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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 : Brief of Appellant

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In the Supreme Court of the State of Utah

DON GERALD WILLIAMS,
Plaintiff,
- vs -
UTAH STATE DEPARTMENT OF FINANCE, as Administrator of the State Insurance Fund,
Defendant,

JAMES ALLEN SCOTT, by and through his Guardian Ad Litem, Erma Lee Scott,
Plaintiff,
- vs -
UTAH STATE DEPARTMENT OF FINANCE, as Administrator of the State Insurance Fund,
Defendant,

JEANETTE WALTON, Administratrix of the Estate of Robert Walton, Deceased,
Plaintiff,
- vs -
UTAH STATE DEPARTMENT OF FINANCE, as Administrator of the State Insurance Fund,
Defendant,

BOYD SIMMONS,
Plaintiff,
- vs -
UTAH STATE DEPARTMENT OF FINANCE, as Administrator of the State Insurance Fund,
Defendant,

ANGELO MELO, WAULSTINE McNEELY and WILLIAM J. ROEDEL,
Plaintiffs,
- vs -
UTAH STATE DEPARTMENT OF FINANCE, as Administrator of the State Insurance Fund,
Defendant,

Case No. 11753

BRIEF OF APPELLANT

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UTAH STATE DEPARTMENT OF FINANCE, as Administrator of the State Insurance Fund,
Defendant,

Case No. 11753

BRIEF OF APPELLANT

NATURE OF THE CASE

Plaintiffs claim an amount of money from Defendant, Utah State Department of Finance, Administrator of the State Insurance Fund, which represents Defendants share of costs and attorneys fees in Third Party lawsuits brought under the provisions of Sec. 35-1-62 Utah Code Ann. (Repl. Vol. 1966).

DISPOSITION IN LOWER COURT

Plaintiffs received judgment.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of Lower Courts judgment.

STATEMENT OF FACTS

The claims of all of the plaintiffs have the following factors in common:

Plaintiffs received on-the-job injuries.

Plaintiffs requested and received compensation payments from defendant, Utah State Insurance Fund.

Plaintiffs pressed claims against "third parties" as provided in Sec. 35-1-62 Utah Code Ann. (Repl. Vol. 1966).

Plaintiffs received compensation of the third party claims.

Plaintiffs reimbursed the defendant for the compensation it had paid.

Defendant did not pay any portion of the attorneys' fees or court costs incurred by plaintiffs in their "third party" claims.

At the time the defendant was reimbursed, plaintiffs' attorneys protested the payment indicating that defendant should be required to pay a portion of the attorneys' fees and court costs.

All of the above events took place prior to the Utah Supreme Court decision in the case of *Worthen vs. Shurtleff and Andrews, Inc.,* 19 Utah 2d 80, 426 P. 2d 223.

At the time the above events took place, the Utah Supreme Court case of *McConnell vs. Commission of Finance,* 13 Utah 2d 395 375 P. 2d 394, enunciated the controlling law on the issued in these cases, i.e., the compensation carrier was not required to pay a portion of the attorneys' fees and court costs of "third party actions."

The present suits were commenced subsequent to the decision in *Worthen vs. Shurtleff and Andrews. Inc.,* 19 Utah 2d 80, 426 P. 2d 223.

ARGUMENT

POINT I

WORTHEN VS. SHURTLEFF, INC., 19 Utah 2d 80, 426 P. 2d 223, SHOULD NOT BE APPLIED RETROACTIVELY.

Defendant contends that the doctrine laid down in the *Worthen* case should not be applied retroactively so as to require defendant to pay costs and attorneys' fees on cases that were settled before the *Worthen* case.

The question of whether the law of a case applies retroactively or only prospectively is said to be an old and difficult one. See 20 *Am. Jur.* 2d. 562, *Courts* Section 233. To be sure, the overwhelming majority of cases dealing with the question are very old with the exception of a few cases dealing with the application of cases construing constitutional rights. A few generalities may be stated with respect to the question. First, retroactive generally does not raise a constitutional issue. *Linkletter vs. Walker,* 381 U.S. 618; *Tehan vs. U.S. ex rel Shott.* 382 U.S. 406; *Ruark vs. People,* 158 Colo. 110, 405 P. 2d 751. An exception to this rule is if retroactive effect would impair the obligations of existing contracts or destroy vested rights. *Taylor vs. Ypsilanti,* 105 U.S. 60 (15 Otto) (1881). *Jackson vs. Harris,* 43 F. 2d 513; *Continental Supply Co. vs. Abell,* 95 Mont. 148, 24 P. 2d 133; *O'Malley vs. Simms,* 51 Ariz. 155, 75 P. 2d 50. The decision of whether or not to apply a decision retroactively is within the discretion of the State Court. See *e.g. Great Northern R. Co. vs. Sunburst Oil and Refining Co.,* 287 U.S. 358. As stated by Mr. Justice Cordoza, "The choice (retroactive or prospective only) for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Id* at 365.

The two legal encyclopedias *Am. Jur.* and *Corpus Juris* agree that the majority of state courts have held that decisions will be applied retroactively. See 20 *Am. Jur.* 562, *Courts* Section 233; 21 *CJS* 326 *Courts* Sec. 194. However, *Am. Jur.* points out an execption that applies in cases such as the instant case.

> "The overruling of a judicial construction of a statute will not be given retroactive effect. Such a decision will be limited to the effect ordinarily inherent in a change of a statutory rule, that is, merely prospective effect."

20 *Am. Jur.* 2d 562-563 *Courts* Section 234. While this exception may be sufficient support for a decision in appellant's favor, appellant will go further.

Tracing the history of the question of retrospective vs. prospective, shows that the early view was that all decisions had to have retroactive effect; there was no authority for the proposition that judicial decisions made law only for the future. *Blackstone and Commentaries* 69 (15th ed. 1809) *Norton vs. Shelby County* 118 U.S. 425 (1886). The philosophy of most all the cases requiring retroactive application is that the court interprets rather than creates the law; that an overruled decision should have no effect and should be treated as if it never was. See *Gray, Nature and Sources of Law,* 222 (1st ed. 1909). The law was treated as if it were "a brooding omnipresence" and the court merely applies the law to the facts.

Legal philosophers and courts have recently realized that such a view was not very realistic and sometimes led to unjust results. Austin maintained that 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 overruled decision is to be considered a juridicial fact and cases decided under it and relations entered into in reliance on it are not to be disturbed. Many other legal philosophers and jurists have espoused the same view. See, *e.q. Cordoza, Address* 55 *Rep. N.Y. State Bar Ass'n,* 263 296-297 (1952); 376, at 387-388; *Traynor, Bad Lands in a Appellate Judge's Realm of Reason,* Utah L. Rev. 157, 167-168, (1960) *Bodeheimer, Jurisprudence* (1962). Professor Edger Bodeheimer, formerly of the University of Utah, College of Law faculty writes, "an unfortunate consequence of discarding a precedent under the still-prevailing doctrine is the retroactive effect of an overruling decision. . . . Regardless of the theoretical question as to whether a judicial decision is law until such time as it is changed, or merely rebuttable evidence of the law, it would seem perfectly sound practice for a court to overturn a precedent, but refuse to apply, on grounds of equitable estoppel, the new principle (retroactively)" *Id* at 375-376.

The Austinian view started gaining acceptance in the courts as early as one hundred years ago. In Ohio, although legislative divorces were held illegal and void, those already granted were immunized by a prospective

application of the rule of the case. *Bingham vs. Miller,* 17 Ohio 445 (1848). The United States Supreme Court first drew on the Austinian concept in *Gepcke vs. Dubuque,* 1 Wall 175 (1863). They discarded the old concept of required retroactivity. The new theory was regarded favorably by Mr. Justice Holmes in *Kuhn vs. Fairmont Coal Co.,* 215 U.S. 349, 371 (1910). Then in 1932, Mr. Justice Cordoza speaking favorably of the Austinian approach denied a federal due process attack on a state court decision allowing prospective application only. *Great Northern R. Co. vs. Sunburst Oil and Refining Co.,* 287 U.S. 358. Eight years later, Mr. Chief Justice Hughes reasoned that because a law was determined unconstitutional or a case overruled, it must still be considered "an operative fact and may have consequences which cannot be justly ignored. The past cannot always be erased by a new judicial declaration." *Chicot County Drainage Dist. vs. Baxter State Bank,* 308 U.S. 371 (1940).

Finally, the Supreme Court has looked with favor on having prospective application only. In *Mosser vs. Darrow,* 341 U.S. 267, at 276, cited approvingly in *Linkletter vs. Walker,* 381 U.S. 618 at 628, Mr. Justice Black stated, "There is much to be said in favor of such a rule (prospective application only) for cases arising in the future."

The instant case might be decided in defendant's favor on the exception, noted by *Am. Jur.,* that retro-

activity is denied in cases dealing with construction of statutes. However, the same result could be reached by re-examining the entire controversy of retroactivity vs. prospectivity. At this stage in the history of Jurisprudence, there can be no doubt that judges do make law; the law is no longer regarded as a "brooding omnipresence." Inasmuch as the old theory behind the rule of retroactivity is thoroughly discredited, an examination of prospective vs. retroactive application, in light of more modern and realistic legal philosophy is needed. If it is considered that a judicial decision can make law, then we must consider that the case of *McConnell vs. Commissioner of Finance*, 13 Utah 2d 395, 375 P.2d 394 was the law in Utah until the *Worthen* case; and further, the the *McConnell* case governs all these cases based on facts taking place prior to the *Worthen* case. Thus, an overruling precedent would operate much the same as a legislative enactment. This seems to be the only realistic and practical approach.

POINT II

PLAINTIFF'S CLAIMS ARE BARRED BY THE DOCTRINE OF EQUITABLE ESTOPPEL.

Equitable estoppel should apply in this case in the sense that Professor Bodenheimer discussed it above. In essence, the argument is that the defendant has justifiably relied on the Utah State Supreme Court's decision of *McConnell vs. Commissioner of Finance*, 13 Utah 2d 395, 375 P.2d 394 and has done so to their detriment. The

State Insurance Fund has not taken into consideration in fixing their premiums the fact that they are required to pay attorney's fees. As pointed out at the hearing in the lower court, the premiums charged to employers by appellant are based on the amount of compensation paid to injured employees in a particular industry. If compensation paid out was reimbursed in whole to appellant as result of a third-party action, then there would be no increase in premiums. This was the practice prior to *Worthen* because the State Insurance Fund actuaries, in figuring rates for premiums, were relying on the decision in *McConnell vs. Commissioner of Finance*. Further, the State Insurance Fund is considered to be made up of trust monies, *Utah State Attorney General's opinion* No. 65-015. The failure to follow the law in administering trust monies may well result in prosecution against defendant's employees, *Industrial Commission vs. Strong,* 239 Pac. 12. If we view the affect of the *Worthen* case as overruling *McConnell,* and declaring it as never being law, then defendant's employees failed to follow the law by refusing to pay attorney's fees. This may seem to be a rather hypothetical and hypertechnical interpretation; however, the same sort of situation happened in *Mosser vs. Darrow,* 341 U.S. 267 (1951). The defendant, Darrow was held personally liable for $43,000 as trustee of a reorganization trust. Not only were the acts complained of not considered wrongful prior to the case, but he did not personally profit from any of the acts which the case law subsequently prohibited. Mr. Justice Black dissented,

stating "It seems to me, however, that there is no reason why the rule should be retroactively applied. . . Under these circumstances, if the new rule is to be announced by the Court, I think it should be given prospective application only."

The defense of equitable estoppel used in the present case is somewhat different than usual. Generally, equitable estoppel is predicated on defendant's reliance on the conduct of the plaintiff. In this case, the only conduct of plaintiff's that defendant relied upon was payment with acquiesence, albeit protested acquiesence, in non participation in costs and attorney's fees. The real reliance, in this case by both defendant and plaintiffs was in the Utah Supreme Court decision in the *McConnell* case. However, this is sufficient reliance for the defense of equitable estoppel to prevent retroactive application. *Bodenheimer, Jurisprudence*, 374 (1962).

POINT III

PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

In its answers to plaintiffs' complaints, the State Insurance Fund raised the defense of statute of limitations. The lower court, in its memorandum decision, held that the limitation period of Sec. 78-12-25 *Utah Code Ann.* (1953) applied to the instant case. That section provides a four year limitation period for actions upon contracts,

obligations, not founded upon a writing, and for services rendered. The lower court further held that the limitation period began to run from the date plaintiffs reimbursed the State Insurance Fund. Inasmuch as all the cases consolidated in this action were begun four years from the date appellant was reimbursed, the lower court held that none of plaintiff's claims were barred by the statute of limitations.

Appellant takes issue with the lower court's decision on this point. Appellant's liability in these cases, if any, is not based on a contract either expressed or implied. Liability is imposed by Sec. 35-1-62 *Utah Code Ann.* (Repl. Vol. 1963), and the Utah Supreme Court's decision in *Worthen vs. Shurtliff and Andrews, Inc.*, 19 Utah 2d 80, 426 P.2d 223, interpreting that statute. If appellant is liable to plaintiffs because of Sec. 35-1-62, then the limitation period should be that provided in either Sec. 78-12-26 (4) or Sec. 35-1-99 *Utah Code Ann.* Section 78-12-26 (4) provides a three year limitation period for actions for liability based on a state statute.

Another limitation period, that provided in Sec. 35-1-99 *Utah Code Ann.* may be applicable. That section provides a three year limitation for actions for compensation under Workmen's Compensation laws. This limitation period seems applicable inasmuch as the statute creating the liability, Sec. 35-1-62(1) *Utah Code Ann.*, is a Workmen's Compensation statute.

It might be argued that claims, such as in the instant case, are not claims for compensation, but rather claims for attorneys fees, and, thus, the limitation period for workmen's injuries should not apply. However, such argument fails to carry weight when it is considered that the fund or pool of money from which the attorney's fees are paid is in reality the amount paid for compensation of injuries. The attorney's fees in all the present cases are based on a percentage of the recovery for injuries and actually are derived from the moneys paid for the injuries. Thus, the claims in the instant case are not for attorney's fees, but for that portion of compensation paid to the State Insurance Fund which represents what the State Insurance Fund would have had to pay an attorney to collect. A hypothetical example may help to illustrate the point. Assume, an injured worker receives a $30,000.00 award in a third-party claim. If the State Insurance Fund had paid out $10,000.00 in compensation payments, the worker, before the *Worthen* case, would only get $10,000.00 of the award. The Insurance fund would get $10,000.00 and the attorney would get $10,-000.00. After *Worthen,* the State Insurance Fund is required to bear its portion of attorney's costs, so now the State Insurance Fund only receives $6,666.00 while the injured worker is allowed to retain an additional $3,-334.00 or $13,334.00. Thus, the claims in the instant case are not really for attorney's fees but for that portion of the compensation award paid to the State Insurance Fund which is computed on the basis of its share of attorney's

fees. If the claim is considered as a claim for additional compensation, then the limitation period pertaining to actions for compensation should apply.

If the Utah Supreme Court decides that Sec. 35-1-99 *Utah Code Ann.* is the proper statute of Limitations then the limitation period should run from the date of the last payment to the worker by the State Insurance Fund. If Sec. 78-12-26(4) *Utah Code Ann.* is considered applicable, then the limitation period should begin, as held in the lower court, from the date that payment was withheld by the State Insurance Fund.

POINT IV

PLAINTIFFS' CLAIMS SHOULD BE DENIED FOR THEIR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

The law is too well settled to require citation that a claimant must exhaust administrative remedies before bringing his claim to court. If the Court views the claims in these cases as claims for additional compensation, as pointed out in the section of this brief immediately above, the plaintiffs must first exhaust administrative remedies by bringing their claim before the State Industrial Commission. Sec. 35-1-60 *Utah Code Ann.*

Only after having their claim denied by the Commission may they bring their claims to Court.

POINT V

PLAINTIFFS ARE NOT THE REAL PARTY IN INTEREST; AND THUS, THEIR COMPLAINTS SHOULD HAVE BEEN DISMISSED.

If the Court does not view plaintiffs claims as claims for additional compensation, but rather as claims for attorney's fees, then appellant would argue that plaintiffs are not real party in interest. The question presented is whether the plaintiffs or their attorneys on the third-party lawsuits are proper parties.

The defendant, in its answer, has raised the affirmative defense that the plaintiffs are not the real party in interest. The law is clear that a plaintiff must possess a right and be owed a duty before he may invoke the jurisdiction of the court. *Wilson vs. Kiesel,* 9 Utah 397, 35 Pac. 488; 39 *Am. Jur.* 858 *Parties* Section 9. This is particularly true with respect to statutory actions, as is the present case. See *Hunt vs. State,* 201 N.C. 37, 158 S.E. 703 wherein the court held, "Where a cause of action is given by Statute, only those persons who are granted the cause of action may sue."

Assuming the Statute, Sec. 35-1-62 *Utah Code Ann.* (Repl. vol. 1966) clearly imposes a duty on defendant to pay attorney's fees, it is not clear to whom this duty is owed. Defendant is obviously concerned with this point to prevent a double liability situation. In a case similar

to the instant case, filed in Federal District Court for Utah, the "third party" plaintiffs' attorneys brought the action. See *Delbert M. Draper, Jr. et. al. vs. Travelers Insurance Co., et. al.*, Civil No. C-228-67.

The fact that as alleged in plaintiffs' complaint plaintiffs have already paid their attorneys' fees, has no bearing. The real party in interest is determined as of the date the cause of action arose, c.f., *Wilson vs. Kiesel,* 9 Utah 397, 35 Pac. 488; *White vs. Tulsa Iron & Metal Corp.,* 185 Okla. 606, 95P. 2d 590; not from the fact that subsequently, plaintiffs paid their attorneys, a payment they may not have been required to make. The duty imposed (in these cases by statute) must be owed to the plaintiff, or there can be no recovery. *Huntington vs. Natl. Sav. Bank,* 96 U.S. 388; *Illinois C. R. Co. vs. Baker,* 155 Ky. 512, 159 S. W. 1169.

The statute reads " . . . attorney's fees shall be paid and charged proportionately against the parties . . . " The statute places the burden on both parties. The implication and most obvious construction of the statute is that the attorney may collect his fees from both parties, proportionately. If such is the case, plaintiff's claims should be denied as they are not the real party in interest.

POINT VI

PLAINTIFFS' CLAIMS ARE BARRED BY THE DEFENSE OF LACHES.

Although it may be determined that plaintiffs' claims are not barred by the Statute of Limitations, recovery may still be precluded on grounds of laches. *Holmberg vs. Armbrecht*, 327 U.S. 392; *Alsop vs. Riker*, 155 U.S. 448; *Godden vs. Kimmel*, 99 U.S. 201; *Whitney vs. Fox*, 166 U.S. 637. The doctrine of laches may, "when justice demands it, refuse relief, even if the time which has elapsed . . . is less than prescribed by the Statute of Limitations." 27 *Am. Jur.* 2d 694 *Equity* Section 157.

Laches, frequently termed the "doctrine of stale demand" is an equitable defense based on the public policy considerations of preventing unreasonable, knowing, injurious delay. *Mockall vs. Casilear*, 137 U.S. 556; *Halstead vs. Grinnon*, 152 U.S. 412. The defense of laches is not mandatory, but is to be applied in the sound discretion of the court. *Davidson vs. Grady*, 105 f. 2d 405. *Sinclair vs. Allender*, 238 Iowa 212, 26 N.W. 2d 320.

There are three requirements before the doctrine of laches may be applied to preclude recovery. They are:

Lapse of time.

The plaintiff had knowledge of the facts giving him a cause of action and ample opportunity to present his claims.

The adverse party had good reason to believe that plaintiff's rights were worthless and had been abandoned so that it would be an in-

justice to permit the plaintiff to now assert them.

See 27 *Am. Jur.* 2d 701-702, *Equity* Section 162.

There is no question that there was a delay or lapse of time with respect to all plaintiffs' claims. Although with respect to some of the claims, the delay is not nearly so long as with others, it does appear that all the cases were delayed. The length of time elapsed is not essential to the defense of laches, although there has to appear to be some delay. *Archaubault vs. Sprouse,* 215 S. C. 336, 55 S. E. 2d 70. "Lapse of time is an element but not the controlling factor of laches." *Finucane vs. Haydau,* 86 Idaho 199, 384 P. 2d 236.

On the other hand, the main element of the defense of laches is that the plaintiff had knowledge of the facts giving rise to his cause of action and still delayed. *Greeley vs. Loveland Irrig. Co. vs. McCloughland,* 140 Colo. 173, 342 P. 2d 1045; *Montana Power Co. vs. Park Electric Corp.,* 140 Mont. 293, 371 P. 2d 1; *Morris vs. Ross,* 58 N.M. 379, 271 P. 2d 823. Equity courts decline to assist a person who has "slept upon his rights" and shows no excuse for his laches in asserting them. *Lane & B Co. vs. Locke,* 150 U.S. 193, *Speidel vs. Henrici,* 120 U.S. 377. In the present case there is no doubt plaintiffs had knowledge of the facts giving rise to other causes of action. They all demanded the defendant participate in the attorneys fees and costs; they all said under protest,

and then they all slept on their rights until years later, after someone else had paved the way for them by appealing the *Worthen* case. There can be no excuse for such a delay.

The final element of laches is that the defendant has good reason to believe that the plaintiff's rights are worthless, or have been abandoned. Factual support for the existence of this element appears from paragraph eleven of the complaints in cases with District Court numbers 186365, 183213 and 182724. In said paragraph plaintiffs allege a long series of continued protest against the defendant not paying a portion of costs and attorneys fees. As support, plaintiffs offered as exhibits several documents dated mostly in 1964 and 1965. Defendant feels that such a showing without filing action for four to five years certainly indicates justifiable reliance that the plaintiffs' rights were worthless or had been abandoned. For support that it appeared plaintiff's rights were worthless, defendant offers the case of *McConnell vs. Commission of Finance,* 13 Utah 2d 395, 375 P. 2d 394 which was the law in Utah at the time the transactions took place.

Some courts have added a further requirement to the defense of laches. They require a showing of detriment to defendant to allow the state claim. Defendant has discussed the detriment in the section of this brief dealing with Equitable Estoppel.

POINT VII

APPELLANT IS NOT REQUIRED TO PAY A PORTION OF THE ATTORNEY'S FEES.

As a final argument, appellant urges the Utah Supreme Court to reconsider the holding in its opinion in the *Worthen* case. *Worthen vs. Shurtleff, supra* was decided by a closely divided court only a few years after *McConnell vs. Commission of Finance,* 13 Utah 2d 395, 375 P. 2d 394. Appellant hopes that in light of the cost and problems raised by *Worthen,* the Court may wish to reaffirm the strong rationale of the *McConnell* case. In support of this argument, appellant reprints below the State Insurance Funds argument in the *Worthen vs. Shurtleff* brief.

The issue presented in this case is the construction of Section 35-1-62, Utah Code Annotated, 1953, which provides, in part, as follows:

"If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorney's 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." (Emphasis added)

This statute was construed, concerning the identical facts in this case, in *McConnell vs. Commission of Finance,* 13 Utah 2d 395, 375 P2d 394. This Court held that the State Insurance Fund is entitled to full reimbursement for all compensation benefits paid to the plaintiff. The question in that case, as in this case, is whether or not, under the circumstances, the State Insurance Fund's share of the recovery should be reduced by a proportionate share of the attorney's fees incurred in the action brought by the injured employee. In this case and in the *McConnell* case, the plaintiff, while in the course and scope of his employment, suffered personal injuries by a third party tort feasor. The State Insurance Fund, as compensation carrier for the plaintiff's employer, paid medical and other compensation benefits to the plaintiff. Thereafter the employee, through his attorney, brought an action against the third party tort feasor. The attorneys in both cases prosecuted the matter on a contingency basis of one-fourth of the recovery. Subsequent to settlement plaintiff's counsel seeked to recover back from the State Insurance Fund one-fourth of the amount paid to the plaintiff's employee as attorney's fees.

35-1-62, set out above, contemplates a three order of priority of disbursement, that is: (1) Expenses of the ac-

tion, including attorney's fees shall be paid *against the parties* as their interest may appear; (2) Of any sums remaining, the insurance carrier shall be reimbursed for compensation benefits *in full;* (3) The balance if any, should be paid to the injured employee or his heirs.

This Court has held that when the State Insurance Fund was not a *party* to the original action then it was not liable nor had it incurred any legal expenses. Sub section 2 of the statute requires that the insurance carrier be reimbursed in full. Therefore, the only reasonable construction that can be made is that if the State Insurance Fund was not a party to the action it must be reimbursed in full.

It is agreed that the State Insurance Fund did not employ Edward M. Garrett and in light of this Court's past ruling was not required to in order to protect its interests in receiving full reimbursement. There is also no doubt that the State Insurance Fund was not a party to the original action and therefore attorney's fees cannot be assessed against it under sub-section (1) of 35-1-62.

Through the differing statutes of sister states dealing with Workmen's Compensation Laws is of different wording and interpretation, it is interesting to note that in the problem of distribution of the proceeds of a third party action that Utah follows the majority rule. 2 *Larson Workman's Compensation Law* (1961), Sec. 74.32:

> "Usually attorney's fees and expenses are deducted both in priority to the employer's lien on the employee's recovery, and before there is any excess for the employee in the employer's recovery. If the sum recovered by the employee is more than enough to pay attorney's fees and reimburse the carrier, the carrier is reimbursed in full, and is not required to share the legal expenses involved in obtaining the recovery. In other words, under the usual provision, the legal expenses diminish the over-all sum to which the insurer's claim attaches; but if it is possible to do so within that fund as diminshed the insurer is entitled to be reimbursed in full * * * "

See also *Tucker vs. Nason* (Iowa), 87 N.W. 2d 547; *Firemen's Fund Indemnity Co. vs. Batts*, (N. J.) 78 A. 2d 293.

It is therefore, the appellant's position that the Lower Court's ruling allowing attorney's fees to Edward M. Garrett was erroneous in light of the *McConnell* decision and in light of the reasonable interpretation of the statute. It is clear that the State Insurance Fund was not a party of this action and the reimbursement in full for all payments made by the State Insurance Fund.

It is, therefore, submitted that Sec. 35-1-62 as applied to the facts of this case compels a reversal to the order entered and judgment should be entered in favor of the Director of Finance as a matter of law.

CONCLUSION

The decision in *Worthen vs. Shurtleff, supra* should not be applied retroactively either on grounds of equitable estoppel or because the Court is of the philosophy, it should only be given prospective application. If the Court decides that a three-year statute of limitations is applicable then the claims of James Allen Scott, Don Gerald Williams, Angelo Melo, Waulstine McNeely and William J. Roedel should be denied. All claims may be barred by the defense of laches. If the claim in this case is, in reality, a claim for compensation, then it should be denied for failure to exhaust administrative remedies. If the claim is for fees owing to attorneys, the plaintiffs are not the real party in interest and their claims should be denied. Finally, the Court may overrule the *Worthen* case reaffirm *McConnell* and deny plaintiffs' claims.

Respectfully submitted,

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