1972

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

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 NEVADA, a corporation,

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

Plaintiffs and Respondents,

vs.

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

Defendants and Appellants.

BRIEF OF DEFENDANTS AND APPELLANTS

WRIT OF REVIEW FROM THE INDUSTRIAL COMMISSION OF UTAH AND APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE MARCELLUS K. [illegible]

LeRoy H. [illegible]
PARSONS [illegible]
520 Kearns [illegible]
Salt Lake City, [illegible]
Attorneys for [illegible]
Calavo Growers [illegible]
of California

L. L. [illegible]
STRONG & [illegible]
604 Boston Building
Salt Lake City, Utah
Attorneys for Defendants and Appellants

Robert F. Orton
Karl Jay Peck
NIELSEN, CONDER, HANSEN AND [illegible]
610 Newhouse Building
Salt Lake City, Utah 84111
Attorneys for Kenneth Whitmore and Sam O. Whitmore

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IN THE

SUPREME COURT

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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 and 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 DEFENDANTS AND RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is a consolidated appeal from a dismissal of appellant's action in the district court and a subsequent denial of benefits by the Industrial Commission of Utah.

DISPOSITION IN THE LOWER COURT AND BEFORE THE INDUSTRIAL COMMISSION

Kenneth Whitmore sustained a permanent injury to his elbow on June 2, 1967, when he slipped or fell from a pickup truck owned and operated by Melvin J. Romney. An action was filed in the District Court of Salt Lake County on October 16, 1968 against Romney. On October 16, 1970, an amended Complaint named Calavo Growers of California an additional party defendant — plaintiff alleging to have been an employee of Calavo Growers of California or Romney.

The district court dismissed the Amended Complaint with prejudice as to both defendants holding that Workmen's Compensation is an exclusive remedy against an employer. An application for benefits was denied by the Industrial Commission based on failure of petitioner to file within the statute of limitations.

RELIEF SOUGHT ON APPEAL

Defendants and Respondents, Calavo Growers of California and Employers Insurance of Wausau, submit that both inferior tribunals should be sustained and the respective decisions affirmed.

STATEMENT OF THE FACTS

Calavo Growers of California and Employers Insurance of Wausau, hereinafter collectively referred to as "Calavo", essentially agree with the statement of facts as set forth in appellants' brief, with certain aspects re-

quiring additional clarification. Calavo maintained a resident agent in Utah, Mr. Melvin J. Romney. Calavo maintained workmen's compensation coverage with Employers Mutual Liability Insurance Company of Wisconsin during the period October 1, 1966 through October 1, 1967 (R. 12367, p. 53).

On October 16, 1970, an Amended Complaint was filed in the District Court of Salt Lake County, naming Calavo an additional party defendant, Romney having been named the sole defendant in the original action filed exactly two years earlier. Counsel for Calavo verified the existence of workmen's compensation insurance coverage on the date of the accident in question, and moved to dismiss plaintiff's Complaint with prejudice pursuant to *Utah Code Annotated*, Sec. 35-1-60, workmen's compensation being an exclusive remedy for an employee against his employer. Melvin J. Romney joined in the Motion to Dismiss, and both motions were granted by the district court. Petitioner then filed an application with the Industrial Commission of Utah, naming Calavo Growers of California, Melvin J. Romney, Employers Mutual Liability Insurance Company of Wisconsin as defendants. This application was filed with the Industrial Commission on December 23, 1970 (R. 12730, p. 2). Defendants then moved to dismiss the application pursuant to *Utah Code Annotated*, Sec. 35-1-99, as having been filed more than three years from the date of the accident or the date of the last payment of compensation. After an extensive hearing and review of briefs filed by both parties, the

Hearing Examiner, and subsequently the Industrial Commission sitting as a whole, denied the application on the limitations argument. After denial of a Motion for Review, both the Industrial Commission case and the district court dismissal were consolidated on appeal.

ARGUMENT

POINT I.

PETITIONERS' ALLEGATIONS THAT THE STATUTE OF LIMITATIONS FOR PRESENTING CLAIMS TO THE INDUSTRIAL COMMISSION IS TOLLED DURING INFANCY, CANNOT BE SUSTAINED PROCEDURALLY OR SUBSTANTIVELY.

If there is one rule to which this Court addresses itself more than any other, it may be that well established principle, or perhaps admonition, that parties shall not be allowed the utilization of this forum to argue a point of law in the first instance. Petitioner now seeks approval of a contravention of this rule by claiming for the first time on appeal that the limitations statute of the workmen's compensation code should be tolled during the infancy of the workman. This Court has repeatedly held that issues not raised in the inferior court cannot be heard for the first time on appeal. *Wagner* v. *Olsen*, 25 Utah 2d 366, 482 P. 2d 702 (1971); *Estate of Ekker*, 19 Utah 2d 414, 432 P. 2d 45 (1967). Writ of Review from the Industrial Commission are equally bound by this rule of practice. *Utah Delaware Mining Co.* v. *Industrial Com-*

mission, 76 Utah 187, 289 Pac. 94 (1930); *Spring Canyon Coal Co.* v. *Industrial Commission*, 58 Utah 608, 201 Pac. 173 (1921). Petitioner would have this Court abandon a time-honored and well-founded precedent and allow arguments on a newly raised issue on the basis of dicta found in *Stanley* v. *Industrial Commission*, 79 Utah 228, 8 P. 2d 770 (1932), to the effect that if some tenable theory was raised by competent evidence and the Commission refused to consider it, that the matter could be remanded by the Supreme Court for findings in light thereof. Under the facts and circumstances of the *Stanley* decision, this dicta was appropriate; however, it should be noted that this Court failed to find the requisite necessity to remand in *Stanley* and affirmed the Order of the Commission.

There is not the slightest suggestion in any pleadings filed with the Commission, nor in any arguments presented before the Hearing Examiner, or in post-hearing briefs, that petitioner questioned the efficacy of the statute of limitations as set forth in *Utah Code Annotated*, Section 35-1-99, as applied to a fourteen year old applicant. It is only after the Hearing Examiner and the Commission, sitting as a whole, determined the application to have been untimely filed that the suggestion is made that the fact of infancy alone should toll the running of the limitations period.

Petitioner's counsel can be commended on his ingenuity in presenting everything possible to allow his client to prevail, but to condone this transparent and

readily admitted attempt to abrogate a basic procedural touchstone would be to fly in the face of pronouncements issued by this Court from its earliest day and which have been the basic foundation of appellate practice before it. Defendants submit that this issue cannot and should not be here considered due to petitioner's failure to raise it with the Commission. *Ogden City Corp.* v. *Industrial Commission*, 92 Utah 423, 69 P. 2d 261 (1937), wherein at 92 Utah 430, Mr. Justice Moffat held:

> this court may not go beyond the record in a review on certiorari and new issues not found in the record may not, for the first time, be made in this Court.

Calavo would further submit that this issue cannot be sustained on a substantive basis. The Kansas Supreme Court has considered an identical question and in *Johnson* v. *Snyder Chemical Co.*, 178 Kan. 580, 290 P. 2d 1010 (1955), that court held the Workmen's Compensation Act to be a creature of the legislature which has determined who is effected by the act, the conditions under which compensation is to be paid injured workmen or his dependents, and what notice of claim must be given and when. The Kansas statute was silent as to tolling in minority and the Kansas court held that a claim on behalf of an injured minor workman was barred by not having been filed within the statutory period.

It should be here noted that Whitmore had the assistance of very able and competent counsel to assist him in filing his claim for relief arising from the accident of

June 2, 1967. Counsel was actively involved in representing applicant for at least twenty (20) months prior to the expiration of the statutory limitations period. He now contends that infancy alone is sufficient to toll the statute; this is contrary to the basic intent of the workmen's compensation statute as being applicable to all workmen, minors or otherwise. This Court has held in *Ortega* v. *Salt Lake Wet Wash Laundry*, 108 Utah 1, 156 P. 2d 885 (1945), that minors are "employees" within the definition of that term as now found in *Utah Code Annotated*, Sec. 35-1-43(2). Thus, as minors are employees and required to follow the dictates and rules and regulations of the Workmen's Compensation Act, the limitations provision applies to minors as to all other employees. Calavo reiterates its position as taken in the Industrial Commission, that no employee-employer relationship existed between Kenneth Whitmore and Calavo. Even if this Court should find the relationship to have existed, the limitations statute would apply against Whitmore and the Order of the Industrial Commission must be affirmed.

POINT II.

THE HEARING EXAMINER CORRECTLY FOUND THAT THE MEDICAL PAYMENT BY STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY WAS NOT MADE ON BEHALF OF CALAVO GROWERS AND, THEREFORE, NO NEW LIMITATIONS PERIOD BEGAN WITH SUCH PAYMENT.

The Hearing Examiner conducted a thorough investigation into the facts and circumstances surrounding the accident of June 2, 1967 and of the medical payments which were paid to Kenneth Whitmore by Melvin J. Romney's personal automobile insurance carrier, State Farm Mutual Automobile Insurance Company, hereinafter referred to as "State Farm". The record reflects that State Farm assumed responsibility for damages sustained by applicant and entered into active negotiations toward settling the claim (R. 12730, pp. 56-57).

Mr. Romney testified that State Farm was acting in the sole capacity of his automobile liability insurance carrier and that no such payments by State Farm were made on behalf of Calavo Growers (R. 12730, p. 53). This Court has held on numerous occasions that in reviewing a compensation case, it will examine evidence only to ascertain whether there is any substantial evidence in support of the findings of the Commission and whether the Commission has acted without or in excess of its jurisdiction. The Hearing Examiner made specific Findings of Fact as follows:

> Subsequent to the accident, Romney's personal automobile insurance carrier, State Farm Mutual Automobile Insurance Company, negotiated settlement for Mr. Whitmore's injuries and paid certain medical benefits. At no time since the accident on June 2 has Calavo Growers of California, or any representative of Calavo Growers, paid any amounts applicant by way of compensation. The payments made by State Farm Mutual Automobile Insurance Company were *not* made on behalf

of Calavo Growers. (Emphasis added.) (R. 12730, 132-133.)

As the Hearing Examiner made a specific finding that the payments made by State Farm Mutual Automobile Insurance Company were not made on behalf of Calavo Growers, it is wonderous the manner in which applicant now attempts to ignore the finding in its entirety. Again counsel's ingenuity can be admired, but no such "slight of hand" should be permitted before this Court to allow payments made by State Farm to become "compensation" as defined in *Utah Code Annotated*, Section 35-1-44(6): "the payments and benefits provided for in this title" and thus magically become payments on behalf of Calavo. The Industrial Commission has made a specific finding and as the finding is supported by competent evidence, this Court must affirm. *Kelly* v. *Industrial Commission*, 80 Utah 73, 12 P. 2d 1112 (1932); *Parker* v. *Industrial Commission*, 78 Utah 509, 5 P. 2d 573 (1931); *Hauser* v. *Industrial Commission*, 77 Utah 419, 296 Pac. 780 (1931).

Calavo would submit that no payments of compensation were ever made by it to applicant. The Hearing Examiner, as the sole judge of credibility of the witnesses, resolved a disputed issue of fact in favor of Calavo. This Court should sustain such specific finding. No evidence, however slight, was adduced on behalf of applicant showing that State Farm was a compensation carrier for Calavo Growers. It follows, as night the day, that no payments on behalf of State Farm may be attributed to Calavo, and therefore, no new limitations period commenced.

POINT III.

THERE WAS NO CONDUCT ON THE PART OF CALAVO GROWERS WHICH WOULD ESTOP FROM ASSERTING THE THREE YEAR STATUTE OF LIMITATIONS.

The Hearing Examiner made a specific Finding of Fact regarding appellant's claim that Calavo should be estopped from asserting the limitations provision of *Utah Code Annotated*, Sec. 35-1-99:

> The above application was filed December 18, 1970, more than three years from the date of the accident or the date of last payment of compensation, and it is therefore barred as a matter of law pursuant to Utah Code Annotated, Sec. 35-1-99.
>
> The Commission finds no conduct on the part of Calavo which would estop it from claiming benefits of this limitation provision (R. 12730, p. 133).

Applicant bases his third assignment of error on the failure of the Industrial Commission to find that Calavo should be estopped from claiming benefit of the statute of limitations because: "Petitioner's delay in filing his claim was attributable to defendant's conduct." (Appellant's brief, p. 14.) Applicant bases his estoppel argument on a purported conversation which occurred some two weeks after the accident wherein Romney is alleged to have stated that there was no workmen's compensation benefit available for Kenneth Whitmore (R. 12730, pp. 39-40). Mr. Romney, the then Calavo representative in

Utah, denied that such conversation took place (R. 12730, p. 56). Both Mr. Whitmore and Mr. Romney agree that Mr. Romney informed the Whitmores that Romney had available personal automobile liability insurance and that subsequent to their conversations, State Farm advised the Whitmores that State Farm would take care of the medical expenses (R. 12730, p. 39). As heretofore discussed, the Industrial Commission is the sole judge of the credibility of the witnesses, the weight of the evidence and the facts, and its decision as to such matters is final if there is any substantial evidence to sustain it. *Chief Consolidated Mining Co.* v. *Industrial Commission*, 70 Utah 333, 260 Pac. 271 (1927). See also, *Board of Education of Salt Lake City* v. *Industrial Commission*, 83 Utah 256, 27 P. 2d 805 (1933). Calavo will submit that as the Hearing Examiner has resolved a disputed issue of fact and is the sole judge of credibility, this judgment should not be overturned in light of the competent evidence to sustain it.

Should this Court determine that the purported conversation did occur, then it must resolve the issue as to whether applicant relied thereon, for without reliance there can be no estoppel as a matter of law. Petitioner cites two cases dealing with estoppel. The first, *Rice* v. *Granite School District*, 23 Utah 2d 22, 456 P. 2d 159 (1969), involved a factual situation where an insurance adjuster made numerous representations to the claimant that "his company would take care of everything". Several conversations occurred between the adjuster and the

claimant during the year following the accident. It was not until the one year statute of limitations had run that the adjuster for the first time indicated to the claimant that her claim was to be denied.

The trial court correctly held that the action by the insurance adjuster was so gross in inducing plaintiff to delay filing of her action until after the statute had run that to allow the insurance carriers to claim the statute of limitations would be inequitable. In *Rice*, there was no factual dispute as to the conversations had between the adjuster and the claimant, either as to content or extent. It is obvious, therefore, that *Rice* can be clearly distinguished from the facts before the Industrial Commission in this case as applicant claims to have relied solely on an isolated conversation which occurred some two weeks after the accident.

In *Utah Apex Mining Company* v. *Industrial Commission*, 116 Utah 305, 209 P. 2d 571 (1949), the insurance carrier was again estopped from claiming benefit of limitations statute when it agreed originally to the acquisition of jurisdiction by the Industrial Commission and subsequently attempted to challenge the jurisdiction. This Court held that the jurisdiction was continuous and denied any attempt to deny continuing coverage to the applicant. As *Utah Apex* was a continuing jurisdiction case, Calavo fails to see how its rationale or holding can be applied to the facts and circumstances of the case before the Court.

The fact that applicant failed to file his claim within

the three year statute is no fault of Calavo, nor should Calavo be estopped from asserting this defense. In deciding the issue of estoppel to claim benefit from the statute of limitations in workmen's compensation cases, this Court in *McKee* v. *Industrial Commission*, 115 Utah 550, 206 P. 2d 715 (1949), considered a matter wherein applicant sustained an injury while at work, visited the company doctor, received six days temporary disability and returned to work. He was eventually laid off and seven years later returned to work. After returning to work, he sustained an industrial accident and sought medical treatment from his personal physician, after which he requested clearance from the company physician to return to work. The company physician advised applicant that he had not been injured in this latest accident, but that he was unable to return to work due to a muscular spasm in his back. Applicant received treatment from his personal physician using the company doctor's diagnosis. Finally, McKee sought and obtained a third physician's opinion and was informed that he had, in fact, sustained an injury on the second occasion.

McKee then filed a claim with the Industrial Commission after the expiration of the statutory period, but contended that he was not barred because the company doctor had either mistakenly or intentionally informed him that there had been no injury to his back and that he had a right to rely and did, in fact, rely on such a diagnosis to his prejudice. This Court framed the issues as follows at 115 Utah 556:

> Before plaintiff can prevail upon a theory of estoppel, it is incumbent upon him to establish his reliance upon the company doctor's statement which we shall assume was erroneous. If the evidence permits a finding by the commission that plaintiff did not rely on the statement, then his claim of estoppel necessarily fails.

The Court held that plaintiff had had an equal opportunity to discover the truth and the fact that he had relied upon the statement of the company doctor was not sufficient to permit him to assert an estoppel under the facts and circumstances presented. McKee had relied upon physicians of his own choosing rather than upon the statement of the company doctor, and, therefore, had failed to establish his theory of estoppel.

It is evident that *McKee* was an identical fact situation as before this Court, except Whitmore contacted counsel of his own choosing rather than a physician. This counsel had an opportunity to contact the Commission to determine whether Calavo had valid workmen's compensation coverage at the time of the accident. He, in fact, did so as his affidavit avers (R. 12367, p. 70). The fact that applicant's counsel was unable to confirm coverage does not controvert the fact that coverage did exist. When counsel for Calavo contacted the Industrial Commission, he was advised such coverage existed and acquired a letter from the Industrial Commission indicating that workmen's compensation coverage was in full force and effect for Calavo Growers of California between October 1, 1966 and October 1, 1967 (R. 12367, p. 50).

Calavo submits that applicant has not shown a reliance upon the purported statement of Romney regarding the nonavailability of workmen's compensation coverage as applicant retained counsel of his own choosing who attempted to verify the issue of coverage. Hence, as there has been no reliance upon any statement by Romney, there can be no estoppel against Calavo as a matter of law.

It is undisputed that applicant did not file his claim until after the expiration of three years from the date of the accident or the date of last payment of compensation; the claim having been filed untimely, it is barred. *Fredrickson* v. *Industrial Commission*, 19 Utah 2d 233, 429 P. 2d 981 (1967); *Jones* v. *Industrial Commission*, 17 Utah 2d 28, 404 P. 2d 27 (1965).

POINT IV.

THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' AMENDED COMPLAINT WITH PREJUDICE.

On October 16, 1970, appellant filed an Amended Complaint, naming Calavo Growers as an additional party defendant and alleging for the first time that Kenneth Whitmore was in the employ of defendants Calavo Growers of California and Melvin J. Romney, or one of them (R. 12367, p. 41). As appellant had framed an issue of the existence of an employee-employer relationship between appellant and respondents, Calavo and Melvin J. Romney each moved to dismiss the Amended Complaint

by virtue of *Utah Code Annotated*, Sec. 35-1-60 which provides in pertinent part:

> The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer. . . .

The District Court dismissed the Amended Complaint with prejudice based solely upon the above-quoted provision.

Calavo is somewhat nonplussed at the argument raised by appellant that there are material factual issues in dispute and, therefore, the granting of the motion was improper. Appellant claimed the existence of an employment relationship and respondents assumed for the purpose of argument that the relationship existed. The statute is clear and unequivocal that no civil liability shall inure and "no action at law may be maintained against an employer or against any officer, agent or employee of the employer based on any accident, injury or death of an employee."

Calavo submits that the district court was required to dismiss with prejudice as the Workmen's Compensation Act affords appellants an exclusive remedy and appellants must be content to accept the compensation provided for by the Act. *Halling* v. *Industrial Commission*, 71 Utah 112, 263 Pac. 78 (1927). The fact that appellant claims he is now unable to benefit from Workmen's Com-

pensation because of an untimely filing of his claim does not detract from the efficacy of the district court's order.

Calavo submitted the affidavit of the policy clerk of the Industrial Commission which stated that Calavo had full workmen's compensation coverage during the period wherein Kenneth Whitmore was injured. Appellant filed a counter affidavit stating that his counsel was unable to verify workmen's compensation maintained by Calavo when counsel first contacted the Industrial Commission. Appellant did not and cannot traverse the affidavit of the policy clerk that workmen's compensation was in full force and effect on June 2, 1967. There is no genuine issue of fact as to coverage being available. Therefore, the granting of respondents' motions to dismiss was proper as each was entitled to judgment as a matter of law. *Dupler* v. *Yates*, 10 Utah 2d 251, 351 P. 2d 624 (1960). See also, *Continental Bank & Trust Co.* v. *Cunningham*, 10 Utah 2d 329, 353 P. 2d 168 (1960).

The fact that appellant claims Kenneth Whitmore may have been the employee of Melvin J. Romney at the time of the accident does not affect the validity of the dismissal as to Calavo. Calavo's sole negligence is claimed to have arisen from the employment relationship and this relationship, *ipso facto*, mandates dismissal.

Appellant lastly decries an alleged impropriety by Calavo denying the existence of the employment relationship in the Industrial Commission hearing after having allegedly utilized it to have the district court Amended Complaint dismissed. It should be noted that the In-

dustrial Commission did not rule on the validity of the employer-employee relationship and based its dismissal solely on the fact that the application was filed untimely; that is, more than three years from the date of the accident or the date of the last payment of compensation. It would appear, therefore, that plaintiff has not been injured in any way by the so-called "about face" for which it complains of Calavo. A similar argument was raised before the Arizona Supreme Court and was disposed of in *Weaver* v. *Martori*, 69 Ariz. 45, 208 P. 2d 652 (1949), wherein that court stated at 208 P. 2d 655:

> The petitioner urges that the respondent, having succeeded in procuring a dismissal of the damage action upon the grounds that the minor was its employee, now, in the proceedings before the Industrial Commission cannot be heard to say that the employer-employeee relationship does not exist. This contention might be well and good were it not for the fact that the Guardian ad Litem's Complaint in the civil suit was based on the allegation that the minor was an employee of the respondent. . . .
>
> Certainly, the respondent by agreeing with the plaintiff in the civil suit that the employer-employee relationship existed did not mislead the plaintiff as to the facts, nor can it be said that the latter changed his position prejudicially by reason thereof.

POINT V.

THE DISTRICT COURT DID NOT ERR IN DISMISSING APPELLANTS' COMPLAINT

AS AGAINST ROMNEY BECAUSE OF ROMNEY'S FAILURE TO PLEAD THE AFFIRMATIVE DEFENSE OF WORKMEN'S COMPENSATION IN HIS ANSWER TO THE AMENDED COMPLAINT.

While it is true that the defendant Romney did not set forth as an affirmative defense "injury by a fellow servant" in the Answer to the Amended Complaint, he did allege that the Complaint failed to state a claim upon which relief could be granted.

On the 18th of November, 1970, Romney filed a Motion to Dismiss on the basis of the amended pleadings and particularly upon the ground that the pleadings alleged both the defendants and plaintiffs were fellow servants and that workmen's compensation was the plaintiff's only remedy. Thereafter, Affidavits and Counter Affidavits were filed without objection by any of the parties, a copy of the policy providing for workmen's compensation was introduced into evidence as an exhibit and the depositions of witnesses and parties were published. The Motion for Dismissal was argued on the 10th of December. At no time did the plaintiff raise the defense or protest that the affirmative defense of workmen's compensation had been waived by defendant Romney by not pleading it in the Answer to the Amended Complaint during the argument of the Motion to Dismiss. Nor did the plaintiff file or argue any motion that the Motion to Dismiss should be stricken.

Under the provisions of Rule 12(b) it is stated:

> "If on a motion asserting the defense numbered 6 to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Rule 12(c), pertaining to Motion for Judgment on the Pleadings, provides:

> "After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

The court did allow the Motion to Dismiss and plaintiff, as indicated, did not file a Motion to Strike, nor did he argue along the lines that the Motion to Dismiss could not properly be filed. The plaintiff, therefore, waived any objection he may have had because defendant could have filed a Motion for Leave to File an Amendment to his Answer to specifically include the defense of fellow employee. The motions of the defendants were treated by the court as a Motion for Summary Judgment in fact and matters outside the pleadings were presented and not

excluded by the court. The plaintiff had full opportunity to raise any defenses which he had to the motion of Mr. Romney for dismissal, but did not present any argument pertaining to improper filing of a motion.

Rule 56 pertains to a Motion for Summary Judgment and subparagraph (b) thereof provides that a party against whom a claim, counterclaim or crossclaim is asserted may at any time move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

This is in effect what defendant Romney has done and inasmuch as it is specifically provided for in the rules set forth above, there was no waiver on the part of Romney at the stage of the proceedings when the motion to dismiss was granted and in view of the pleadings filed by the parties at that stage.

Subparagraph (h) of Rule 12 pertaining to Waiver of Defense states:

> "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, (2) the defense of failure to join an indispensible party, and (3) the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings. * * *"

It is clear, therefore, that the rules do provide for the procedure that was followed by the defendant Romney and the plaintiff's failure to take any action to have the defendant Romney's motion to dismiss stricken constituted a waiver on the part of the plaintiff, if in fact there was anything improper about the filing of such a motion. The case cited by the plaintiff, to-wit, *Thomas* v. *Braffet's Heirs*, 6 Utah 2d 57, 305 P. 2d 507, (1956), is not in point in this case, and the court properly granted the defendant Romney's motion.

CONCLUSION

The District Court properly dismissed Appellants' Amended Complaint with prejudice based upon workmen's compensation being the exclusive remedy against an employer. The Industrial Commission properly denied applicant's claim as having been filed more than three years after the date of the accident or the date of last payment of compensation. Calavo Growers of California and Melvin J. Romney submit that this Court should affirm both the District Court and the Industrial Commission.

Respectfully submitted,

LeROY S. AXLAND
of and for
PARSONS, BEHLE & LATIMER
520 Kearns Building
Salt Lake City, Utah 84101

Attorneys for Calavo Growers of California and Employers Insurance of Wausau

L. L. SUMMERHAYS
of and for
STRONG & HANNI
604 Boston Building
Salt Lake City, Utah 84111

Attorneys for Melvin J. Romney