1972

Kenneth Whitmore v. The Industrial Commission of Utah, Calavo Growers Of California, Melvin J. Romney And Employers Insurance Of Wausau : Brief of Petitioner And Appellants

IN THE SUPREME CO
OF THE STATE OF

KENNETH WHITMORE, a Minor by and through his Guardian ad litem SAM O. WHITMORE,

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vs.

THE INDUSTRIAL COMMISSION OF
CALAVO GROWERS OF CALIFORNIA
MELVIN J. ROMNEY and EMPLOYERS
INSURANCE OF WAUSAU, a

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KENNETH WHITMORE, a Minor, by
through his Guardian ad litem, SAM
WHITMORE, and SAM O. WHITMORE,

Plaintiffs and

vs.

CALAVO GROWERS OF CALIFORNIA
a Corporation, and MELVIN J. ROM

Defendants and

Brief of Petitione

WRIT OF REVIEW OF THE
AWARD AND APPEAL
JUDICIAL DISTRICT COU
HONORABLE MARCELLUS

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH WHITMORE, A Minor by and through his Guardian ad litem SAM O. WHITMORE,

Petitioner,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, CALAVO GROWERS OF CALIFORNIA, MELVIN J. ROMNEY and EMPLOYERS INSURANCE OF WAUSAU, a Corporation,

Defendants.

Case No. 12730

KENNETH WHITMORE, a Minor, by and through his Guardian ad litem, SAM O. WHITMORE,

Plaintiffs and Appellants,

vs.

CALAVO GROWERS OF CALIFORNIA, a Corporation, and MELVIN J. ROMNEY,

Defendants and Respondents.

Case No. 12367

Brief of Petitioner and Appellants

STATEMENT OF THE CASE

Kenneth Whitmore was injured suffering permanent partial disability in a motor vehicle accident on June 2, 1967, in Salt Lake County, Utah. Thereafter, he and

his father, Sam O. Whitmore, sought to recover damages in a negligence action brought in the Third Judicial District Court of Salt Lake County, State of Utah, against Melvin J. Romney, driver of the vehicle in which Kenneth Whitmore was riding at the time of the accident. Subsequently, by amended complaint, Romney's employer, Calavo Growers of California, was joined as a party defendant. Calavo Growers moved to dismiss on the ground that Plaintiffs' sole remedy was provided by the Utah Workmen's Compensation Statute. Subsequently, Kenneth Whitmore filed a claim for workmen's compensation with the Utah Industrial Commission.

DISPOSITION IN LOWER COURT AND BEFORE THE INDUSTRIAL COMMISSION

The District Court, Judge Marcellus K. Snow, presiding, dismissed the Complaint of Kenneth and Sam O. Whitmore against Calavo Growers of California and Melvin Romney "on the merits, and with prejudice, on the ground and for the reason that Plaintiffs' sole remedy was under workmen's compensation. . . ."

Thereafter, Kenneth Whitmore's claim for workmen's compensation was refused by the hearing examiner on the ground that the claim was filed after the three-year statute of limitations had elapsed. Whitmore's Motion for Review to the Industrial Commission was subsequently denied. (Tr. No. 12730 at 132-133.)

Applicant and Petitioner, Kenneth Whitmore, (hereinafter Petitioner) petitioned for Writ of Review and

was granted leave to challenge the legality of the Industrial Commission's ruling. Plaintiffs and Appellants, Kenneth Whitmore and his father, Sam O. Whitmore, appeal from the Order of the Third Judicial District Court dismissing their Complaint with prejudice.

Both causes have been consolidated for the purpose of this appeal.

RELIEF SOUGHT ON APPEAL

On this consolidated appeal, relief is sought from the rulings of the Industrial Commission and the Third Judicial District Court.

First, Petitioner, Kenneth Whitmore, seeks vacation of the Industrial Commission's ruling that his claim for workmen's compensation is barred by the statute of limitations.

Appellants, Kenneth Whitmore and Sam O. Whitmore, seek reversal of the District Court's Order dismissing Appellants' Complaint with prejudice.

STATEMENT OF FACTS

About June 1, 1967, Dino DiLello and Kenneth Whitmore, at that time 14 years old, were requested by their schoolmate and friend, Donald Romney, to come to Growers Market in Salt Lake City and help him sort coconuts for his father, Melvin Romney, branch manager for Calavo Growers of California. The evening before the boys were to go to work, Kenneth Whitmore's father,

Sam O. Whitmore, called Melvin Romney, and asked if he brought his son and the DiLello boy to the market the next day, whether they could ride home with Mr. Romney. This was apparently agreed upon and all three of the boys, Donald Romney, Dino DiLello and Kenneth Whitmore, spent the day of June 2, 1967, sorting coconuts at Growers Market. Donald Romney remembers that Kenneth Whitmore and Dino DiLello were later paid for their work. (Deposition of Donald Romney at 4.) His father, Melvin Romney, states that he kept a petty cash fund from which such disbursements were generally made. (Tr. No. 12730 at 48.)

Near the end of the day, Appellant, Kenneth, and the other boys loaded some distressed merchandise (rose bushes packed in cardboard boxes) onto Mr. Romney's personal pickup truck to be taken to his home and disposed of. (Tr. No. 12730 at 50.) During the trip to Mr. Romney's home, Kenneth Whitmore, who was riding with the merchandise in the back of Mr. Romney's pickup truck with the other boys, was thrown or fell from the vehicle suffering permanent injuries.

In October of 1968, Appellants, Kenneth Whitmore and his father Sam O. Whitmore commenced legal action against Melvin Romney. Subsequently, Calavo Growers of California was joined as a party defendant. Prior to joining Calavo Growers, however, Appellants' legal counsel contacted the policy clerk of the Utah Industrial Commission to determine whether there had been a filing of an employers' liability insurance policy during the

period of October 1, 1966, to October 1, 1967, by Melvin Romney or Calavo Growers in accordance with the Utah Workmen's Compensation Act. It was reported that there was no record of any such filing. (Tr. No. 12730 at 63 and 99.)

Nevertheless, when joined, counsel for Calavo Growers moved to dismiss on the grounds that any recovery to be had must be obtained under workmen's compensation. Defendant, Melvin Romney, also joined in this motion, and the Court dismissed Appellants' Complaint with respect to both Defendants, Melvin Romney and Calavo Growers on the basis of an affidavit stating that there was insurance coverage.

A second check with the Industrial Commission by Appellants' counsel showed that there was no copy of a policy or contract of insurance on file as required by Section 35-1-47 of the Utah Code Annotated (1953); no record of a report of the accident had been filed as required by Section 35-1-97 of the Utah Code Annotated (1953); and no filing card indicating insurance coverage was available for the period October 1, 1966, to October 1, 1967. There was, however, found to be a notation on a card for a subsequent period indicating coverage for the above, 1966-1967 period. (Tr. No. 12367 at 68-69 and Tr. No. 12730 at 99-100.)

After the District Court had dismissed the Complaint on the grounds that Appellants were by law limited to their workmen's compensation remedy, Petitioner, Kenneth Whitmore, filed a workmen's compensation claim

with the Commission even though more than three years had elapsed since the accident. It was argued to the Hearing Examiner that Kenneth's parents had been mislead by Defendants into believing that no workmen's compensation was available and that, therefore, Defendants should be estopped from asserting the three-year statute of limitations. In support of this argument Petitioner argued: that Mr. Romney had advised his parents that no compensation under workmen's compensation was available; that at no time after suit was filed until over two years later when the statute of limitations had run had the defense of workmen's compensation been raised; and that no employers liability insurance policy had been on file with the Industrial Commission.

Calavo Growers defended Kenneth Whitmore's industrial claim claiming that Kenneth Whitmore had never been its employee as defined by Utah's Workmen's Compensation Act, and by asserting lapse of the three year statute of limitations. Calavo Growers prevailed on this latter argument.

ARGUMENT

POINT I

THE HEARING EXAMINER ERRED IN NOT RULING THAT THE THREE YEAR STATUTE OF LIMITATIONS FOR PRESENTING WORKMEN'S COMPENSATION CLAIMS TO THE INDUSTRIAL COMMISSION IS TOLLED DURING INFANCY.

Section 78-12-36 of the Utah Code Annotated (1953) provides:

> If a person entitled to bring an action . . . is at the time the cause of action accrued . . . (1) under the age of majority;
>
> * * *
>
> The time of such disability is not a part of the time limited for the commencement of the action.

At the time he was injured, Kenneth Whitmore was fourteen years old. Due to his minority, the three year time limitation was tolled and, therefore, the Industrial Commission Hearing Examiner erred in holding that Kenneth Whitmore's application was barred on the grounds that it was filed six months late.

In *Weaver v. Martori,* 69 Ariz. 45, 208 P.2d 652 (1949), the Arizona Supreme Court dealt with a very similar case involving a minor. In that case, the guardian ad litem for an injured minor and his parent had brought suit in the county court to recover damages for injuries sustained while loading cantaloupes at Defendant's place of business. The case was subsequently removed to federal court, where the case was dismissed on the ground that Plaintiffs' sole remedy was afforded by the Arizona Workmen's Compensation Statute. Plaintiffs' claim before the Arizona Industrial Commission, however, was held barred because, *inter alia,* the statute of limitatoins had run. Plaintiffs appealed and on the issue of tolling the statute of limitations, the Arizona Supreme Court wrote:

> We hold that the limitation of time prescribed by our Workmen's Compensation Law for the filing of a claim by an employee thereunder is tolled

> during the disability of infancy and that the limitation does not begin to run against a minor until either a guardian has been appointed or the infant becomes sui juris, whichever shall first occur. *Linberry* v. *Town of Mebane,* 219 N.C. 256, 13 S.E.2d 429, 142 A.L.R. 1033; *Allen* v. *St. Louis-San Francisco R. Co.,* 338 Mo. 395, 90 S.W.2d 1050, 105 A.L.R. 122. Texts: 71 C.J., Workmen's Compensation Acts Section 799 and 8 Am. Jur., Workmen's Compensation, Section 418.[1]

Utah's Workmen's Compensation Act makes no provision that the express tolling provision protecting minors found in Section 78-12-36 should not apply. And, in view of the general rules of liberal statutory construction which govern Utah's Workmen's Compensation Act, nothing less than an express provision should operate to cause the statute of limitations to run against a minor and negate the tolling provision. The California Supreme Court apparently adopted such a position in the case of *Colonial Ins. Co.* v. *Industrial Accident Commission,* 27 Cal. 2d 437, 439, 164 P.2d 490, 492 (1948). Therein the court wrote:

> It must be remembered that *the provisions of the Workmen's Compensation law dealing with limitations of time* within which proceedings for compensation may be commenced, like other parts of the law, *are to be liberally construed* to the end that the beneficial features thereof shall not be lost to employees, and *where provisions are susceptible of an interpretation either beneficial or detrimental to an injured employee, they must be construed favorably to the employee.* (emphasis added)

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[1]208 P.2d at 254.

Thus, the California Supreme Court would apparently require that a provision operating against the workman be clearly spelled out and that any indefinite wording be construed in his favor. No clear evidence of a legislative intent to remove the general protections afforded minors can be found in the Utah Act — only an intent to restrict minors as well as all other workmen to the remedy afforded under the Act.

An argument that the general rule tolling statutes of limitation and thereby protecting infants is not applicable when applied to infants' workmen compensation claims might possibly be constructed on the basis of *Ortega* v. *Salt Lake Wet Wash Laundry,* 108 Utah 1, 156 P.2d 885 (1945). In *Ortega,* the Utah Supreme Court stated that the legislature had intended to bring legally employed minors (the law was subsequently amended to include illegally employed minors, Laws of Utah (1945) Chapter 65.) under the provisions and protections of Utah's workmen's compensation title and that a minor could not, therefore, disaffirm his contract of employment and thereby avail himself of his common law remedy. Petitioner does not contest this holding, but asserts that the *Ortega* holding that a minor workman cannot disaffirm his employment contract and assert a civil remedy, but is instead limited to the Act's remedy, should not be extended to make an employed infant sui juris for all purposes and thereby vitiate the express legislative protections granted infants in Section 78-12-36. Moreover, such an argument cannot be supported by any express legislative intent in the Workmen's Compensation

Act and would be obiter dictum as far as the *Ortega* holding is concerned.

On the other hand, in *Ortega* the Utah Supreme Court cites with approval the New Hampshire Supreme Court's holding that where a statute does not expressly confer upon an infant the status of an adult, such status will not be inferred.[2] Indeed, it is evident that gross injustice would result if the disability protection, tolling a statute of limitation in the case of a minor, were to be denied when one considers that the Act covers injured infant workmen who may be at the very tenderest of ages due to the fact that even those illegally employed are bound by its remedy.

It is admitted that the argument that the Industrial Commission can take jurisdiction inasmuch as the statute of limitations has been tolled due to Kenneth Whitmore's disability as a minor is raised for the first time on appeal. Nevertheless, some questions of jurisdiction can be properly raised for the first time on appeal. *Collins v. Industrial Commission,* 102 Ariz. 509, 433 P.2d 801, 802 (1967). Moreover, the Utah Supreme Court in *Stanley v. Industrial Commission,* 79 Utah 228, 232, 8 P.2d 770, 771 (1932) has pointed out that the general rule on raising arguments on appeal is somewhat different when applied to the decisions of the Industrial Commission as compared to the rulings of a court, the reason therefor lying in the different obligations and duties of the Industrial Commission as

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[2]*Ortega v. Wet Wash Laundry,* 108 Utah 1, 14, 156 P.2d 885, 891 (1945).

distinguished from the adversary proceeding of a court. Unlike a court, the Commission has a duty to make its own independent finding on the question of whether an applicant should be compensated. The Utah Supreme Court stated in *Stanley:*

> "We are not prepared to say that, if it appears from the record that the commission ignores or fails to consider some tenable theory of the case upon which compensation might be granted, the court might not send it back for consideration of such issue or theory, provided the evidence was sufficient to demand that such a theory be considered. The rule that pertains to the courts to the effect that parties cannot try a case on one theory and then attempt to gain a reversal upon some other theory on appeal not advanced on the trial should probably not be applied as strictly to the commission, especially if the parties were honest and were not experimenting with the tribunal. The reasons that lie at the base of that rule as applied to the courts are not as potent as applied to the commission. ***It is its duty to determine whether the conditions precedent exist which entitle an applicant to payment. Consequently it has the duty to determine, regardless of theories advanced by counsel, whether the conditions precedent exist.*** In case it clearly appears it has not performed that duty, this court would return the record for that purpose. (emphasis added.)

Petitioner was 14 years old when the accident occurred. The legislative provisions protecting minors should control the tolling issue in light of the fact that Utah's Workmen's Compensation Act makes no statement on the question.

POINT II

THE CONCLUSION OF LAW MADE BY THE INDUSTRIAL COMMISSION'S HEARING EXAMINER IS NOT SUPPORTED BY THE EVIDENCE.

The findings made by the Industrial Commission will not be disturbed by this Court unless they are not supported by the evidence nor will the Court weigh the evidence presented. The Hearing Examiner's conclusions of law, however, are not binding on this Court, and are, in the instant case, incompatible with his findings. (Tr. No. 12730 at 132).

The Hearing Examiner concluded that no compensation had been received, which would operate to establish a new date from which the three-year limitation period would begin to run pursuant to Section 35-1-99 of the Utah Code Annotated (1953). The Examiner stated that "at no time since the accident on June 2 has Calavo Growers of California, *or any representative* of Calavo Growers, paid any amounts to Applicant by way of compensation." (Tr. No. 12730 at 132) (emphasis added). This statement, however, is in direct conflict with the Hearing Examiner's finding that State Farm Insurance Company had "paid certain medical benefits" on behalf of Mr. Romney, "Calavo's resident agent in Utah." (Tr. No. 12730 at 132 and 133). The Examiner's legal conclusion that no payments by way of compensation have been made is not supported by findings so it is, therefore, impossible to determine why the medical payments did not constitute compensation.[3] Several explanations are possible: The

[3]*Moser v. Industrial Commission*, 21 U.2d 51, 53, 440 P.2d 23 (1968).

Examiner may have believed that "compensation" can only mean payments made by an employee liability insurance carrier under a workmen's compensation insurance policy; that to be "compensation" the employer must state that the payments are compensation; or, that payments made on behalf of the regional manager and resident agent are not attributable to Calavo Growers of California. None of these reasons is legally sufficient in light of the broad definition of "compensation" provided by the legislature in the statute. "Compensation" is defined by Subsection 35-1-44 (6) of the Utah Code Annotated (1953) as "payments and benefits provided for by this title." Section 35-1-45 further provides that an injured employee is entitled to compensation for loss sustained due to *medical payments.*

Kenneth Whitmore was entitled to medical payments under the act, and medical payments were made by State Farm Insurance Company on behalf of Mr. Romney, Calavo's Utah agent. This operated to extend the statute of limitations to three years from the date when the last such compensation was paid.[4]

The Utah Supreme Court has viewed such medical services or payments provided by the employer as "compensation" within the statutory definition. In *Jones v. Industrial Commission,* 17 U.2d 28, 404 P.2d 27 (1965), for example, the Court stated that the petitioner therein was barred by the three-year limitation inasmuch as he was last attended by a doctor more than three years before pre-

[4]Said compensation was paid within three years of filing a claim with the Industrial Commission. (Tr. 12730 at 26).

senting his claim. Compensation in that case was not narrowly viewed, but included the services of a doctor provided by the employer. The medical payments by State Farm Insurance Company on the behalf of Mr. Romney, as Petitioner's employer or as Calavo's representative, should qualify therefore, as "compensation" and operate to toll the statute of limitations.

POINT III

RESPONDENTS' CONDUCT OPERATED TO MISLEAD APPELLANTS TO NOT FILE A WORKMEN'S COMPENSATION CLAIM. RESPONDENTS SHOULD, THEREFORE, BE ESTOPPED FROM ASSERTING THE THREE-YEAR STATUTE OF LIMITATIONS.

Petitioner asserts that Defendants are precluded from setting up the three-year bar because Petitioner's delay in filing his claim was attributable to Defendants' conduct. *Rice v. Granite School District,* 23 U.2d 22, 456 P.2d 159 (1969); *Utah Apex Mining Co., et al v. Industrial Commission,* 116 Utah 305, 209 P.2d 571 (1949).

The Hearing Examiner's legal conclusion that there was no conduct on the part of Calavo Growers that would estop it from asserting the three-year limitation, fails to account for the actions of Melvin Romney, its resident agent for Utah. Petitioner's evidence showed that Mr. Romney had represenetd that there was no workmen's compensation available. Even the testimony of Mr. Romney shows that he told the Whitmores that his insurance would take care of it. He also failed to give Calavo Growers, Calavo's insurance carrier, or the Industrial Commission any report

of this accident, the serious consequences of which he was well aware. Moreover, from the time suit was first filed against him in October of 1968 until November of 1970, neither Romney nor his legal counsel raised the defense or gave any indication that workmen's compensation might be available. It was only after the statutory three-year period had run that workmen's compensation was raised as a defense.

The only justification, it seems, for a statute of limitation in regard to workmen's compensation claims at all is to protect the employer and, perhaps indirectly, the insurance carrier from the unexpected and unreported claim. Defendants cannot assert in this instance, however, that they have been prejudiced by not knowing of the claim sooner. Calavo Growers was constructively informed of the accident through its resident agent, Mr. Romney, who was physically present when the accident occurred and fully aware of the extent of Petitioners disability. Thus, Petitioner's employer knew of the claim from the very beginning.

Furthermore, to Petitioner's detriment, Calavo Growers did not have a policy of workmen's compensation insurance on file as required by the Utah Code Annotated, Section 35-1-47 (1953) and any check that was made, or could have been made, to determine whether the employer had complied with Section 35-1-48 left, and would have left, Appellants with the impression that they were free to proceed with their civil remedy pursuant to Section 35-1-57. (Tr. 12730 at 59.)

For the reasons stated above, Appellants were misled into believing that workmen's compensation was not available. Moreover, inasmuch as Calavo's regional manager was present at the time the accident occurred and knew of the seriousness of the injury it cannot be asserted that Calavo will be prejudiced if it is estopped from asserting the statute of limitations.

Inasmuch as the Hearing Examiner made no findings of fact on any of the issues relating to estoppel, the Court is not bound by the Examiner's legal conclusion that no estoppel-like conduct had taken place. *Moser v. Industrial Commission,* 21 U.2d 51, 440 P.2d 23 (1963).

POINT IV

THE DISTRICT COURT ERRED IN TREATING RESPONDENTS' MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT AND DISMISSING APPELLANTS' CLAIM WITH PREJUDICE.

This Court has consistently held that summary judgment is inappropriate when there are material factual issues in dispute. *Transamerica Title Ins. Co. v. United States Resources, Inc.,* 24 U.2d 346, 348, 471, P.2d 165 (1970) and *Gillmor v. Carter,* 15 U.2d 280, 283, 391 P.2d 426 (1964). Nevertheless, Appellants' Complaint in the lower court was dismissed with prejudice pursuant to Section 35-1-60 of the Utah Code Annotated (1953) on the ground set forth by Respondents, that workmen's compensation was Appellants' sole remedy. Upon Kenneth's filing with the Industrial Commission, however, Calavo

Growers claimed that Kenneth Whitmore was not an employee and that, besides, any claim was barred by the three-year statute of limitations. If the rulings of the District Court and the Industrial Commission are permitted to stand, therefore, Appellants will have been effectively barred from any remedy.

Several factual determinations were not made in the lower court which if resolved in favor of Appellants would establish the right to pursue a civil remedy. The lower court seemingly based its decision to dismiss Appellants' complaint with prejudice upon the affidavit of Virginia Leahy, policy clerk with the Industrial Commission, who stated that a policy of employees' liability insurance was in effect covering Calavo Growers at the time of the accident. (The affadivit did not state that the policy was on file.) None of the submission of the parties, however, furnishes sufficient information to determine whether at the time of the accident Melvin Romney and Kenneth Whitmore were acting as co-employees of Calavo Growers.[5] If not, Kenneth Whitmore would not be a fellow-servant with Romney of the common employer, Calavo, and Appellants should be free to pursue their civil remedy.[6]

In *Christean v. Industrial Commission* 113 Utah 451, 458, 196 P.2d 502 (1943) this Court adopted the criteria suggested in the Restatement of the Law of Agency to be

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[5]See Utah Code Annotated §35-1-42 (1953); *Galleyos* v. *Stringham,* 21 U.2d 139, 422 P.2d 31 (1968).

[6]Utah Code Ann. §35-1-61 (1971 Supp.): *Worthen v. Shurtleff and Andrews, Inc.,* 19 U.2d 80, 426 P.2d 223 (1967).

used to determine whether one was an independent contractor.[7] These criteria were not considered by the District Court, nor indeed was any determination made on the question of whether Romney was within the scope of his employment, or whether he was acting as an independent contractor at the time of the accident.

Moreover, the District Court should have determined whether Kenneth Whitmore was an employee of Calavo Growers. Appellants alleged in their amended complaint that on June 2, 1967, Kenneth Whitmore had been an employee of "Defendants Calavo Growers of California and Melvin J. Romney, *or one of them* . . . ." (Tr. No. 12367 at 411). Upon a hearing on the merits, Kenneth Whitmore could be found not to have been an employee of Calavo Growers, as in fact alleged by counsel for Calavo Growers before the Industrial Commission (Tr. No. 12730 at 120). He may have nevertheless been an employee of Melvin Romney. Melvin Romney was not covered by a policy of employer's liability insurance at the time of the accident, or at least it was so never alleged before the trial court. Appellants, therefore, may be able to pursue their civil remedy as provided by Section 35-1-57 of the Utah Code Annotated (1971 Supp.) But this fact is still in dispute—it having not been resolved by the lower court or the Industrial Commission. Thus, if the District Court's order is permitted to stand, Appellants will never have opportunity to have this issue resolved.

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[7]Cited with approval in *Sutton* v. *Industrial Commission,* 9 U.2d 339, 341, 344 P.2d 538 (1959).

Furthermore, Kenneth Whitmore may not have been acting within the scope of any employment at all when the accident occurred. The Hearing Examiner implies that this might be his ruling when he states that Kenneth was injured while merely riding home. (Tr. No. 12730 at 132.) Appellants should be permitted to have Keneth's status as an employee at the time of the accident ajudicated to determine whether workmen's compensation applies at all.

In addition to dismissing the case when material issues of fact were still unresolved, the District Court erred in treating Respondents' motion to dismiss as a motion for summary judgment and ordering Appellants' Complaint dismissed with prejudice. Rule 56(c) of the Utah Rules of Civil Procedure provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings . . . .

Respondents' motions to dismiss were supported by an affidavit to the effect that a policy of insurance was in force, but were not supported as required by Rule 56(c) with regard to the issues stated above regarding the status of Melvin Romney and Kenneth Whitmore as employees.

Respondents' Motions to Dismiss were therefore, improperly granted in that material questions of fact have been left unresolved, and this case should be remanded to the District Court for a determination on the merits.

POINT V

RESPONDENT ROMNEY WAIVED THE AFFIRMATIVE DEFENSE OF WORKMEN'S COMPENSATION, AND THE DISTRICT COURT ERRED, THEREFORE, IN DISMISSING APPELLANTS' COMPLAINT AS AGAINST HIM.

Rule 8(c) of the Utah Rules of Civil Procedure provides:

> In pleading to a preceding pleading, a party shall set forth affirmatively . . . assumption of risk, contributory negligence . . . *injury by fellow servant* . . ., and any other matter constituting an avoidance or affirmative defense. (emphasis added)

Rule 8(d) provides that "[a]verments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleading."

In response to Appellants' initial Complaint, Defendant Romney raised the affirmative defense of contributory negligence and assumption of the risk. Likewise, Defendant Romney raised these same defenses in his Answer to Plaintiffs' Amended Complaint. Romney did not, however, raise the defense of fellow servant, or workmen's compensation as provided by Rule 8. Therefore, this defense was waived by Romney and the District Court erred in dismissing Plaintiffs' Complaint with respect to him. *Thomas v. Braffet's Heirs,* 6 U.2d 57, 305 P.2d 507 (1956).

CONCLUSION

This Court should vacate the Industrial Commission's ruling that Petitioner's claim for compensation is barred by the three-year statute of limitations. To permit the statute of limitations to run against a fourteen-year-old, at least until a guardian ad litem is appointed, would be unreasonable and contrary to the provisions made by the Utah Legislature. Moreover, in light of the broad definition given the term "compensation" in the Workmen's Compensation Act, this Court should rule that the last date upon which medical payments were made by a foreign corporation's resident agent, or by someone else on his behalf, to an injured workman is the date from which the three-year limitation period for presenting workmen's compensation claims begins to run.

The Hearing Examiner's conclusion that there was no estopping conduct on the part of Calavo Growers of California or their Utah representative, Mr. Romney, is difficult for Petitioner to refute inasmuch as no findings of fact were made in support of this conclusion. It is asserted, however, that the record clearly indicates that the Whitmores were whipsawed by the use of two forums. Misled by Romney's representations and Calavo's failure to report the accident to the Industrial Commission or have a copy of its employers' liability insurance on file, the Whitmores were induced to pursue their claim in District Court. After the case had pended for two years, the defense of workmen's compensation was raised to secure dismissal of Appellants' Complaint in District Court. And, thereafter, the statute of limitations was used as a defense to Petition-

er's claim for compensation. If this is not a case for the application of estoppel, Petitioner is at least entitled to know what the findings of facts were upon which this decision was based.

Appellants seek reversal of the District Court's dismissal of their Complaint with prejudice on the grounds that material issues of fact are in dispute which were not resolved in the District Court, and which if resolved in Appellants' favor may permit recovery in a civil action. Furthermore, these issues were not resolved by the submissions of the parties and dismissal was, therefore, improper under the Utah Rules of Civil Procedure. In any event, the District Court's dismissal was improper with respect to Appellants' Complaint against Romney because the affirmative defense of fellow servant or workmen's compensation had been waived by Romney inasmuch as it was not timely raised.

Respectfully submitted,

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