9-17-1974

CF & I Steel Corp. v. Robb

26629

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

Richard D. Tinell

CF&I STEEL CORPORATION, a Colorado corporation, Petitioner, vs. RICHARD D. ROBB, District Judge and the DISTRICT COURT in and for the Tenth Judicial District of the State of Colorado, Respondents.	BRIEF IN SUPPORT OF PETITION FOR WRIT IN THE NATURE OF PROHIBITION AND FOR STAY OF PROCEEDINGS

COMES NOW the Petitioner, CF&I Steel Corporation, by and through its attorneys, RECTOR, MELAT & WHEELER, P.C., to submit the following Brief in Support of Petition for Writ in the Nature of Prohibition and for Stay of Proceedings.

ISSUES

1. Whether or not, pursuant to Rule 106(a)(4) of the Colorado Rules of Civil Procedure, the District Court in and for the State of Colorado and County of Pueblo, and presided over by District Judge Richard D. Robb, exceeded its jurisdiction in failing to grant Defendant's Motion to Set Aside Default Heretofore Entered and Motion to Dismiss for Lack Jurisdiction of the Subject Matter and there is no plain, speedy and adequate remedy which the Defendant can otherwise pursue.

2. Whether or not, pursuant to Rule 106(a)(4) of the Colorado Rules of Civil Procedure, the District Court in and for the State of Colorado and County of Pueblo, and presided over by District Judge Richard D. Robb, abused its discretion in

failing to set aside the default heretofore entered by the District Court pursuant to the Defendant's Motion to Set Aside Default Heretofore Entered and there is no plain, speedy and adequate remedy which the Defendant can otherwise pursue.

FACTS

On or about October 31, 1973, Richard B. Casaus was employed by State, Inc., a Colorado corporation. State, Inc. was a subcontractor working on the premises owned by CF&I Steel Corporation as a subcontractor for Wheelabrator-Frye, Inc., who was the general contractor. While working on the premises, Richard B. Casaus was killed by an explosion. The claims asserted by the Plaintiffs were allegedly the result of the negligence and carelessness of the Defendant, CF&I Steel Corporation.

SUMMARY

In summary, it is submitted that the Complaint of the Plaintiffs falls within the Colorado Workmen's Compensation Act and, therefore, no cause of action exists for and on behalf of the Plaintiffs. The exclusive remedy and jurisdiction for the injury is afforded by the Workmen's Compensation Act; therefore, the District Court is without subject matter jurisdiction over this case and the jurisdiction is limited to the Industrial Commission of the State of Colorado. Without subject matter jurisidiction, the District Court has no competency to hear the matter, and the default judgment entered by the District Court is legally void, and as such this issue can be raised at any point in time by the Defendant. Therefore, the default entered by the District Court against the Defendant should be held for naught and set aside since the District Court is exercising a jurisdiction which it does not possess. Pursuant to Rule 106(a)(4) of the Colorado Rules of Civil Procedure the District Court has exceeded its jurisdiction, and if the District Court

is not prevented from proceeding any further, a large money judgment will be entered by the District Court, for which the Defendant has no plain, speedy and adequate remedy to otherwise prevent the District Court from proceeding any further.

It is also submitted that the District Court should be prevented from pursuing the matter of damages any further because it has clearly abused its discretion, and even if the District Court had jurisdiction of this matter, it exceeded its legitimate powers by failing to set aside the default pursuant to Defendant's Motion. The basis for this reasoning is that the District Court admitted the Defendant had a meritorious defense, and this in itself is sufficient to satisfy the good cause requirement of Rule 55 of the Colorado Rules of Civil Procedure for setting aside a default. In addition, if the Order previously entered by the District Court is construed to be a default judgment on liability, then the Defendant has likewise satisfied the requirement for setting aside a default judgment by having demonstrated to the District Court that the judgment was void; and also has shown to the District Court that excusable neglect existed on the part of the Defendant, CF&I Steel Corporation, and the negligence of Defendant's first counsel should not have been imputed to the Defendant. Such reasons are sufficient to satisfy Rule 60 of the Colorado Rules of Civil Procedure for setting aside a default judgment.

ARGUMENT

1. An interpretation of the Colorado Revised Statutes, Chapter 81, Article 3, Section 2, 1963, as amended, Chapter 81, Article 9, Section 2, 1963, and Chapter 81, Article 13, Section 2, 1963, clearly indicates that the Plaintiffs' causes of action fall within the Workmen's Compensation Act and, therefore, the purported claims against the Defendant are

barred by virtue of these provisions. All three of these provisions are set out at the end of the Defendant's Brief.

The Plaintiffs' Complaint clearly sets forth that CF&I Steel Corporation was the owner of the premises on which Richard B. Casaus was injured; that the widow and children of decedent are bringing the action, as is the Plaintiff, Commercial Union Insurance Company, who paid compensation under the Colorado Workmen's Compensation Act to other Plaintiffs; that the death of Richard B. Casaus was caused by the negligence and carelessness of CF&I Steel Corporation; that Richard B. Casaus was an employee of State, Inc. and was engaged in his employment at the time of his death; and in subsequent briefs which were filed on behalf of the decedent, it was alleged that he was the employee of State, Inc., who in turn was a subcontractor of Wheelabrator-Frye, Inc., the general contractor. It is apparent from these allegations set forth on the face of the Complaint that the claims for relief set out by the Plaintiffs fall within the provisions above cited, and the Plaintiffs have alleged no facts bringing the case without the Act; therefore, the Complaint is insufficient. See 101 C.J.S. Workmen's Compensation, Section 949 (1958). The Court will note that in the case at hand, it was alleged in the Plaintiff's Complaint that all three elements of C.R.S. 1963, 81-13-2, are present. This section, taken together with C.R.S. 1963, 81-3-2 and C.R.S. 1963, 81-9-2, clearly exclude the Plaintiffs from any recovery, and preclude any liability whatsoever, to any and all persons whomsoever for an personal injury sustained or death resulting therefrom.

A reading of the above cited provisions clearly discloses the public policy of the State of Colorado as expressed by the Legislature in the Workmen's Compensation Act, such policy being to limit the liability of an employer or his insurance carrier recovery under the Act. The language

used in these provisions is sweeping and all-inclusive and absolutely abolishes all other types of actions of whatever nature brought by any and all persons. See C.R.S. 1963, 81-3-2, as amended, which clearly indicates that every corporation or company that owns real property and contracts out work done on said property shall be deemed to be an employer under the Workmen's Compensation Act. Said language in these provisions does not permit any construction which would permit a third person to maintain an action for contribution. In addition, the language in C.R.S. 1963, 81-9-2(2), clearly precludes the contractor, subcontractor, its employees, or its insurers, from acquiring any right of contribution or action of any kind against the company or corporation owning the real property which contracts out the work done on the property. Thus, all the Plaintiffs' claims clearly fall within the language of these provisions and make their complaints fatally defective.

The reasons underlying the exclusiveness of compensation remedy are clearly stated as follows:

> Once a workmen's compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier. This is part of the quid pro quo in which the sacrifices and gains of the employees and employers are to some extent put in balance, for, while the employer assumed a new liability without fault, he is relieved of the prospects of large damage verdicts. 2 Larson, The Law of Workmen's Compensation, Section 65.10, Page 137 (1974).

The Supreme Court of the State of Colorado is presented with a case similar to the case at hand which was Nicks v. Electron Corporation, --Colo. App.-- 478 P.2d 683, 1970, and was decided by the Colorado Court of Appeals. That particular case clearly indicates that an employee working on the premises of the owner has no cause of action against the owner. The

Court interpreted the Colorado Revised Statutes, Chapter 81-9-1 (1963) and Chapter 81-9-2 (1963), and held that the Plaintiff, the employee, was excluded from maintaining a common law action against a party construed to be his employer under the Workmen's Compensation Act. The Court in Nicks specifically referred to Alexander v. Morrison-Knudsen, 166 Colo. 118, 444 P.2d 397 (1968), which case considered the effect of C.R.S. 1963, 81-9-2. The facts of Alexander are quite similar to the facts in the present case. In that case, the defendant, Morrison-Knudsen, contracted with Colorado-Ute Electric Association, Inc. to construct an electric power plant on property owned in part by the Colorado-Ute Electric Association. The plaintiff, Alexander, a crane operator, was employed by Morrison-Knudsen and was seriously injured on the project. Morrison had Workmen's Compensation insurance in effect at the time. The Court held that since Morrison brought himself within the gamut of the Act, it was not subject to a common law action, and the plaintiffs were limited to the remedies specified in the Act, citing C.R.S. 1963, 81-3-2. The Court then indicated that the trial court properly dismissed both claims as to Morrison and Colorado-Ute, and Colorado-Ute was not subject to any liability of any kind to the plaintiff.

The most recent case in this area is O'Quinn v. Walt Disney Productions, Inc., 493 P.2d 344, 1972, where the owner of the premises contracted with a general contractor, who in turn contracted with the subcontractor, who in turn employed the plaintiff who was injured on the premises of the property owner. The plaintiff received Workmen's Compensation from his immediate employer. Subsequently, he filed an action in tort against both the general contractor and the property owner. As to the property owner, the action was dismissed pursuant to C.R.S. 1963, 81-9-2. The Supreme Court on

appeal held in part that statutes establishing liability of a real property owner as employer and thereby, under statute governing liability of complying employers, depriving the plaintiff of his common law right to sue such statutory employers, were not unconstitutional. The decision recognizes that although the owner of the premises is not in fact an employer, the statute may still create an employment relationship for the purposes of Workmen's Compensation, and to do so is not unconstitutional. See also Varda v. Colorado Milling & Elevator Co., -- Colo. App. --, 499 P.2d 1206 (1972).

The purpose of the Workmen's Compensation Act is two-fold. This is not only a statute designed to protect employees from work-related injuries, but also, it is an Act in which the employer assumes a new liability without fault and he is releived of the prospect of large damage verdicts. See Quote from 2 Larson, The Law of Workmen's Compensation, at Page 4. It is clear from the above cited case as well as those cited previously by the defendant that the language of C.R.S. 1963, 81-9-2, C.R.S. 1963 81-3-2, and 81-13-2, clearly precludes any liability on the part of a corporation owning real property which contracts work done on said property so long as said contractor, subcontractor, or other person doing work or undertaking to do any work for the owner of the property shall keep insured his liability for compensation. From the allegations of the Plaintiffs' Complaint, it is clear that the Plaintiff, Richard B. Casaus, received Workmen's Compensation insurance, and therefore, pursuant to the above cited provisions, both Plaintiffs are estopped from pursuing any right of contribution or action of any kind against the Defendant.

The Petitioner has alleged that there was no direct contractual relation between the Defendant, CF&I Steel Corporation and the immediate employer of the Plaintiff, State, Inc. But, by the very nature of the word "subcontractor", it is clear that

the Workmen's Compensation Act does not require a direct contract for hire. Invariably, the word "subcontractor" refers to a situation where one to whom the principal has let right to do a part of the work which the principal has contracted to do. In other words, subcontractor also is defined as one who has entered into a contract for the performance of an act with a person who has already contracted for its performance. There is no question but what C.R.S. 1963, 81-3-2 and C.R.S. 81-9-2 encompass such definition and preclude the Plaintiffs' recovery in a common law action. In fact, in State Ex Rel First National Bank and Trust Company of Helena v. District Court, 505 P.2d 408 (Mont. 1973), the property owner, pursuant to its contract with the general contractor required the general contractor to provide Workmen's Compensation insurance for its employees, and to see to it that such coverage was provided for employees of subcontractors. Claimant, an employee of a subcontractor, brought a negligence action against several parties, including the property owner. The property owner was held to be entitled to immunity from suit. The question the Court concerned itself with in the Montana case was whether the bank, the property owner, was entitled to the same immunity in the absence of a direct contractual requirement that the plaintiff's immediate employer carried Workmen's Compensation. They held it was.

The Defendant asserts that it does not absolve itself of all responsibility by merely contracting with a third party. Rather, such owner is placed in the vertical chain of responsibility and if the contractor, subcontractor, and person or persons using four or more employees or workmen, fail to keep their liability for compensation as provided in this Act, then such responsibility to insure under the Act falls on the owner. For purposes of this particular discussion, we cite to the Court an additional case, Hartford Accident &

Indemnity Co. v. Clifton, 190 P.2d 909 (1948). Clifton, claimant's deceased husband, was employed by Trimmer and lost his life as a result of an accident while he was in Trimmer's employment. Trimmer had allowed his insurance to lapse before the death occurred. The Court concluded that the power company was the employer, that both the claimant's husband and Trimmer were employees by reason of the fact that Trimmer failed to keep his liability insurance. The Court then held that Trimmer and the deceased, being in the same employment, the provisions of Section 336, Chapter 97, *35 C.S.A. relating to election of remedies does not apply, and the claimant's remedy before the Commission was exclusive. The Court said that the power company was not released from liability under the Act and thus the power company's insurer, Hartford, had to supply the insurance coverage for the decedent's spouse. This case merely affirms the view that if the immediate employer in the chain of responsibility does not carry Workmen's Compensation insurance, then the responsibility for such insurance coverage falls on the next employer in the chain.

Decisions reached by the Colorado Supreme Court in the above cited decisions as well as others are consistent with the great weight of authority in the United States. There are three general types of "exclusive liability" clauses and Colorado clearly has one of the broadest of all statutes. As such, the cases with unanimity have excluded suits by all persons for the wrongful death of an employee. See 2 Larson, Workmen's Compensation Law, Section 66.10 and 66.12, Pages 152-152.3 (1974). In effect, what the Colorado cases in Larson's treatise state is that once the Workmen's Compensation Act has become applicable, it affords the exclusive remedy for the injury and all other causes of action of whatever nature or kind are abolished. In fact, it can be stated that since no cause of action was

stated by the Plaintiffs in their Complaint, the District Court had no justification for allowing a default to be entered. In Fidelity Finance Co. v. Groff et al, 235 P.2d 994, the plaintiff sued the finance company, to cancel a note and chattel mortgage. A default judgment was entered by the District Court and the defendants brought error. The Supreme Court held that entry of a default judgment was erroneous, for the complaint did not disclose the main facts or incidents constituting alleged fraud. The Court quoting from 31 Am. Jur., Section 15 at Pages 130-131, in which the following statement appears:

> - - - It is a general rule that a judgment by default must be justified by the pleadings. Such a judgment may not be rendered where the pleadings of plaintiff omit averments essential to the showing of a cause of action.

The Supreme Court then remanded the case with directions to vacate the default judgment heretofore entered, and to permit the finance company to file its answer to the end that the case may be tried on its merits. It is clear that a default should not have been entered by the District Court in this matter and the District Court should have dismissed the entire action pursuant to the Defendant's Motion to Set Aside Default Heretofore Entered and Motion to Dismiss for Lack of Jurisdiction of the Subject Matter. It is quite obvious from the discussion set out above that the exclusive remedy of the Plaintiffs lies within the Colorado Workmen's Compensation Act. As such, the Industrial Commission had primary and exclusive jurisdiction of this matter and since the claimants of the decedent were awarded compensation, and since it is clear that Richard B. Casaus was an employee at the time of the injury, and that the Defendant, CF&I Steel Corporation was an employer pursuant to C.R.S. 1963, 81-9-2, the District Court had no jurisdiction to hear this matter. It is only proper that in

this instance the claims of the Plaintiffs be dismissed. In fact, under Rule 12 of the Colorado Rules of Civil Procedure, it is stated:

> . . . (h)(3) Whenever it appears by the suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action.

Such a dismissal could be raised by the Court of its own motion upon lack of jurisdiction or by the suggestion of the parties. It is now stated that the Defendant's only remedy is to prevent the District Court from proceeding further, since they are attempting to exercise a jurisdiction not vested in them. It is apparent that in the case before us, the exclusive remedy is through the Workmen's Compensation Act and thus the District Court has no jurisdiction over the subject matter, but rather this jurisdiction lies with the Industrial Commission. The general rule is that where there is a lack of subject matter jurisdiction, any orders made by the Court are legally void. This would be true even where the Court believes that subject matter jurisdiction is within its own jurisdiction. For a discussion of this matter, see 20 Am. Jur. 2d, Courts, Sections 95, 96, and 105.

In Packaging Corporation of America v. Roberts, 455 P.2d 652 (1969), the Colorado Supreme Court considered the question of subject matter jurisdiction in an action by an employee against a former employer. In this action, the employee had been discharged by his employer. An argument ensued and subsequently his supervisor struck the plaintiff on the head with a pitchfork. Thereafter, the Plaintiff filed a notice of claim with the Industrial Commission for compensation. The plaintiff then proceeded to pursue a common law action in the District Court. The trial court determined the plaintiff was not an employee at the time of the incident. The employer, that is, the corporation, urged the Supreme Court of Colorado to hold

that the Industrial Commission had primary and exclusive jurisdiction of this matter, and that until the Industrial Commission determined that the plaintiff was not an employee at the time of the striking, the District Court had no jurisdiction. After citing several sections of the Workmen's Compensation Act, referring to C.R.S. 1963, 81-3-2, and observing that the corporation was in full compliance with the Act, the Court undertook to discuss the jurisdiction of the District Courts. The Court referred to Article VI, Section 9, of the Colorado Constitution, defining the powers of the trial court, and went on to state:

> Article VI, Section 9, of the Colorado Constitution provides: The district courts shall be trial courts of record with general jurisdiction and shall have original jurisdiction on all civil, probate, and criminal cases, except as otherwise provided herein . . . if the plaintiff was an employee at the time the injury occurred, the Industrial Commission would have exclusive jurisdiction of the matter. However, we hold that the district court had jurisdiction in determining whether the plaintiff was an employee at that time. Supra, page 654.

After discussing the matter of whether or not the plaintiff was an employee and strongly suggesting to the trial court by reference to the Workmen's Compensation law that he was, the Court stated:

> . . . on retrial, there must be a determination as to whether the plaintiff remained under the Workmen's Compensation at the time the altercation took place, and, if it is found that he is still under the Act, the court loses jurisdiction of the matter. Supra, page 655 (Emphasis Added)

The Court then remanded the case for further proceedings consistent with the views expressed therein. What the Court is saying in the Packaging Corporation case is that once the Workmen's Compensation Act has become applicable, it affords the exclusive remedy for the injury and the Industrial Commission affords the exclusive jurisdiction. The language in the Packaging Corporation case is clear and unequivocal. It

states exactly what jurisdiction the District Court has and further states that if the plaintiff was an employee at the time he was injured, the Industrial Commission would have exclusive jurisdiction of the matter. The only question the District Court had jurisdiction to determine was whether the plaintiff was an employee at the time he was injured. Such is not the question with the case at hand. Plaintiffs admit in their Complaint and accompanying Brief that the Plaintiff was an employee at the time of the injury. Defendants did not refute this in any of their answers or briefs. In fact, the Complaint clearly alleges that the Plaintiffs received Workmen's Compensation. Therefore, since the decedent was an employee at the time of the accident and the Defendant is clearly an employer under C.R.S. 1963, 81-9-2, the exclusive jurisdiction of this matter lies within the Industrial Commission and the District Court has no jurisdiction of this matter.

The question of jurisdiction was raised again in Sieck v. Trueblood, 485 P.2d 134 (1971), where a co-employee sued his fellow employee. The defendant appealed from an adverse ruling of the District Court and the Supreme Court held that the plaintiff was acting within the scope of his employment at the time of the accident. The Court went on to hold that the Plaintiff's only remedy was limited to recovery under the Act and the trial court should have so ruled. Applying this holding to the case at hand, it is apparent that the Plaintiffs are limited to recovery under the Workmen's Compensation Act. The Defendant, CF&I Steel Corporation, cannot be classified as a stranger in this action. Therefore, there is not a third party tort-feasor and the Supreme Court has so expressed this view in O'Quinn v. Walt Disney Productions, Inc., 493 P.2d 344 (1972), and Alexander v. Morrison-Knudsen, 166 Colo. 118, 444 P.2d 397 (1968).

A judgment is valid if, among other requirements, it is rendered by a Court with competency to render it. Restatement of Judgments, Section 4 (1942). Section 7 of the same restatement states that such a judgment is void if it is not rendered by a Court with competency to hear the matter. The Restatement cites several cases where subject matter jurisdiction would not exist. For instance, they state that a divorce rendered by a Court which is not empowered to entertain suits for divorce is void. The same would be true of a judgment rendered by a justice of the peace if under the law of a state such justices were not empowered to deal with the subject matter of the action. Even if the defendant failed to object to the competency of the Court, where the Court has no jurisdiction to render judgment because of its lack of competency, the objection is never waived. This is true even if the Defendant expressly consents to exercise of jurisdiction. See generally Restatement of Judgments, Section 7 (1942). A challenge to the jurisdiction of a Colorado Court was raised in Avery v. County Court of Gilpin County, 126 Colo. 421, 250 P.2d 122 (1952), where the Court stated that the County Court was without jurisdiction and that all orders entered in the action before it were null and void and should be vacated. The Supreme Court of the State of Colorado came to the same conclusion in Meyers v. Williams 137 Colo. 325, 324 P.2d 788 (1958). This was an action for wrongful death brought in the District Court against the executor of the estate of a Sanford Cadwell. The District Court awarded the plaintiff a judgment on a finding that the decedent, Cadwell, was negligent. On appeal, the defendant contended that the District Court had no jurisdiction to entertain the cause. The state statute in effect at the time this action was heard gave the County Court jurisdiction over probate matters. The executor as defendant in the District Court action did not challenge the

jurisdiction of the Court and at no time objected to the trial court's error. The Supreme Court of Colorado, on appeal, stated:

> Assuming that the executor did agree to the trial in the district court, jurisdiction of the subject matter . . . cannot be conferred by agreement or stipulation of the parties . . . objection to jurisdiction can be made at any time, even for the first time here on writ of error. Supra, page 789

The Court held that after probate jurisdiction had attached to the claim against the estate for the death, the County Court was vested with sole and exclusive jurisdiction of the claims presented before it, and hence the District Court did not have jurisdiction of the action thereafter filed to recover damages for death, even if the executor had agreed to trial of action in the District Court. The Meyers case coincides with the case at hand because in the instant case the Industrial Commission has jurisdiction over all matters relating to compensation for accidental injury to and death of employees. The powers and duties of the Commission over all matters relating to compensation for accidental injury to and death of employees. The powers and duties of the Commission are expressed in C.R.S. 1963, 80-1-9, where it states that the Commission shall have jurisdiction and authority to enforce and administer all the provisions of law relating to compensation for accidental injury to or death of employees. It is thus apparent that the jurisdiction over matters relating to compensation for accidental injury to and death of employees lies within the Industrial Commission unless otherwise excluded by the Workmen's Compensation Statute. Thus the matter that we are concerned with is not one of a plea in bar as suggested by the District Court, but rather one of jurisdiction. In fact, the definition of a plea in bar is one that virtually admits that a cause of action once existed, but insists that the plaintiff cannot and never can maintain his action for the cause alleged.

The District Court cited this same definition in its order. An example of a plea in bar is the statute of limitations. This affirmative defense, in effect, admits that a cause of action once existed, but is now barred by the statute of limitations. It is clear that when an injury or breach occurs, a cause of action has to exist at that point in time even though later barred for such cause to be considered a plea in bar. The Defendant, in the present case, has not admitted that a cause of action existed at any time for the Plaintiffs and, none in fact ever existed. Pursuant to the language in C.R.S. 1963, 81-3-2, as amended, coupled with C.R.S. 1963, 81-9-2, and C.R.S. 1963, 81-13-2, it is quite obvious that a cause of action never existed for and on behalf of the Plaintiffs. The State of Colorado adopted the common law pursuant to legislative enactment. Thus, if all causes of action, common law rights and remedies of an employee against his employer are abolished pursuant to the Workmen's Compensation Act, it is impossible to construe any part of the Workmen's Compensation Act as merely a plea in bar. The language of C.R.S. 1963, 81-3-2, as amended, states:

> All causes of action, actions at law, suits in equity, and proceedings whatsoever, and all statutory and common law rights and remedies for and on account of such death of, or personal injury to any such employee and accruing to any and all persons whatsoever, are hereby abolished except as provided in this chapter.

Therefore, to suggest that Defendant's defense is a plea in bar is clearly wrong, since 81-3-2 abolishes all common law rights and Plaintiffs' claim is based on a common law right. Also, as stated previously, (See Packaging Corporaton of America v. Roberts, 455 P.2d 652 (1969)), the Industrial Commission has exclusive jurisdiction of this matter, since the decedent was an admitted employee, and therefore, the District Court had no jurisdiction to hear this matter.

2. Not only did the District Court exceed its

jurisdiction by entering a default judgment in this matter, and not setting it aside on defense motion, but the District Court also clearly abused its discretion by failing to set aside the default judgment entered when a meritorious defense was shown by the Defendant which was a complete and absolute defense. It should be noted at this point that on May 22, 1974, the District Court directed the default to be entered. On May 23, 1974, one day later, the Defendant appeared by and through its first counsel of record, the law firm of Petersen & Fonda, and filed an Answer.

It is submitted that the District Court abused its discretion based on the following reasons: First, the District Court lacked subject matter jurisdiction over the matter. A discussion of jurisdiction has been clearly set out previously, it has been shown that this is a clear and absolute meritorious defense. Secondly, it is also stated previously it is the general rule that where a default judgment is not justified by the pleadings a judgment may not be rendered. See Fidelity Finance Co. v. Groff, et al, 235 P.2d 994 (1951). This reason is sufficient to set aside the default for abuse of discretion. Thirdly, the default judgment was entered as a result of Defendant's former counsel's negligence in failing to Answer before the default judgment was entered. Such neglect was not that of the Defendant, since Defendant notified its first counsel of the Complaint and Summons shortly after being served. Finally, it is submitted that the highest purpose of any trial court is to deal out substantive, not procedural justice. Only one day passed from the entry of default until Defendant's counsel answered. In addition, the District Court has admitted in its most recent Order that the Defendant had a meritorious defense. On this basis, it is submitted the District Court should have set aside the default judgment and clearly abused its discretion for not so doing.

Allegedly the default judgment in this matter was entered pursuant to the Colorado Rules of Civil Procedure, Rule 55. Under Rule 55,

> . . . For good cause shown in the Court may set aside an entry of default and, if the judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60 of the Colorado Rules of Civil Procedure states that a default judgment may be set aside

> . . . for the following reasons: (1) mistake, inadvertance, surprise or excusable neglect, . . . (3) the judgment is void, . . . (5) any other reason satisfying relief from the operation of the judgment.

In Coerber v. Rath, 435 P.2d 228 (1967), the plaintiff's claims arose out of the alleged tortious conduct of the defendants. The defendants failed to answer interrogatories and default judgment was entered by the trial court. The defendants alleged a meritorious defense. The reason for failure to answer interrogatories was because defendants' counsel was negligent. The Court stated that counsel's neglect was inexcusable, but under the circumstances here, this neglect should not have been imputed to the defendants. The Court then held that where the primary cause for defendants' failure to answer interrogatories was inexcusable neglect of counsel, in whom the defendants had placed their confidence, and setting aside default and ordering trial on the merits would not unwarrantly prejudice plaintiff, the trial court abused its discretion, refusing to set aside the default. The Supreme Court in Coerber noted that the vacating of a default judgment was addressed to the sound discretion of the trial court, and also stated that the Supreme Court has never hesitated to overrule a trial court where that discretion has been abused. That case noted that where a meritorious defense is shown, that is sufficient for a good cause. In addition, in the present case, it is submitted that under Rule 60 of

the Colorado Rules of Civil Procedure, the default judgment should be set aside since the Court lacks subject matter jurisdiction over the matter and therefore, the judgment is void, and even assuming subject matter existed, for the reason that although the neglect on the part of Defendant's first counsel was inexcusable, this should not be imputed to the Defendant. In fact, in Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971), the Appellate Court stated that gross negligence on the part of the Defendant's counsel is considered excusable neglect on the part of the client entitling him to have judgment set aside. See also, Beyer v. Petersen, 92 Colo. 462, 21 P.2d 1115 (1933), and Calkins v. Smalley, 88 Colo. 227, 294 P. 534 (1930). In both of these cases, the Supreme Court reversed the District Court's refusal to set aside a default judgment on the basis that the District Court abused its discretion. In Calkins the Supreme Court felt that the Defendant should have his day in Court, even though it appeared that the Defendant's counsel was negligent. The Defendant, CF&I Steel Corporation, has not had its day in Court either, and as such is entitled to be heard on the merits of the case.

At this point, it is important to note the quotation that was cited in Burlington Ditch, Reservoir & Land Co. et al v. Ft. Morgan Reservoir & Irrigation Co. et al, 59 Colo. 571, 151 P. 432 (1915), in which the Colorado Supreme Court decided a Washington decision which said:

> The function of a court is to adjudicate the differences existing between litigants and mete out that which is right and lawful, so far as such a consummation may be approximated under the forms of law. They are not institutions where the rights of suitors are to be determined by the prowess, skill, or sharp practice of attorneys on the one side, or by the inconsequential errors, omissions, and oversights of the opposite counsel. Technicalities, forms, and rules must not be permitted to defeat the highest purpose

> of courts--the dealing out of substantial justice--unless, in a given case, an arbitrary statute or established rule of decision positively so requires. Douglas v. Badger State Mine, 41 Wash. 266, 83 P. 178, 4 L.R.A. (N.S.) 196.

The Supreme Court in the Burlington decision stated that a motion to vacate a default judgment although is addressed to the sound discretion of the Court, nevertheless the statute authorizing such motion is to be construed liberally to promote substantial justice. It is submitted in the case at hand that to promote substantial justice, the default judgment rendered by the District Court should be set aside.

The Supreme Court on numerous occasions has stated that a motion to set aside a default judgment should be considered in a manner calculated to promote substantial justice. See F & S Construction Co. v. V. Christlieb, 166 Colo. 67, 441 P.2d 656 (1968). The only way in which justice can be served in this matter is to prevent the District Court from proceeding on the question of damages and allow the Defendant to be heard on the merits of the case. See Fidelity Finance Co. v. Groff, 235 P.2d 994 (1951), in which the Supreme Court cited Am. Jur. which stated that if there is neglect of counsel in resulting in a judgment against the party, vacation of the judgment is authorized.

Ordinarily the attorney is faced with setting aside a default or a default judgment after the client has informed him of the adverse party attempting to execute on property owned by the defendant. This is not true in the instant case. We are faced with neglect of former counsel in failing to Answer before the default was entered, not with the neglect of client. Thus, we have a situation here where there is excusable neglect on the part of the client. Even assuming for purposes of discussion, that there was no question of subject matter jurisdiction, the fact still remains that the

Complaint of the Plaintiffs does not state a cause of action and this in itself would be a meritorious defense. In fact the Colorado Supreme Court has stated on a prior occasion that as a general rule where a default is not justified by the pleadings, a judgment may not be rendered. The District Court has admitted a meritorious defense existed at one time, and therefore, pursuant to Rule 55, this is sufficient for good cause shown to set aside a default, and, the Defendant has also satisfied the Rule 60 requirement for setting aside a default judgment by showing both that the judgment was void and excusable neglect on the part of the client, CF&I. In addition, another reason under Rule 60 to set aside the default judgment, is that the highest purpose of any trial court is to deal out substantive, not procedural justice, and substantive justice would not be the satisfied here if this matter is not set aside.

CONCLUSION

In conclusion, it is respectively submitted that the Supreme Court should grant the Writ in the Nature of Prohibition and for Stay of Proceedings pursuant to Rule 106 (a) (4) of the Colorado Rules of Civil Procedure, for the reasons and arguments previously cited.

Respectively submitted,

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C.R.S. 1963 81-3-3, as amended

Liability of employer complying. -- Any employer who has elected to and has complied with the provisions of this chapter, including the provisions relating to insurance, shall not be subject to the provisions of section 81-3-1; nor shall such empolyer or the insurance carrier, if any, insuring such employer's liability under this chapter be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided in this chapter; and all causes of action, actions at law, suits in equity, and proceedings whatever, and all statutory and common law rights and remedies for and on account of such death of, or personal injury to any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in this chapter.

C.R.S. 1963 81-9-2

Repairs to real property--liability for insurance.--(1) Every person, company or corporation, that owns any real property or improvements thereon and that contracts out any work done on and to said property to any contractor, subcontractor, person, or persons, who shall hire or use four or more employees or workmen, including himself if working thereon in the doing of such business, shall be deemed to be an employer under the terms of this chapter and every such contractor, and subcontractor, person, or persons, as well as their employees, shall each and all of them be deemed to be employees as defined in this chapter and such employer shall be liable as provided in this chapter to pay compensation for injury or death resulting therefrom to said contractor, and subcontractor, and their employees and, before commencing said work shall insure and shall keep insured his liability as provided in this chapter. Such employer shall be entitled to recover the cost of such insurance from said contractor, subcontractor, person or persons, and may withhold and deduct the same from the contract price or any royalties or other money due, owing, or to become due said contractor, subcontractor, person, or persons.

(2) If said contractor, subcontractor, person or persons doing or undertaking to do any work for an owner of property, as provided in subsection (1) of this section, shall himself be an employer, as defined in this chapter, in the doing of such work and shall before commencing such work insure and shall keep insured his liability for compensation as provided in this chapter, neither said contractor, subcontractor, person, or persons, its employees or its insurers, shall have any right of contribution or action of any kind including actions under section 91-13-8, herein against the person, company, or corporation owning real property and improvements thereon which contracts out work done on said property.

Conditions of recovery.-- (1) (a) The right to the compensation provided for in this chapter, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:

(b) Where, at the time of the accident, both employer and employee are subject to the provisions of this chapter; and where the employer has complied with the provisions thereof regarding insurance;

(c) Where, at the time of the accident, the employee is performing service arising out of and in the course of his employment;

(d) Where the injury or death is proximately caused by accident arising out of and in the course of his employment, and is not intentionally self-inflicted.