURT DID NOT ERR IN PERMITTING THIS CASE TO BE TRIED ON ITS MERITS.

Appellant contends that this case should have been dismissed by the lower court because of the delay of filing Appellant's answers to the discovery requests. Sanctions of the Utah Rules of Civil Procedure are not self-executing and never have been. The contention of Appellant that the trial judge should have dismissed this case without any motion being made by Appellant is not substantiated or sound. If such were allowed or ruled the correct procedure of this court, the trial judges would then be placed in a position that would require trial judges to be a third advocate, and to become judicially active in each case, thus changing the nature of actions from that of "Plaintiff vs Defendant" to an unwritten third party situation of "Court vs. Plaintiff and Plaintiff vs. Defendant and Court vs. Defendant."

Respondent agrees that there are perhaps those cases where the court on its own may find the situation such that independent rulings are made. But such is not, or has it ever been the rule. Such is, if anything, in the discretion of the trial court. In the instant case, the trial court exercised its discretion to proceed. No objection to the exercise of the discretion was raised below. Since the sanctions of the rules are not self executing and since there has been no showing or

must be sustained.

Respondent deems it important, however, to point out to the court that none of the cases cited by Appellant involve "self executing" rules. In each instance motions were brought before the court for rulings. For example, in Schmitt v. Billings, et.al., No. 16084 (Utah, filed August 24, 1979) cited by Appellant), the Plaintiff filed a summary judgment at the trial level to have the requests for admission admitted when the defendant failed to answer. And in W.B. Gardner Inc. v. Park West Village, Inc., 568 P.2d 734 (1977) (cited by Appellant), the plaintiff filed a motion for summary judgment and a motion for default judgment with the trial court when the defendant did not respond to the discovery requests.

Counsel for Respondent is involved with a separate case now when he filed requests for Admissions and Interrogatories over six months ago, and because other counsel had problems getting information, allowed the answers and admissions to be filed without further notice to the court. To say that the present filing of those documents is a futile exercise and disallowed is an injustice to the party. There are always two sides to the issues before the court. If one party acquiesces in the extensions or delays of the other party, then it can be assumed, and in fact must be accepted, that he is allowing extra time to see that proper information is forthcoming and that the trial should go on. If he thinks otherwise, the avenues of bringing the matter before the court for determination are as much a reality for one party as well as another. Appellant has no one

to complain to but himself for his action or lack of action.

In the cases cited by Appellant, the trial judge did not rule on the failure of one to respond to discovery requests until a motion was made by a party to the action. That is not so here. Since no motion was made at the trial level by the Appellant to impose the sanctions of the Utah Rules of Civil Procedure, the trial court did not err in permitting this case to be tried on its merits. At such trial level, at least, Respondent would have been able to present its side. It, not being part of this record is not relevant to the action here, but answers were timely prepared and signed and apparently filed in 1974, but when counsel who presently handles the case took over in 1978, learned they were not part of the record and resubmitted them bearing the 1978 date. If such information had been presented to the trial court in response to appropriate motion of Appellant, the trial court would still have had his discretion to rule. Since that had not happened here, Appellant is attempting to have this court make a decision without the opportunity of learning the facts. Such a position should be rejected.

### POINT III

ALTHOUGH THERE WAS A DELAY IN ANSWERING APPELLANT'S DISCOVERY REQUESTS, THE TRIAL COURT DID NOT ERR IN PERMITTING THE PRESENT CASE TO BE TRIED ON ITS MERITS.

Even if there is support for Appellant's position that the trial judge should have dismissed this case without a motion, such a decision would still be in the discretion of the trial judge. The Utah Supreme Court stated the following:

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when discussing the sanctions of Rule 37 of the U.R.C.P.:

"The language of the rule as presently worded is permissive, rather than mandatory, wherein it states: that the court '...may make such orders... as are just, and...may take any action etc.' This grants the court discretionary authority to impose the sanctions mentioned." (Carmen v. Slavens, 546 P.2d 601, 603 (Utah 1976); see also U.R.C.P. Rule 37(d). Emphasis Added).

Thus, the trial judge in using his discretion could have decided that it was just to allow this case to go to trial for any of the following reasons; (1) No motion was made by Appellant for dismissal on discovery grounds, (2) Appellant had eleven months to prepare his case for trial after the answers to the discovery requests were filed, (3) When the case finally went to trial Appellant was still not ready to defend himself, and (4) the trial judge could be following the Utah Supreme Courts' "consistent policy of resolving doubts in favor of permitting parties to have their day in court on the merits of the controversy." Ruffinengo v. Miller, 579 P.2d 342, 344 (Utah 1978); see also Carmen v. Slavens, 546 P.2d 501 (Utah 1976).

For whatever reason the trial judge had in allowing this case to go to trial, his decision was based on having all the circumstances of the case close at hand. This court has stated the following when a decision is left to the judge's discretion;

"In situations where the exercise of discretion is appropriate, considerable weight should be given to the determination of the trial court, whichever way it goes. This is true because due to his close involvement with the parties, the witnesses, and the total circumstances of the case, he is in the best position to judge what the interests of justice require in safeguarding the rights and interests of all parties concerned." Barber v. Calder, 522, P.2d 700,702 (Utah 1974).



The trial judge was in the best position to decide whether this case should go to trial, and he decided that justice would best be served by allowing the parties to have their day in court.

#### POINT IV

THE TRIAL JUDGE DID NOT ERR IN DENYING APPELLANT'S REQUEST FOR DISMISSAL OF THIS CASE ON THE GROUND OF FAILURE TO PROSECUTE.

When a trial judge has decided to grant or deny a motion to dismiss for failure to prosecute, this court has stated that it will not reverse the lower court's ruling except for abuse of discretion, to wit, that it is arbitrary, capricious, or not based on adequate findings of fact or on law. Pacer v. Myers, 534 P.2d 616, 617 (Utah 1975).

The lower court did not abuse its discretion in denying Appellant's request for failure to prosecute because when the motion was brought Respondent was diligently prosecuting this action. 2 AM JUR. 2d §59 at page 51 states as follows:

"A motion to dismiss for want of prosecution should not be granted if at the time of the motion Plaintiff is diligently prosecuting his claim, even though at some prior period of time he had been guilty of gross negligence or neglect."

Appellant's request for failure to prosecute was not brought until the first day of trial, at that time Respondent was diligently pursuing this action.

In discussing whether a motion for failure to prosecute should be granted this court has stated the following:

"It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to do a fair and impartial trial."



to be heard and to do justice between them.  
In conformity with that principle the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party."  
(Emphasis added).

Westinghouse El. Sup. Co. v. Paul W. Larsen Con., Inc., 544 P.2d 876, (Utah 1975). This court further stated in Westinghouse, id,

at page 879 that:

"Whether there is such justifiable excuse is to be determined by considering more factors than merely the length of time since the suit was filed. Some consideration should be given to the conduct of both parties, and to the opportunity each has had to move the case forward and what they have done about it; and also what difficulty or prejudice may have been caused to the other side; and most important, whether injustice may result from the dismissal." (Emphasis added).

Numerous other cases, which will not be cited, also reiterate that time is only one factor out of many.

Accordingly, the length of time since the filing of the suit is insufficient for reversal of the entire matter. Action had been taking place one year before trial up to trial itself that is prosecuting an action. In applying the other factors it is evident that the delay in prosecuting this case is reasonably excusable in light of the various counsel that plaintiff has had on the case, the complexity of the case, and that had Appellant been anxious to proceed he could have taken such affirmative steps himself, or file appropriate motions when counsel was not acting.

POINT V

APPELLANT'S REQUEST TO DISMISS BECAUSE OF LACHES  
WAS CORRECTLY DENIED BY THE TRIAL JUDGE

In matters concerning laches this court has stated  
the following:

"The existence of laches is one to be determined primarily by the trial court; and reviewing courts will not interfere with the exercise of the trial court's discretion in the matter, unless it appears that a manifest injustice has been done, or the decision cannot reasonably be found to be supported by the evidence." Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates, 535 P.2d 1256 (Utah 1975)

In the present case the trial judge did not abuse his discretion in denying Appellant's request for dismissal on laches, because the prejudices complained of by Appellant were all created by Appellant's unpreparedness and not by the delay. For example, in the present case the Respondent never gave notice to Defendant that this case was not being diligently prosecuted. In fact, Appellant knew 11 months before trial that pleadings were being filed, 9 months prior to trial that his counsel had withdrawn, 8 months prior to trial when the trial date was scheduled 5 weeks before that a pre-trial was scheduled, 3 weeks before at pretrial that Appellant would be required to be prepared because no continuances would be allowed. However, on the date of the trial Appellant had neither prepared himself nor had he obtained counsel. This was not the results of anything Respondent had done. In fact it is obvious on page 2 of the trial transcript (R.79). Appellant states: "Mr. Barker, I went into his office to find the file. He says it's in his inactive file. I had been searching three days..." The fact that only three days or even a few days before the trial Appellant took this matter

seriously is not the fault of Respondent. If a party himself delays his own preparedness after knowing the schedule of upcoming motions, or trials, the party so prepared should and must not be punished or prejudiced by the one not prepared. Based on this record, the court properly denied Appellants motion for a continuance. Only after this did Appellant try to have this case dismissed for laches. This, the court appropriately denied. If the Appellant had truly wanted to prevent the prejudices mentioned he could have procured counsel, taken affirmative steps to move the case forward, or at the very least reviewed the file kept by his attorney who had withdrawn 8 months prior to trial. None of these steps were taken by the Appellant, and thus the only thing left which Appellant could complain of was the length of the delay. However, for purposes of finding laches applicable to bar an action, mere passage of time does not amount to the required prejudice. Leon v. Byns, 115 Ariz. 451, 565 P.2d 1312 (1977); see also Darby v. Keeran, 211 Kan. 133, 505 P.2d 710 (1973); Leathers v. Commercial Nat'l Bank in Muskogee, 410 P. 2d 541 (Oklahoma, 1966).

Therefore, the trial judge did not abuse his discretion when he denied Appellant's request for dismissal on laches; because there was ample evidence to show that the injustice complained of by Appellant was inflicted upon him by himself and not by the delay. Appropriate and timely steps taken by the appellant himself would have solved his own problems.

## CONCLUSION

The Appellant misrepresented on his public assistance application forms essential information which is used to determine eligibility. As a result of these misrepresentations, Appellant obtained a substantial sum of money that he was not entitled to receive. A great injustice would occur to the State if Appellant, who perpetrated his fraud, is allowed to retain these funds.

The arguments raised by Appellant for dismissing this action have nothing to do with whether or not he committed fraud. The arguments Appellant raises on appeal deal only with the period of time between the filing of the complaint and the date this action was tried on its merits.

Appellant's first three arguments concerning the answering of discovery requests, are now being raised for the first time on appeal. This court should not consider these arguments because they were never raised in nor ruled upon by the trial court. Nonetheless, the court did not abuse its discretion, the sanctions are not self executing, and the matter was properly allowed to proceed.

On the other hand, even if the trial judge can invoke the sanctions of the Utah Rules of Civil Procedure on his own motion as Appellant contends, he chose not to do so after reviewing the record. This argument as well as arguments of failure to prosecute and laches are understood to be exerciseable "in the discretion of the trial court." The trial judge did not abuse his discretion by allowing this case to be tried on its merits.

Appellant does not cite any abuse or try to substantiate abuse except citing delay of Respondent. The court had ample evidence to determine that the Appellant was in no particular hurry in getting the pretrial discovery procedures completed, getting on with trial, or even moving the court for relief prior to trial. Thus, the lower court, as the trier of fact, was in a position to properly see the issues and evidence and ruled properly in all aspects of this case.

The judgment for \$11,981.21 plus costs should be affirmed.

Respectfully Submitted,

ROBERT B. HANSEN  
Attorney General,

STEPHEN G. SCHWENDIMAN  
Assistant Attorney General

#### MAILING CERTIFICATE

This is to certify that I mailed a true and exact copy of the foregoing Brief of Respondent to the Appellant's Attorney, John Walsh, 2870 South State Street, Salt Lake City, Utah 84115 on this 21<sup>st</sup> day of January, 1980.

Sandra Lundquist