12-13-1974

CF & I Steel Corp. v. Robb

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 26629

CF&I STEEL CORPORATION, a Colorado corporation,	)
Petitioner,	)
V.	)
RICHARD D. ROBB, District Judge and the DISTRICT COURT in and for the Tenth Judicial District of the State of Colorado,	)
Respondents.	)

RESPONSE TO ORDER TO SHOW CAUSE

BRANNEY & GRIFFITH
3755 South Broadway
Englewood, Colorado 80110
761-5600

CRISWELL & PATTERSON
3780 South Broadway
Englewood, Colorado 80110
761-0800

ALBERT E. ZARLENGO, JR.
American National Bank Bldg.
Denver, Colorado 80202
222-0601

Counsel for Respondents

INDEX

TABLE OF CASES CITED

STATUTES

OTHER AUTHORITIES

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 26629

CF&I STEEL CORPORATION, a Colorado corporation,	)	
Petitioner,	)	
V.	)	RESPONSE TO ORDER TO SHOW CAUSE
RICHARD D. ROBB, District Judge and the DISTRICT COURT in and for the Tenth Judicial District of the State of Colorado,	)	
Respondents.	)	

Pursuant to previous order of this Court, Respondents respectfully show below why the relief requested in Petitioner's "Petition for Writ in Nature of Prohibition and For Stay of Proceedings" should not be granted:

1. The Issues Presented

In Petitioner's brief in support of its Petition, Petitioner characterized the issues presented herein as ones involving whether Respondents abused their discretion or exceeded their jurisdiction within the meaning of Rule 106(a)(4), C.R.C.P.[1] While Respondents agree that this matter raises these general issues, nevertheless, we suggest that, in the interest of specificity, the precise issues presented here are as follows:

1. On June 26, 1974, when Respondents denied Petitioner's first motion to set aside the default previously entered by Respondents, did they abuse their discretion, i.e. at that time did Petitioner make a sufficient showing either that it had failed to respond to the summons because of "excusable

[1] Rule 106, of course, has no applicability to the issuance by this Court of original writs. Rather, these proceedings are governed by the provisions of Article VI, Section 3, of the state constitution and Rule 21, C.A.R.

neglect" or that it had a meritorious defense to the plaintiffs' claims?

2. By failing to raise the issue of its immunity from suit (based upon the provisions of the Workmen's Compensation Act) in either its first motion to set aside the previously entered default, or in its second motion to set aside the default, did Petitioner waive this defense, at least for purposes of the entry of the default?

3. Assuming, arguendo, that the Respondents improperly refused to set aside its previously entered default, should this Court remand this matter to the trial court for further proceedings?

2. Statement of the Case

A review of both the petition and the brief in support thereof, previously filed by Petitioner with this Court, leaves the impression that Petitioner, immediately upon the entry of the default by Respondents, filed a motion with Respondents, timely raising the issue of its immunity from suit under the Workmen's Compensation Act, and that Respondents, in utter disregard of this showing, improperly refused to set aside the default which had previously been entered against Petitioner.

Respondents concede that, had the foregoing occurred, the assertion that Respondents abused their discretion would be based upon a firmer foundation. That did not occur, however. Rather, Petitioner failed even to mention the issue which it now asserts is dispositive of this matter, until it had filed, not one, not two, but three proposed answers to plaintiffs' Complaint.

Because of this, Respondents view it as an imperative necessity to review all of the proceedings leading up to their final order in these proceedings.

a. Plaintiffs' Complaint [2]

On April 24, 1974, one Mabel Casaus, both in her own right, and as the natural guardian of three children ("Casaus"), together with the Commercial Union Insurance Company, ("Insurance Company"), filed their Complaint against the CF&I Steel Corporation, ("CF&I"), with Respondents. Service of summons and copy of this Complaint was effected on April 29, 1974 (f. 33).

This Complaint (ff. 4-10) was based upon the wrongful death of the individual plaintiffs' husband and father, which death was allegedly caused by the defendant. It contained four claims, which alleged, in essence, as follows:

1. That CF&I owned, and has exclusive control over, certain premises in Pueblo, Colorado;

2. That plaintiffs' decedent was, at the time of his death, working upon the premises as an employee of State, Inc., a "subcontractor";

3. That CF&I was under a duty to provide to decedent a safe place to work and to warn him against dangerous conditions, but that it failed to perform either of these duties;

4. That, on the premises involved, CF&I engaged in an inherently dangerous activity, but failed to exercise reasonable care in relation thereto;

5. That, on the premises involved, CF&I harbored a dangerous instrumentality (molten steel) which it allowed to escape;

---

2 Save for a very few "facts", presented by affidavit (see, for example, ff. 86-89), no evidence, as such, was presented to the Respondents upon this matter. While both plaintiffs and defendants made various factual assertions in the legal memoranda filed with Respondents, such assertions cannot serve as the basis for a summary judgment by a trial court. See Aetna Casualty and Surety Co. v. Chisman, (Ct. App., Oct. 30, 1974), The Colorado Lawyer, December, 1974, p. 1067.

6. That, as a result of decedent's death, the Insurance Company had paid workmen's compensation benefits to Casaus and had become subrogated to her claim against CF&I to the extent of the benefits paid.

Consequently, judgment was requested against CF&I in the collective amount of $1,536,888.00.

b. The Subsequent Motions and Pleadings

As noted, service was made upon CF&I on April 29, 1974. Under the provisions of Rule 12(a), C.R.C.P., therefore, an answer or other response to the suit was due to be filed on or before May 20, 1974.[3]

There having been no filing by CF&I by this date, Casaus, on May 22, filed a "Motion for Default" (ff. 36-39) and a "Motion for Default Judgment on Liability" (ff. 20-28), and the Respondents ordered that CF&I's default be entered (ff. 40-41), that a judgment by default on liability be entered, and that a hearing upon Casaus' damages be set for June 19, 1974 (ff. 42-44).

Apparently later that day, CF&I filed a motion to strike (ff. 49-51) and a memorandum in support of that motion (ff. 45-48), which protested only that Casaus was apparently maintaining suit on behalf of the children, as well as on her own behalf.

On June 12, then (nearly three weeks after the Court directed that the default be entered and 7 days before the date set for the damage hearing), CF&I filed, inter alia:

1. A "Motion to Set Aside Orders Entering Default" (ff. 92-96);

2. A "Motion to Vacate Trial on Damages" (ff. 74-77);

3. An "Affidavit of Excusable Neglect and Some

---

3 The 20th day was May 18, 1974, a Saturday, making the pleading due the following Monday, May 20. See Rule 6(a), C.R.C.P.

Facts Regarding the Accident" (ff. 79-90); and

4. An "Answer" (ff. 58-68).

The affidavit (ff. 79-90) asserted, in essence, that counsel for CF&I had received the complaint and summons on May 8 or 9 (ff. 79-80) and that, because of other commitments, counsel did not complete the motion to strike, which was filed on May 22, until the afternoon of that day, and that CF&I's counsel did not attempt to contact plaintiffs' counsel because they were in Denver (ff. 85-86).

The Answer filed at the same time consisted of a general denial (wherein, interestingly, CF&I denied that it was the owner of the premises) (ff. 59-61) and further alleged the following as affirmative defenses:

1. That decedent's death resulted from the negligence of the supplier of scrap metal (f. 62);

2. That decedent assumed the risk (ff. 62-63);

3. That decedent's employer was negligent (ff. 64-65);

4. That decedent was negligent (f. 65);

5. That decedent's employer was contractually bound to carry public liability insurance to protect CF&I (ff. 66-68).

Aside from the naked allegations contained within this Answer, the only factual recitation presented to Respondents, in support of these allegations, was contained within the affidavit filed by CF&I's counsel where it was stated, in essence, that the "flare-up" which caused decedent's death came about because of some "foreign substance" contained within the scrap metal placed in the vessel containing the molten steel or dropped therein by an employee of State, Inc., decedent's employer (ff. 86-89).

Nothing within this affidavit summarized, or otherwise

spoke to, any facts which had any bearing upon decedent's possible negligence, nor upon his assumption of risk.

Significantly, in none of the documents filed on June 12, 1974, nor in the later hearing on June 19, did CF&I make any allusion to the immunity from suit allegedly granted to it by the Workmen's Compensation Act. This was simply not mentioned.

A hearing upon these motions was held on June 19, 1974 (ff. 470-673), and on June 26, 1974, Respondents entered an order (ff. 163-177), refusing to set aside the previously entered default because:

> 1. There were no unusual occurrences, such as personal tragedy or illness, or other unforeseen circumstances, preventing counsel from filing a response to the Complaint within the time fixed by the rules therefor, and the sole basis for the failure to file such a response was counsel's neglect to do so (ff. 168-169); and
>
> 2. There were insufficient allegations of fact contained within either the proposed Answer or the affidavit "to enable this Court to assess the merits thereof". Moreover, many of the allegations therein contained are directed toward third parties and those allegations, "even if true, would not provide a defense to the claims alleged by plaintiff". (ff. 169-170).

The Respondents again set a time and date for a hearing upon plaintiffs' damages (f. 171).

On July 8, CF&I filed another affidavit (ff. 184-200), a motion to set aside the default (ff. 172-183) and an Answer -- i.e., a second answer (ff. 201-212).

This answer was substantially identical to the previous answer which had been filed by CF&I, as was the affidavit, except that the affidavit now asserted that the decedent in his work

either was not wearing any safety devices, or, if he was, was using them improperly (f. 198).

According to CF&I's motion, this second motion and supporting documents were being filed under Rule 55(c), C.R.C.P., while the first motion was filed under Rule 60(b), because CF&I's counsel was originally under the impression that a default judgment, rather than a mere default, had been entered and that, under Rule 55(c), "excusable neglect" need not be shown.

Again, in none of these papers filed on July 8, 1974, was any mention made by CF&I of any defense based upon the Workmen's Compensation Act.

Ten days later, on July 18, 1974, the following occurred:

1. Counsel who had, up to this time, been representing CF&I, withdrew from the matter (ff. 303-304);

2. CF&I filed a "Supplementary Motion to Set Aside Default", which, for the first time in the litigation, suggested that, because of the provisions of 81-3-2 and 81-9-2, C.R.S., 1963, as amended, the Respondents lacked jurisdiction over the plaintiffs' claims (ff. 278-284); and

3. CF&I filed yet a third answer, which was identical to the two previously filed answers, except that it added a "Sixth Defense", based upon the provisions of the above statutes. (ff. 288-301).

Hearing upon all these motions was held before the Respondents on August 19, 1974 (ff. 675-848), and, on September 5, 1974, an order was entered denying CF&I's motions. The bases for this order were, in essence, as follows:

1. The default judgment entered on May 22, was an interlocutory judgment, pending determination of plaintiffs' damages, and finally and conclusively adjudicated CF&I's liability to plaintiffs;

2. The provisions of 81-3-2 and 81-9-2 do not oust a court of jurisdiction over the subject matter, but merely constitute the basis for an affirmative defense, which must be pleaded pursuant to Rule 8(c), C.R.C.P.;

3. By failing to raise this matter prior to the Respondents' original order denying CF&I's motion to set aside the default, CF&I waived this affirmative defense; and

4. Nothing further had been presented to Respondents to support the assertion that CF&I's failure to respond was a result of excusable neglect. (ff. 391-406)

3. Summary of the Argument

In its brief in support of its Petition, CF&I seems to rely upon two premises as the foundation for its claim that Respondents exceeded their jurisdiction and abused their discretion.

First, CF&I asserts that the immunity granted to an employer under the provisions of 81-3-2 and 81-9-2, C.R.S., 1963, as amended, constitutes an "ouster" of the courts of this state of "subject-matter jurisdiction" in actions between an employee and another party, who might be determined to be a statutory employer under 81-9-2, even though that other party does not raise the issue in his responsive pleadings. Thus, while CF&I does not expressly say so, its first premise necessarily includes the hypothesis that the immunity granted by the statute is an absolute one, not subject to waiver by the party for whose benefit it was adopted, and which need not be pleaded as an "affirmative defense" under the provisions of Rule 8(c), C.R.C.P. Indeed, CF&I, by asserting that this is a matter going to the jurisdiction of the Respondents over the subject matter of the litigation, necessarily must claim that it is a matter which could

be utilized as a basis upon which a judgment could be set aside, even after a full trial and appeal, if the matter is first raised at that time.

Second, CF&I asserts that, even if the immunity granted by 81-9-2 is not jurisdictional, nevertheless, the Respondents violated their discretion in failing to set aside the default entered against it, when CF&I finally (after previously filing two series of documents in which the issue was not even mentioned) called Respondents' attention to this possible defense.

Now, Respondents are of the view that neither hypotheses advanced by CF&I are meritorious.

The default judgment on liability was entered by Respondents on May 22, at a time when CF&I was in obvious default. No one, not even CF&I, asserts that the entry of this judgment was in any way procedurally irregular, or that CF&I was not then in default.

Three weeks later, on June 12, CF&I filed a series of motions, affidavits and a proposed Answer. This Answer denied that CF&I was the owner of the premises involved and alleged a series of affirmative defenses without articulating the factual bases therefor. In addition, the affidavit filed by CF&I's then counsel provided no excuse for the failure of counsel to respond to Casaus' Complaint, except that he was busy with other matters. Nothing was said about any immunity under the Workmen's Compensation Act.

After extensive argument upon the matter, during which CF&I's counsel merely reiterated the assertions contained within his affidavit, Respondents refused to set the default judgment aside.

Because CF&I had failed to show either that its failure to respond to Casaus' Complaint was due to excusable neglect or that there was a factual basis which would support the conclusion

that it had a meritorious defense, Respondents properly denied CF&I's motion to set the default judgment aside.

Then, two weeks after this order was entered, CF&I filed a series of documents, allegedly under Rule 55, rather than under Rule 60, which were substantially identical to its previous motions and other documents. This was done, according to CF&I, because it was of the view that no default judgment had been rendered and that the "good cause" requirement of Rule 55 was less stringent than the "mistake, inadvertence, surprise or excusable neglect" criteria of Rule 60.[4]

It was not, then, until July 18 -- nearly 2 months after the original default judgment had been entered and more than 3 weeks after Respondents first denied CF&I's motion to set aside the default judgment -- that CF&I finally filed a third Answer which, by means of an affirmative defense, raised the issue of CF&I's immunity from suit under the Workmen's Compensation Act. Even then, however, CF&I continued to deny a basic, underlying fact upon which this affirmative defense was based, i.e. it continued formally to deny that CF&I was the owner of the premises involved. (See paragraph 6 of Complaint and paragraph 4 of defense to first claim for relief in this Answer, ff 8 and 291).

Respondents refused, again, to set aside the default judgment.

Respondents assert that the entry of these orders did not constitute an abuse of discretion on their part for two reasons:

1. In order to have a default, or a default judgment, set aside, it is necessary for the moving party to show both that the failure to respond was

---

4 Since Respondents had previously denied CF&I's motion under Rule 60 on the basis, inter alia, that no excusable neglect had been shown, CF&I must have contemplated that "good cause" under Rule 55 encompassed inexcusable neglect. See, however, Intermountain Lumber & Builders Supply, Inc. v. Glen Falls Ins. Co., ____ Nev. ____, 424 P.2d 884 (1967).

the result of excusable neglect (a factual determination) - and that that party has a meritorious defense to the action. By the date that Respondents entered their first order, CF&I had done neither.

2. The protection from suit provided to an "employer" under the Workmen's Compensation Act does not oust the courts of this state of jurisdiction over inquiries occurring to employees. It is a provision granting immunity to certain parties in return for those parties' actions in standing behind an employee's common law employer in providing workmen's compensation benefits to the employee. Being a statutory benefit to a "statutory employer", the party for whose protection those provisions were enacted may waive their benefit; and, unless those provisions are pleaded as an affirmative defense under the provisions of Rule 8(c), C.R.C.P., they are waived.

Finally, this Court has before it nothing more than naked allegations of the pleadings; even if it should determine that Respondents should be directed to set aside the default judgment against CF&I, this matter should be remanded to Respondents for further proceedings. The naked allegations of the pleadings do not constitute a sufficient basis upon which to base any final judgment.

4. Argument

a. Respondents' order of June 26 denying CF&I's motion to set aside the previously entered default was proper, since CF&I failed to show that the time limits set by the rules were not met because of excusable neglect and failed to supply to the Respondents the necessary factual foundation for a determination that it had a meritorious defense.

This Court and the Colorado Court of Appeals have uniformly held that, in order for a default judgment to be set aside, two requirements must be met: first, the movant must show that the neglect which brought about the default was "excusable", and, second, the movant must show that he possesses a "meritorious defense" to the claim. Gumaer v. Bell, 51 Colo. 473, 119 P. 681, 683 (1911); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); Moskowitz v. Michaels Artists and Engineering Supplies, Inc., Colo. App., 477 P.2d 465 (1970). Were both of these requirements met as of June 26, 1974, the day Respondents refused to set aside the default previously entered by Respondents? It is submitted by Respondents that neither requirement was met.

This Court has had occasion to define the meaning of the term "excusable neglect" in Farmers Insurance Group v. District Court of the Second Judicial District, ____ Colo. ____, 507 P.2d 865 (1973), cert. den., 414 U.S. 878. In that case this Court, sitting en banc, and speaking through Justice Hodges, interpreted the term "excusable neglect", as used in C.R.C.P. 6(b)(2), as follows:

> "Excusable neglect involves a situation where the failure to act results from circumstances which would cause a reasonably careful person to neglect a duty. It is impossible to describe the myriad situations showing excusable neglect, but in general, most situations involve unforeseen occurrences such as personal tragedy, illness, family death, destruction of files, and other similar situations which would cause a reasonably prudent person to overlook a required deadline date in the performance of some responsibility. Failure to act due to carelessness and negligence is not excusable neglect. Doyle v. Rice Ranch Oil Co., 28 Cal. App.2d 18, 81 P.2d 980. On the other hand, 'excusable neglect' occurs when there has been a failure to take proper steps at the proper time, not in consequence of carelessness, but as the result of some unavoidable hindrance or accident. Government Emp. Ins. Co. v. Herring, 257 Or. 201, 477 P.2d 903." [507 P.2d at 867. Emphasis added.]

Petitioner's affidavit of excusable neglect (ff. 79-90) fails to set forth any reasons, for failing to respond in a timely manner

to plaintiffs' complaint, other than the fact that Petitioner's then counsel was too busy with other matters to so respond. The affidavit itself (f. 79) admits that Petitioner's then counsel had the summons and complaint in his possession at least 11 or 12 days prior to the time an answer or other responsive pleading should have been filed. An examination of the affidavit discloses no showing of illness, personal tragedy, or other extraordinary circumstance which would constitute "excusable neglect" as previously defined by this Court. Further, the affidavit does not, by a showing of clear, strong and satisfactory proof, establish excusable neglect, which showing the Colorado cases require. See, e.g., Browning v. Potter, 129 Colo. 448, 271 P.2d 418 (1954), in which this Court said:

> "The neglect of plaintiffs in error was of their own making, and cannot be considered as excusable under the undisputed facts. *** We have consistently held that the burden is upon a defendant to establish the grounds on which he relies, to set aside a default entered against him by clear and convincing proof; that the granting or denial of an application to vacate a default, based on excusable neglect rests in the sound judicial discretion of the trial court and to warrant a reversal it must appear that there was an abuse of that discretion...[citing cases]. [A] careful review of the entire record convinces us that there was no abuse of discretion on the part of the trial judge. His action is supported by the record." (271 P.2d at 423, emphasis added.)

The above quoted language from the Browning case discloses that Respondents' finding of inexcusable neglect was, and is, a determination which is to be made within the "sound legal discretion" of the trial court. This Court and the Colorado Court of Appeals have held that the trial court's determination as to the existence, or non-existence, of excusable neglect will not be disturbed on review unless an abuse of discretion is clearly shown by the complaining party. See, e.g., Riss v. Air Rental, Inc., supra; Mountain v. Stewart, 112 Colo. 302, 149 P.2d 176 (1944); Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967); Gumaer v. Bell, supra; Bannerot v. McClure, 39 Colo.

472, 90 P. 70 (1907); Browning v. Potter, 129 Colo. 448, 271 P.2d 418 (1954). Such an abuse of discretion, or any abuse of discretion, on the part of Respondents, has not been shown by Petitioner.

Petitioner, in its brief at pp. 18-19 cites two primary cases, as support for the proposition that the neglect of counsel should not be imputed to the client in actions to set aside default judgments.[5] A reading of those cases readily discloses their inapplicability to the present case. First, in Burlington Ditch, Reservoir & Land Co., et al., v. Ft. Morgan Reservoir & Irrigation Co., 59 Colo. 571, 151 P. 432, 433 (1915), this Court stated:

> "...litigants, by reason of no fault on the part of their counsel, have lost their right to be heard on the merits of the cause. It is settled in this state that, under such circumstances, there being an honest mistake, a motion, seasonably made, to set aside the default, should be granted." [Emphasis added.]

The facts in that case showed that defense counsel had relied upon a representation by plaintiff's counsel that there would be no necessity for defense counsel to file a pleading in the case, nor enter an appearance, without prior notice by plaintiff's counsel. The default was taken without such notice. In the present case, the record discloses that Petitioner's then counsel made no effort whatsoever to obtain from plaintiffs' counsel, a "gentlemen's agreement", regarding the time for responding to the complaint. In the present case there was no honest mistake or absence of fault on the part of Petitioner's counsel. The holding of Burlington, therefore, is inapposite.

The second case relied upon by Petitioner is Coerber v. Rath, supra, 435 P.2d 228. In that case, this Court held that the trial court had abused its discretion in refusing to set aside a default judgment, the rationale being that the gross negligence of counsel should not be imputed to the client, who would suffer the consequences of his counsel's negligence. The

---

5 As a matter of agency law, the negligent or incompetent acts of an attorney are, as a general rule, imputed to the client. 7 Am.Jur.2d, Attorneys at Law, §110; see, also, Bunnell v. Holmes, 64 Colo. 345, 171 P. 365 (1918).

facts showed that plaintiffs' claim was a tort claim against Coerber arising out of Coerber's malicious conduct in connection with the repossession of an automobile owned by Path. Coerber's employer, his brother, was also a party defendant. The case was at issue, but judgment by default was entered against the Coerbers by virtue of the failure of their counsel to timely answer interrogatories propounded by plaintiff.[6] The entry of the default resulted in the jailing of Charles Coerber on a body execution. Further, execution was had against the property of Carl Coerber. Under these "unusual" and "shameful" circumstances, this Court set aside the default judgment. However, in Coerber, this Court found that (the case being at issue) a meritorious defense had been alleged by defendants. Such a defense, of course, had not even arguably been raised in the present case until July 18, 1974, nearly three months after the filing of the complaint.

Even assuming, arguendo, that either excusable neglect was present in this case, or in the alternative, that the inexcusable neglect of counsel should not be imputed to Petitioner, the default judgment may not be set aside, because Petitioner had failed to set forth an arguably meritorious defense to plaintiffs' claims by the time Respondents heard, and denied, Petitioner's motion to set aside the default previously entered.

A "meritorious defense", the Colorado courts have held, consists of something much more than naked allegations in responsive pleadings. In Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267, 269 (1958), this Court said:

> "We have uniformly held and again hold that one seeking to have a default judgment set aside must set forth facts which, if established, would produce a judgment other than the one entered." [Emphasis supplied by the Court.]

---

6 The Coerbers' counsel was later censured by this Court for his conduct in this case.

See, also, Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971); Lopez v. Reserve Insurance Co., ____ Colo. App. ____, 525 P.2d 1204 (1974).

Contrary to this Court's admonition in Ehrlinger, Petitioner failed to allege, in either its first or second proposed answers, facts which, if proven, would be a defense to plaintiffs' claim. In the June 26, 1974, Findings of Fact and Conclusion of Law, Respondent Robb found:

> "Moreover, a review of the said affidavit [of excusable neglect] and of the defendant's tendered answer, convinces this Court that defendant has failed to make a satisfactory showing that defendant possesses a meritorious defense to any of the claims alleged in the Complaint. Nowhere in any of these documents, nor in defendant's oral presentation to this Court, has defendant set forth sufficient evidentiary facts so as to enable this Court to assess the merits thereof. Rather, these documents contain merely a general denial, coupled with legal conclusions. Many of the allegations therein contained are allegations directed toward the wrongdoing of persons not parties to this litigation which, even if true, would not provide a defense to the claims alleged by plaintiff." (ff. 169-170)

It is submitted by Respondents that the following language from Ehrlinger v. Parker, supra, 327 P.2d at 269 is here appropriate:

> "We find nothing in the record to indicate that the trial court abused its discretion; in fact, the record strongly sanctions the trial court's findings and order denying the motion to vacate.
>
> Rules of procedure are to be followed and not ignored, as they were in this case. The summons served on defendants clearly stated that defendants should appear within twenty days. We find nothing in the record to indicate any justifiable excuse for not appearing."

b. The provisions of 81-3-2 and 81-9-2, C.R.S., 1963, do not oust the courts of this state of subject-matter jurisdiction over any claims for personal injuries. Rather, they merely provide protection to a statutory employer, in the form of a substantive bar to a claim, in appropriate circumstances. Rule 8(c) requires any defense based upon these provisions to be affirmatively pleaded and a failure to do so constitutes a waiver of any such defense.

As Respondents read CF&I's Petition and brief, it asserts that, since Casaus' Complaint clearly indicated that her claims were barred by the provisions of the Workmen's Compensation Act, Respondents lacked subject-matter jurisdiction to enter a default judgment and the fact that CF&I, in two later series of motions, affidavits and answers, failed to mention any defense based upon the pertinent statutory provisions is substantially immaterial. Presumably, then, CF&I would contend that Respondents should have been more cognizant of the applicability of the Workmen's Compensation Act to Casaus' Complaint (based solely upon the allegations of that Complaint) than was CF&I's original counsel!

If, of course, the mere existence of 81-9-2 ousts the trial court of this state of subject-matter jurisdiction to determine the merits of a common law personal injury claim, then, CF&I is right in its assertion.

If, on the other hand, those provisions merely provide protection to statutory employers in return for the statutory imposition upon them of certain obligations, the matter has no relationship to jurisdiction, but involves merely an application of substantive law, in the same manner that many other statutory provisions are required to be applied by the courts of this state.

In view of the different results which emanate from the differing characterizations of the pertinent statute, then, it is not inappropriate to briefly examine the statute's history.

The Colorado Workmen's Compensation Act was originally

adopted in 1919 (Sess. Laws, 1919, p. 700, et seq.). The theoretical basis for the application of its provisions to an employment relationship was not a mandatory imposition, required by public policy. Rather, it was based, theoretically, upon the voluntary election by both the employer and the employee to be covered by the coresponding obligations and benefits set forth in the Act. Thus, none of the Act's provisions were applicable to either party to the relationship unless both elected to come under its provisions. (See 81-4-1 and 81-4-3, C.R.S., 1963.)

If, however, an employer elected not to be covered by the Act, he could not raise, in a common law action brought by his employee, the common law defenses of assumption of risk, negligence of a fellow servant or contributory negligence (less than willful misconduct). 81-3-1.

If an employee elected not to come under the Act, while his employer elected to be covered, all such defenses were available to the employer. 81-3-3.

Finally, if both elected to be covered by the Act's provisions and if the employer obtained the necessary insurance required, then, all common law causes of action by the employee were "abolished" and the extent of the employer's liability would be to provide insurance benefits under the Act.[7] 81-3-2.

The statute, therefore, did not, itself, "abolish" any common law cause of action. Their abolition, if there was to be one, was based, in effect, upon the voluntary waiver thereof by the employee's election to be covered by the Act.

At the same time, it was provided, via the predecessor of present 81-9-2, that an owner of premises would be considered to be a statutory employer, where he contracted with a true

---

[7] There has been no showing by CF&I that it obtained the insurance required by 81-3-2 and 81-9-2(1). 81-3-2, therefore, does not bar Casaus' claims, although 81-9-2(2) may.

"employer". However, as originally adopted, this section provided, in essence, that, if the contractor provided the necessary workmen's compensation benefits, the owner:

> "shall not be subject to the provisions of this section". (See 81-9-2, C.R.S., 1953.)

Consequently, in the case of Great Western Sugar Co. v. Erbes, 148 Colo. 566, 367 P.2d 329 (1961), this Court held that the foregoing provision did not "provide immunity" to an owner whose contractor was, himself, an "employer" and which contractor had provided the necessary workmen's compensation benefits.

As a result of that decision, the Colorado General Assembly amended the pertinent section (81-9-2, C.R.S., 1963) to its present form. Now, the statute provides that, if the contractor does obtain workmen's compensation insurance:

> "neither said contractor, subcontractor, person, or persons, its employees or its insurors, shall have any right of contribution or action of any kind including actions under section 81-13-8, herein"

against the owner.

Although this provision has been attacked as being unconstitutional, this Court has sustained its validity, principally on the grounds that, in return for the employee foregoing a common law negligence action, an "immunity" is granted to the owner, who "stands behind and secures the Workmen's Compensation liability of the workman's immediate employer". The statute, in effect, benefits both the employee, who is supposed to receive "double" protection, and the owner, who is granted immunity from suits. O'Quinn v. Walt Disney Productions, Inc., 177 Colo. 190, 493 P.2d 344, 346 (1972).

Since the date of its amendment, then, owners have been held to be shielded against suits by contractors' employees based upon common law claims. Alexander v. Morrison-Knudsen Co.,

166 Colo. 118, 444 P.2d 397 (1968); Varela v. Colorado Milling & Elevator Co., 31 Colo. App. 49, 499 P.2d 1206 (1972); and O'Quinn, supra.

In none of these decisions, however, is it suggested that a trial court of this state lacks jurisdiction over the subject matter of the personal injury claim[8] being asserted. Nor do they intimate that the trial and appellate courts of this state are somehow required to pass upon the applicability of the provisions of 81-9-2 to such claims in the absence of proper pleadings raising the issue.

On the contrary, CF&I's assertion of a lack of subject-matter jurisdiction is directly refuted by the principal decision of this Court relied upon by it, Packaging Corporation of America v. Roberts, 169 Colo. 316, 455 P.2d 652 (1969).

There, an employee was discharged and, while he was leaving the employer's premises, was allegedly assaulted by a supervisor. The employee filed both a claim for compensation and a complaint with the district court. The issue in both proceedings was, of course, whether he was an "employee" at the time of the alleged assault. He did not vigorously pursue his claim for compensation before the Industrial Commission, having filed the same merely to protect his rights in the event of a ruling that he was an employee at the time. In the district court lawsuit, he recovered a judgment which was appealed to this Court.

The employer contended that the provisions of 81-14-1 granted to the Industrial Commission "primary and exclusive jurisdiction" over disputes relating to workmen's compensation; and, consequently, the district court was required to withhold

---

[8] Obviously, only the Director of Labor and the Industrial Commission have subject-matter jurisdiction over claims for workmen's compensation benefits. (See 81-14, C.R.S., 1963). Casaus' Complaint, however, doesn't state such a claim; it alleges common law claims.

the exercise of its jurisdiction over plaintiff's common law claim "until the Industrial Commission determines that plaintiff was not an employee at the time" of the assault. 455 P.2d at page 654.

Citing the provisions of Article VI, Section 9 of the Colorado Constitution, this Court rejected this assertion and held that the court had jurisdiction to determine the issue.

Thus, while the courts obviously do not possess authority or jurisdiction initially to pass upon claims for workmen's compensation benefits, there can be no doubt but what they possess authority and jurisdiction to interpret and apply the provisions of the Act to the extent it becomes necessary to do so in passing upon common law personal injury claims.

Now, the provisions of 81-9-2 granting immunity to the owners of land in certain circumstances are provisions which inure to the benefit of those owners. As a result, there is no reason why public policy would prohibit the owner from waiving that benefit. Certainly, the general rule is that a statutory benefit may be waived by the party for whose benefit it was enacted, 56 Am.Jur. 108, et seq., "Waiver", §7.

Indeed, while there have been no Colorado decisions discovered which speak to the point, other courts have held that the "bar" of the Act to a common law claim is an affirmative defense which must be pleaded and proven. See Gorrell v. Battelle, 93 Kan. 370, 144 Pac. 244 (1914), and Bishop v. Weems, 188 Ga. App. 180, 162 S.E.2d 879 (1968). See, also, American Smelting & Refining Co. v. Sutyak, 175 F.2d 123 (C.A.-10, 1949), involving the Colorado Act and Federal Rule 8(c).

Of course, any affirmative defense not pleaded is waived. Rule 8, C.R.C.P.

Here, then, CF&I filed two sets of pleadings with Respondents without any mention being made of its claim that it was immune from suit by Casaus. This constituted a waiver of that defense and allowed Respondents to properly act upon CF&I's first motion to vacate without considering that defense.

c. In any event, even if this Court directs the vacation of the default judgment, it should not direct the Respondents to enter judgment for CF&I at this stage of the litigation.

In CF&I's Petition, it requests that this Court should prohibit Respondents "from proceeding further in the trial of the cause of action alleged in the Complaint". Admittedly, if this Court concludes that Respondents abused their discretion in refusing to set aside the default judgment, this Court should direct Respondents to enter an order setting that default aside.

Respondents should not, at this stage in the proceedings before them, be prohibited from engaging in a trial or other proceedings, however. If the judgment against CF&I is to be set aside, nevertheless, the case is not "ripe" to have judgment entered in its favor.

We do not here argue the merits of CF&I's Sixth Affirmative Defense. We do assert, however, that there presently exists an insufficient evidentiary basis for the disposition of that defense on its merits.

Among the factual questions which would necessarily be required to be resolved are the following:

1. Is CF&I the owner of the premises involved?

2. Did CF&I comply with the requirements of 81-9-2(1)?

3. Did Casaus' decedent's death occur under circumstances, and for reasons, which would warrant the application of the "dual capacity" doctrine enunciated by the United States Supreme Court in Reed v. The Yaka, 373 U.S. 410 (1963), and adopted by several states. See 2 Larson on The Law of Workmen's Compensation, §72.80, pp. 226.20-226.27 and Comment, 5 St. Mary's Law Journal 818.

In short, even if this Court determines that CF&I

should be enabled to raise the defense involved, it lacks, at this point, a sufficient evidentiary basis for determining the validity of that defense.

5. Conclusion

For the reasons herein stated, Respondents respectfully pray that this Court enter its order discharging the rule.

Respectfully submitted,

BRANNEY & GRIFFITH
3755 South Broadway
Englewood, Colorado 80110
761-5600

CRISWELL & PATTERSON
3780 South Broadway
Englewood, Colorado 80110
761-0800

ALBERT E. ZARLENGO, JR.
American National Bank Bldg.
Denver, Colorado 80202
222-0601

By: John A. Criswell
John A. Criswell

Counsel for Respondents

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Order to Show Cause was deposited in the U.S. Mails, with sufficient postage affixed thereto, this 13th day of December, 1974, addressed to:

Leo W. Rector, Esq.
Counsel for Petitioner
228 North Cascade Avenue
Colorado Springs, Colorado 80903

Sandra F. Glenn