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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 Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

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

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

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

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

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

Case No. 11753

Brief of Plaintiffs-Respondents

NATURE OF THE CASE

Plaintiffs demand the State Insurance Fund bear its share proportionately as its interest appears, of attorneys' fees and costs incurred by plaintiffs in

recovering from third parties, sums paid to or for plaintiffs by the Fund for medical and hospital expenses and for compensation for injuries occasioned by on-the-job accidents caused by such third parties.

DISPOSITION IN LOWER COURT

Plaintiffs received Summary Judgment by Memorandum Decision based upon agreed facts.

RELIEF SOUGHT ON APPEAL

Plaintiffs-respondents seek affirmation of the District Court judgment and a determination that costs as well as attorney fees are reimbursable.

STATEMENT OF FACTS

Defendant accurately states the facts, i. e., that plaintiffs received on-the-job injuries; they received medical payments and compensation from the State Insurance Fund; they pressed claims against third parties responsible for their injuries, made recovery and reimbursed under protest or allowed under protest payment to the Fund which refused to pay any portion of attorneys' fees and costs; they brought suit after the decision in *Worthen v. Shurtleff*, 19 Utah 2nd 80, 426 P2d 223 against the Utah State Department of Finance as Administrator of the State Insurance Fund for reimbursement of defendant's share proportionately of such costs and attorneys' fees.

TABLE OF CONTENTS

Page

NATURE OF THE CASE 1

DISPOSITION IN LOWER COURT 2

RELIEF SOUGHT ON APPEAL 2

STATEMENT OF FACTS 2

ARGUMENT 3

POINT I

DEFENDANT SHOULD PAY ITS FAIR SHARE OF ATTORNEY FEES AND COSTS 3

A. *On Principles of Contribution Irrespective of any Statute.* 3

B. *The Statute Requires Reimbursement* 9

C. *There is No Problem of Retroactive Application* 9

POINT II

PLAINTIFFS' CLAIMS ARE TIMELY 13

A. *The Statute of Limitations Is Not a Bar* 13

B. *Laches and Equitable Estopple are Inapplicable* 24

POINT III

COSTS AS WELL AS ATTORNEY FEES ARE REIMBURSABLE 26

CONCLUSION 28

CITATIONS

CASES CITED:

Burrows v. M'Whann, 1 S.C. Eq. (1 Desauss) 409 25

Charles Seligman Distributing Co. v. Brown (Ky), 360 S.W. 2d 509, 511 8

Fleming v. Fleming, 264 U.S. 29, 68 P.Ed, 547, 44 C. Ct. 246 (1924) 11

Fong Sik Leung v. Dulles, 226 F 2 CA Calif. 9

Friedman v. Maltinsky, 260 Pa. 312, 103 A 731 24

Legg's Estate v. C.I.R., 114 F2d 760 (C.A. 4, 1940) 12

Jackson v. Harris, 43 F2d 513 (C.A. 10 Okla), 1930 11

Massaglia v. Commissioner, 286 F2d 258 (C.A. 10 1961) 11

Page

McConnel v. Commission of Finance,
13 Utah 2d 395, 375 P2d 394, Page 84.....8-9

Peterson v. John Hancock Mutual Insurance Co.,
116 F2d 148 (C.A. 8, 1940) 12

Ragghianti v. Sherwin,
196 Cal, App. 2d 345, 16 Cal. Rpt. 583 (1961).....12

Sunray Oil Company v. Commissioner of Internal
Revenue, 147 F2d 962 (C.A. 10 1945), cert. den,
325 U.S. 861, 89 L.Ed. 1982, 65 S Ct. 1201.....11

Vansant v. Gardner, 240 Key. 318, 42 SW2d 300.....24-25

Waldref v. Dow, 172 Minn. 52, 214 NW 767.....25

Webber v. Salt Lake City, 120 Pac. 503, 40 Utah 221.....20

Worthen v. Shurtleff, 19 Utah 2nd 80, 426 P2d 223.....2-4

STATUTES CITED:

Utah Code Annotated, 1953, Sec. 35-1-62,
Workmen's Compensation 5

Utah Code Annotated, 1953 (78-12-23,25,26,31),
Limitations of Actions 13-16-17-18

TEXTS CITED:

18 Am Jur 2nd, *Contribution* 3

10 ALR 3d 1371, *Overruling Decisions* 10

18 Am Jur 2d *Contribution—Statute of Limitation*.....13

18 Am Jur 2d *Contribution* 14

34 Am Jur, *Limitation of Actions* 21

18 Am Jur 2d, *Contribution*, Page 132 24

The amounts paid, dates of payment and the fact of payment (or allowing payment) under protest are not in dispute.

ARGUMENT

POINT I.

DEFENDANT SHOULD PAY ITS FAIR SHARE OF ATTORNEY FEES AND COSTS

A. *On principles of contribution irrespective of any statute.*

On ordinary principles of contribution, each recipient of benefits from the third party law suit ought to bear his share of the burdens of such suit.

18 AM Jur 2nd *Contribution* expresses this concept as follows:

> § 1. *Generally; definitions.*
>
> The principle or doctrine of contribution is one of equality in bearing a common burden. Contribution has been defined as a payment made by each person, or by any of several persons, having a common interest or liability, of his share in the loss suffered or in the money necessarily paid by one of the parties in behalf of the others. The right of contribution has also been variously described as the right of one who has discharged a common liability or burden, to recover of another, also liable, the aliquot portion which he ought to pay or bear; as the right enjoyed by a person who is jointly liable with others and has paid

more than his proper share in discharge of the joint liability to force them to reimburse him to the extent of their liability; and as an equity which arises when one of several parties liable on a common debt discharges the obligation for the benefit of all.

In accordance with these definitions, the general rule is that one who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares. In other words, when any burden ought, from the relationship of the parties or in respect of property held by them, to be equally borne and each party is in aequali jure, contribution is due if one has been compelled to pay more than his share. The doctrine is founded not upon contract, but upon principles of equality, and assists in the fair and just division of losses, preventing unfairness and injustice. And since the doctrine of contribution has its basis in the broad principles of equity, it should be liberally applied.

The same principle was enunciated in *Worthen v. Shurtleff*, 19 Utah 2d 80, 426, P2d 223 at 83, the court saying:

"Where each of the parties has the right to bring the action and one takes the initiative and obtains recovery for the benefit of both, *it is only fair that each bear his share of the expenses necessarily incurred in doing so.*"

B. *The Statute requires reimbursement.*

The statute involved is 35-1-62 UCA 1953 and reads as follows:

> When an injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission.
>
> If any recovery is obtained against such third person it shall be disbursed as follows:
>
> (1) The reasonable expense of the action, including attorneys' 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.

In interpreting the statute, this court in *Worthen v. Shurtleff*, supra, an identical case, said:

> "The basic purpose of this statute is that of making an equitable arrangement between an injured employee, and an insurer (or employer) who pays him workmen's compensation, with respect to a cause of action against a third party who injures the employee. It preserves the action to the employee, but it prevents him from having double recovery by requiring him to reimburse the insurer. It also gives the insurer the right to bring the action, but allows it only to reimburse itself and then pay any balance to the employee.
>
> Where each of the parties has the right to bring the action and one takes the initiative and obtains a recovery for the benefit of both, *it is only fair that each bear his share of the expenses necessarily incurred in doing so.* That this is the meaning intended in paragraph (1) seems unmistakably clear. In providing that if recovery is obtained against the third party the expenses including attorney's fees shall be charged 'proportionately against the *parties* as their *interests* may appear,' it is to be noted that those terms could not apply to the two parties to the original action (plaintiff Worthen and defendant Shurtleff and Andrews) because Worthen receives the money from Shurtleff and Andrews, who have no further interest in it after paying it over. Therefore, the only possible 'parties' who have 'interests' in the money are Worthen and The

State Insurance Fund (the latter being entitled to reimbursement.) It thus follows that Sec. (1), with unmistakably clarity requires that the expenses and attorney's fees be charged proportionately against these 'parties' (Worthen and The State Insurance Fund) as their 'interests' appear. It is more reasonable to assume that the Legislature intended this application of the statute which comports with its equitable purpose than one which would bring about a contrary result.

In addition to the equitable result arrived at by giving priority to paragraph (1) as we have discussed above, there is another persuasive consideration which supports that conclusion. When a statute undertakes an allocation of funds, the sequence in which it does so should be regarded as having some significance. This perhaps would be plainer if the statute had stated that the funds recovered should be disbursed 'first,' 'second,' and 'third.' However, the intent shown thereby is not necessarily different from the priority of allocation which would be indicated by using the numerals (1), (2), and (3). If we do as the statute says and make the allocation provided for in paragraph (1) first, that is, charging the recovery with the costs and attorney's fees *in proportion to the interests of the parties, the disbursement stated first is made first*, and has priority over the provision for disbursements which follows it in paragraph (2). Then the reimbursement to the insurer is made from the funds remaining and to extent possible after the first requirement for disbursement is complied with. This application of the statute can be reconciled with the requirement that the insurer be 'reimbursed in full by regarding that phrase simply meaning reimbursement for *its full share* after the prior requirement

> of the statute is fulfilled, and that the insurer cannot be compelled to take less than its proportionate share in any compromise or settlement arranged by others."

In overruling the earlier case of *McConnel v. Commission of Finance*, 13 Utah 2d 395, 375 P 2d 394, the court said, Page 84:

> We have so concluded cognizant of McConnell v. Commission of Finance, 13 Utah 2d 395, 375 P2d 394, in which the insurance carrier was not made a party, but in so far as this case may be *inconsistent with McConnell, that case is overruled.* Consistent with our holding here, see Charles Seligman Distributing Co. v. Brown (Ky.), 360 S.W.2d 509, 511.

That case is directly in point and supports plaintiffs' position here. The injured workman sued a Third Party and recovered damages. The Kentucky statute provides that the employee has to reimburse the employer or his insurer for the amount paid out as compensation. Reversing two prior cases the Court stated and held:

> ". . . Moreover, regardless of the respective amounts recovered, where the employer or its insurer has a reasonable opportunity to intervene in the employee's action against the Third Party tortfeasor, but chooses not to do so it would be inequitable to require the employee to bear the attorney fees on that portion of the recovery which K.R.S. 342.055 obliges him to pay over to the employer or its insurer . . ." Supra at 510.

In *McConnell vs. The Commission of Finance* 13 Utah 2d 395, 375 Pac. 2d 394, 1962, an earlier case, The Utah Supreme Court declined to require the fund to pay its proportionate share of attorney's and costs because the Insurance Fund was not made a party, the court saying, page 396:

> "If an insurance carrier initiates an action under this statute against the third party, or its made a party in an action initiated by the injured employee, any attorney's fees incurred by it would fall within the priority provided in sub-section 1 (of the statute), however in the instant case the State Insurance Fund was not a party to the action and did not insure any legal expenses."

The court there took a narrow view of the word "party" and should have taken a broad view as in *Fong Sik Leung v. Dulles*, 226 F2 CA Calif. where the court defines the word "party" as follows:

> "In its broadest meaning the word party includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as formal party or not."

C. *There is no problem of retroactive application.*

Defendant contends application of the Worthen case rule would be retroactive therefore, unfair. Yet in the Worthen case the contribution rule was applied in 1967 to funds obtained between 1964 and

1967 in suit on a December 2, 1964 accident, thus the application was similar to that requested here.

The only difference is that in the Worthen case the funds were held by the court and here they were paid, or the Fund allowed to obtain same under protest; and the law would never shy from this slight inconvenience.

Defendant asserts that the Worthen case changed the law so that contribution could only be granted on cases arising after the Worthen decision, and this despite the fact that the Worthen case itself was applied retroactively.

It would seem that the Worthen case declared what the law had always been, it being the general rule as stated in numerous cases in 10 ALR 3d 1371, that the judicial ruling of a precedent has both prospective and retroactive effect unless the overruling decision declares that it shall have only prospective effect.

An annotation of numerous cases involving the application of an overruling decision is found in 10 ALR 3d 1371. The general rule or traditional theory of the unlimited retroactive operation that has existed for many years is stated at page 1382 as follows:

> "The traditional view was that by overruling a prior decision the Court does not 'pre-

> tend to make a new law, but to vindicate the old one from misrepresentation. . . . It is declared, not that such a sentence was bad law, but that it was not law.' Accordingly, the correct (new) rule would naturally apply to all questions subsequently coming before the Court, regardless of the chronolgy of the factual events from which the legal rights and liabilities at issue arose.
>
> "This view was founded on the notion that a Court is merely a discoverer rather than a maker of the law, and that a Court's earlier decisions are mere evidences of the law and not the law itself. Such a notion still finds expression in many decisions."

A landmark case cited as standing for this position is the case of *Fleming v. Fleming*, 264 U.S. 29, 68 P.Ed. 547, 44 C. Ct. 246 (1924). Also there cited as enunciating this rule are a number of Circuit Court opinions, including three from the Tenth Circuit, *Jackson v. Harris*, 43 F2d 513 (C.A. 10 Okla., 1930); *Sunray Oil Company v. Commissioner of Internal Revenue*, 147 F2d 962 (C.A. 10 1945), cert. den., 325 U.S. 861, 89 L.Ed. 1982, 65 S.Ct. 1201; and *Massaglia v. Commissioner* 286 F2d 258 (C.A. 10 1961). In *Sunray Oil Company*, the Court speaking through Chief Judge Phillips said:

> "It is a general rule that the decisions of the highest appellate court of a jurisdiction overruling a former decision is retrospective in its operation. In effect, it declares that the former decision never was law."

See also *Ragghianti v. Sherwin*, 196 Cal. App. 2d 345, 16 Cal. Rpt. 583 (1961); *Legg's Estate v. C.I.R.*, 114 F2d 760 (C.A. 4, 1940); *Peterson v. John Hancock Mutual Insurance Company*, 116 F2d 148 (C.A. 8, 1940).

Defendant, in its memorandum cites several cases, which, while acknowledging this general rule, indicates an exception thereto, where a contract has been entered into in reliance upon a Legislative enactment as it was construed by earlier decisions. The cases cited by defendant involve situations where bonds or similar contractual obligations had been issued or incurred based directly upon a decision upholding a statute, which decision was subsequently overruled. The court properly in those situations held that the contractual obligation that was entered into between the parties in reliance on such prior decision should not be disturbed by the later overruling decision. It is respectfully submitted that any such exception to the general rule of retroactivity has no application in this present case, because the plaintiff and defendant never entered into any contracts of any kind and because the rights and obligations between them arise out of the contribution principle as enunciated by the terms of the Utah statute.

POINT II

PLAINTIFFS' CLAIMS ARE TIMELY.

A. *The Statute of Limitations is not a bar.*

The district court in deciding the instant case, with regard to the Statute of Limitations, said:

> "I am also of the opinion that the four year statute of limitations of Section 78-12-25, UCA 1953, applies, since I consider that the action is based upon a contract for services rendered rather than an action for a liability created by statute (Section 78-12-26—3-year statute) or against an officer who is a tax collector (Section 78-12-31—6-month statute).
>
> "The file in each case reflects that the respective plaintiffs have each filed his complaint within the four-year period from the date the funds were paid to the state to reimburse the State Insurance Fund, and, in my opinion, the date of such reimbursement would constitute the date upon which the statute of limitations would begin to run."

He is well supported by case law as summarized in 18 Am Jur 2d *Contribution*, as follows:

> §90. *Statute of limitations applicable.*
>
> Considerable contrariety exists among the decisions as to what statute of limitations is applicable to the right of a paying obligor to recover contribution from his co-obligors. Most of this appears to result from the fact that the following different remedies are available for the enforcement of the right to contribution: an action at law on the implied contract; a suit in equity to equalize the bur-

den which should be borne in common; procedure as successor to rights and remedies of the creditor, where allowable; and combinations of these remedies. A simple action for contribution by one co-obligor against another is generally held, however, to be governed by the statute of limitations applicable to actions based on implied contracts or those not in writing; for purposes of limitations the action may be regarded as one for a debt not evidenced by writing, or as one to recover, upon an implied promise, money paid for the defendant's benefit.

As a general rule, where contribution is sought between parties who were co-obligors to another upon a written contract, the statute of limitations governing is not that relating to actions founded upon such a contract or instrument in writing, but rather that relating to contracts not in writing or to an implied promise or contract. But a statute of limitations governing actions upon contracts, express or implied, "arising out of a written agreement," has been held applicable to such a case. Of course, where the parties expressly contract for the right of contribution itself, the statute of limitations applicable to contracts in writing applies.

The origin of the action is always material in determining what statute of limitations applies. 18 Am Jur 2d *Contributions* is helpful here:

4. *Basis and Origin of Right.*

The doctrine of contribution had its origin in courts of equity, upon the principle that equality among those in aequali jure is deemed to be equity, and at first was available only

in courts of equity. The common law has adopted and given effect to this equitable principle, and the principle also obtains under the civil law. Unlike the courts at common law, however, equity resorts to no fiction of an implied promise to contribute in case of unequal payments by co-obligors. It equalizes burdens and recognizes and enforces the reasonable expectations of the co-obligors because it is just and right in good morals and not because of any supposed promise between them.

The meaning of the statement, often made, that contribution is not founded upon contract is sometimes misapprehended. It means only that there need not be an express contract for the right of contribution to exist, and that it can exist upon principles of equity and natural justice and independently of any contract. Under the circumstances of many cases the right to contribution may well be considered as resting alike upon principles of equity and upon contract for its foundation. The right to contribution and the legal duty to contribute may be qualified or controlled by agreement, or may even arise therefrom; and in the absence of an express agreement, contribution may be enforceable on the theory of a contract implied in law or in fact. The right to contribution depends upon a common burden or indebtedness, and not upon the fact that all the parties are bound in writing. An agreement for joint liability giving a right to and duty of contribution between parties who are prima facie severally and successively liable upon a written instrument may be inferred from the circumstances of the case.

§5. *Availability in courts of law.*

Although the doctrine of contribution originated in courts of equity, it was subsequent-

> ly adopted by courts of law and is now universally applied therein. In order to make the doctrine consistent with the forms, theories, and practices of courts of law, the fiction of an implied contract by one obligor to contribute to another co-obligor who had been compelled to pay more than his share of the obligation was adopted. From the language of the courts it would seem that ordinarily the implied contract in such a case is one implied in law based on the equitable obligation to equalize the common burden, although it is doubtless true that universal recognition of the doctrine of contribution may well justify the view that a contract for contribution may be implied in fact among parties who join in undertaking some common burden or obligation. Furthermore, since in most jurisdictions now only one form of action, known as the "civil action," is substituted in place of the common - law forms of action, formal distinctions between forms of action and between legal and equitable actions have been abolished; and hence it would appear that in such jurisdictions at least it is no longer necessary for a court to resort to the fiction of an implied contract in justification of an action brought before it for contribution.

As to the statute of limitations, the following code provisions deserve consideration:

> 78-12-23. Within six years.
>
> 2. An action upon any contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding section.
>
> 78-12-25. Within four years.

(1) An action upon a contract, obligation or liability not founded upon an instrument in writing; also on an open account for goods, wares and merchandise, and for any article charged in a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) An action for relief not otherwise provided for by law.

78-12-26. Within three years.

(1) An action for waste or trespass upon or injury to real property; provided, that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such waste or trespass.

78-12-26. Within three years.

(2) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof; provided, that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," having upon it at the time of its loss a recorded mark or brand, if such animal had strayed or was stolen from the true owner without his fault, the cause shall not be deemed to have accrued until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession thereof by the defendant.

(3) An action for relief on the ground of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(4) An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

78-12-31. Within six months.

An action against an officer, or an officer de facto:

(1) To recover any goods, wares, merchandise or other property seized by any such officer in his official capacity as a tax collector, or to recover the price or value of any goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to, any goods, wares, merchandise or other personal property seized, or for damages done to any person or property in making any such seizure.

(2) For money paid to any such officer under protest, or seized by such officer in his official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded.

In defense of the six-year statute of limitations, it can be said in each instance that the State Insurance Fund authorized plaintiff by writing to represent it, that there are ample memoranda to support this and that a running dispute arose as to the mat-

ter of reimbursement. In the Scott case, the State Insurance Fund, by letter dated February 27, 1963 (attached to the Complaint), said:

> ". . . You are also authorized to represent the interests of the State Insurance Fund in proceedings against the third parties, upon a contingent attorney's fee of one-third of the amount recovered if, before the introduction of evidence in the trial, or one-third of such recovery if obtained after the introduction of evidence in a trial. The State Insurance Fund is entitled to full reimbursement before Scott shall receive any part of the recovery."

In the Williams case the May 2, 1963 letter (R10) to the State Insurance Fund (copy attached to Complaint); October 22, 1964 letter, Hunt to Williams (R7); October 22, 1964 letter, Hunt to Gordon R. Strong (R8), Attorney for third party and other corespondence (R9, R10) in the Williams file amply substantiates a similar engagement by the Insurance Fund of plaintiffs' counsel and a similar continuing dispute as to the matter of reimbursement of attorney's fees.

In the Malo case, August 14, 1964 letter, State Insurance Fund to Gayla Dean Hunt (R4), reads in part:

> "You are authorized to represent the interests of the State Insurance Fund in proceeding against the third party and his liability insurance carrier upon the following terms: . . . "

In the McNeely case a similar letter, August 14, 1964 (R14), reads in part:

> "You are authorized to represent the interest of the State Insurance Fund in proceedings against the third party . . ."

In the Roedel case, a similar letter dated October 6, 1964, (R19) reads in part:

> "You are authorized to represent the interest of the State Insurance Fund in proceedings against the third party and his liability insurance carrier . . ."

If the memorandum should be deemed inadequate, then, of course, the four year statute would be applicable unless, as contended by defendant, a three year statute should be applied. This would depend upon whether or not the cause of action is created by statute under 78-12-26.

The test is whether or not the cause of action would exist except for the statute. In *Webber v. Salt Lake City*, 120 Pac. 503, 40 Utah 221, compiled LAWS of Utah, 1907, Sec. 282, authorized the recovery of damages to an abutting property owner by change of an established grade on the street. The defendant contended plaintiff's cause of action arose by reason of a statute and that the statute of limitations for statutory cause of action should apply. The Utah Supreme Court held not so; that the cause of action existed before and aside from and irrespective

of the statute in question and although the statute delineated the same, it did not create the cause of action and the statutory limitation provision did not apply. The court pointed out that constitutional provisions, prior to the enactment of the statute, would have created the cause of action, the court saying, page 224:

> "As we have pointed out, the constitutional provision existed when Section 282 was adopted. Moreover, the right to recover damages would continue precisely the same, although section 282 were repealed. If a right or liability—call it what you will—therefore existed before section 282 was adopted, such right or liability was not created by that section. Again, if the right or liability will continue in full force and effect, although that section were repealed, such right is not even exercised by virtue of that section. In other words, for the purpose of an action like the one at bar, the provisions of section 282 are not controlling or even material."

The foregoing case is quoted in 34 *Am Jur, Limitation of Actions*:

> § 48. Statutory Proceedings; Liabilities Created by Statute—
>
> Where laws create special statutory proceedings, the provisions of the general law of limitations are sometimes construed as not applying thereto. Thus, when there is no time limit within which such special statutory proceedings shall be commenced, the courts may construe the law as exempting the proceedings from all limitations and may refuse to apply

thereto a general law of limitations. It is the rule in most jurisdictions that such proceedings are not subject to the exceptions contained in a general statute of limitations. However, in most jurisdictions, the statutes of limitation contain special provisions prescribing the time within which actions upon liabilities created by statute must be commenced. *To come within the terms of such a provision, the liability must be one which would not exist except for a statute.* Whether a statute creates by implication a cause of action, as regards the application of a statute of limitations upon a cause of action so created, depends largely upon whether the duty is imposed for the benefit of a particular class of persons or whether it merely defines, in the interest of the general public, the degree of care to be exercised under special circumstances. A right to damages for injuries to abutting property as a result of the change in the grade of a street, which is given by a Constitution, does not depend upon a statute passed to harmonize the statutory law with the Constitution, and is not given by the statute, within the meaning of the statute of limitations, *and the fact that a duty to pay money for work and materials which the defendant failed to perform was a statutory one does not make the action one upon the statute,* for such an action is on assumpsit. It has also been held that the statute of limitations applicable to a suit by a school district which, through error in computing the apportionment of school funds, has received less than its proportionate share, against districts which have in consequence received more than their share, is that relating to actions for relief on the ground of mistake, and not that relating to liabilities created by statute. On the other hand, in some jurisdictions the

limitation period pertaining to actions on statutory liabilities governs actions to enforce the statutory liability of stockholders, and, in proper circumstances, such a provision applies to a suit between master and servant and to proceedings for the recovery of workmen's compensation. There is a difference of opinion as to whether an action to enforce the liability of a surety on an administrator's bond, the giving of which is required by a statute prescribing the terms and conditions thereof, comes within such a provision. The general rules relating to the application of the statute of limitations to actions for the recovery of penalties are discussed in another article.

As to the purpose of the statute in question, 35-1-62, the language in the Worthen case, supra, may be helpful:

19 Utah Reports 2d Series, 1967, P.83

"The basic purpose of this statute is that of making an equitable arrangement between an injured employee, and an insurer (or employer) who pays him workmen's compensation, with respect to a cause of action against a third party who injures the employee, but it prevents him from having double recovery by requiring him to reimburse the insurer. It also gives the insurer the right to bring the action, but allows it only to reimburse itself and then pay any balance to the employee.

Where each of the parties has the right to bring the action and one takes the initiative and obtains a recovery for the benefit of both, *it is only fair that each bear his share of the expenses necessarily incurred in doing so. . . .*"

Certainly, if the party injured and the State In-

surance Fund had joined in an original action for the mutual benefit of both against the third party, the obligation of each to bear its fair share of the joint venture would not depend upon any statute but upon ordinary rules governing a joint venture, hence the cause of action for one to force the other to contribute would not depend upon the statute but upon other principles.

On principles of fairness it can be argued that the statute of limitations should run only from April 7, 1967—the date the Worthen decision was struck, as prior thereto a plaintiff could not effectively assert his rights.

B. *Laches* and *equitable estopple* are *inapplicable.*

18 Am Jur 2d *Contribution*, reads, page 132:

> Laches does not apply to an action at law for contribution, citing *Vansant v. Gardner*, 240 Ky. 318, 42 SW2d 300; *Friedman v. Maltinsky*, 260 Pa. 312, 103 A 731, and, it has been held, where there is concurrent jurisdiction over contribution in law and equity, the application of the doctrine of laches must be influenced by the spirit of the law of limitations. Where the relief sought is equitable in nature, however, laches may sometimes bar recovery of contribution, and has been held to do so where the claimant failed to prosecute the claim within a reasonable time and in the lifetime of other parties who had knowledge of the facts. It has been held that laches, and not

statutory limitation, applies to the right of the paying obligor to be subrogated to the creditor's security.

As in other cases, laches in an action for contribution is not, like limitation, a mere matter of time, although that is one of its important elements; there must be not only delay, but delay which works a disadvantage to another, citing *Vansant v. Gardner*, 240 Ky 318, 42 SW2d 300.

As a general rule, laches cannot be successfully asserted unless the delay was culpable and prejudice resulted. *Waldref v. Dow*, 172 Minn. 52, 214 NW 767.

A delay of 7 years has been considered not such laches as to bar relief on a bill for contribution in equity where no prejudice was caused thereby. *Burrows v. M'Whann*, 1 SC Eq (1 Desauss) 409.

As to equitable estopple, the doctrine necessitates, among other elements, a change of position or status to the detriment or injury of the person claiming estopple. See 28 Am Jur 2d *Estopple B Elements, Requisites* and *Grounds*, page 640.

Here there is no detriment.

Neither is there reliance on conduct of the claimant, another essential element; nor conduct of the claimant designed to or capable of misleading or inconsistent with the position now taken; nor any intention to mislead; or superior knowledge of the true facts; or change of position in any way, shape or form.

POINT III.

COSTS AS WELL AS ATTORNEY FEES ARE REIMBURSABLE.

The district court ordered contribution as to attorney's fees but not as to costs. We submit it should have allowed costs. In the *Worthen v. Shurtleff* case supra, the award appealed from and affirmed was for attorney's fees and costs.

Furthermore, the statute clearly contemplates something other than attorney's fees in its reference to—

> ". . . reasonable expense of the action including attorney's fees."

In speaking of contribution in a different facet of the field, Am Jur aptly says (*Contribution*, p. 32):

> "Where the claimant has paid costs under such a judgment they cannot be distinguished from the debt and every equitable principle which entitles him to contribution, for the one applies equally to the other."

Defendant asserts plaintiffs are not the proper parties. This is refuted by the record which confirms plaintiffs paid the sums here demanded.

In discussing parties in Contribution actions, Am Jur 2d summarizes, p. 135:

> In general, the common obligor who has

paid more than his proportionate share of the common obligation is the proper party plaintiff in an action for contribution; he should sue in his own name and not in the name of the obligee whom he has paid.

CONCLUSIONS

Plaintiffs have brought an ordinary contribution action where the statute, as interpreted in the Worthen case, clearly delineates how the third party proceeds should be allocated to the end that each party pays the fair share of the expenses including attorney's fees. The case was really quite simple until barnacled with assertions of equitable estopple, etc. We submit the trial court reduced the case to its proper denominator and that this court has only to decide:

1. Does the rule in the Worthen case apply,

2. Which statute of limitation applies, and

3. Does contribution apply to costs as well as attorney fees,

and we respectfully urge that affirmance is compelled by the law and the facts.

Respectfully submitted,

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