1976

Clark Bambrough v. Ray Bethers, dba Ray Bethers Trucking, and Danny Shimizu : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

CLARK BAMBROUGH,

Plaintiff and Appellant,

vs.

RAY BETHERS, dba Ray Bethers Trucking, and DANNY SHIMIZU,

Defendants and Respondents.

Case No. 14320

RESPONDENTS' BRIEF

Appeal from Judgment of the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Ernest F. Baldwin, Judge

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RESPONDENT'S BRIEF

NATURE OF CASE

Plaintiff claimed the defendants' negligence caused him personal injuries. Defendants claim plaintiff was an employee of the defendant Bethers and/or in the same employment with both defendants for purposes of the Utah Workmens

Compensation statutes, and that Workmens Compensation was plaintiff's exclusive remedy. Pursuant to stipulation of the parties, issues raised by these defenses were tried separately from questions of liability and damage.

DISPOSITION IN LOWER COURT

The employment issues relevant to the Workmens Compensation defenses were tried before a jury on a special verdict. Based upon the jury's responses to the propositions set forth in the special verdict, the court entered a Judgment of Dismissal dated September 25, 1975 (R. 6-7).

RELIEF SOUGHT ON APPEAL

Defendants pray that the trial court judgment be affirmed.

STATEMENT OF FACTS

1. On January 15, 1973 the plaintiff drove a tractor and trailer owned by D & L Corporation onto the defendant Bethers business premises to deliver a load of wood paneling to Denver, Colorado(R-284). The load plaintiff was to deliver had to be transferred from a trailer owned by the defendant Bethers and onto the trailer owned by D & L (R-252).

2. Prior to the time plaintiff arrived, the defendant Bethers then dispatcher, Clair Anderson, called the owner of D & L Corporation, and made verbal arrangements that D & L would trip lease its truck and trailer to Bethers for the trip to Colorado (R-207-208). Mr. Anderson recalls discussing the trip lease with plaintiff (R-238), although Bambrough denies recollection of any such discussion (R-286).

3. Clair Anderson testified he prepared part, but not all, of a trip lease for the load plaintiff was to transport on the date of the accident (R-211-213). He indicated he signed that lease in the blocks marked "signature of inspector" and "signature for certification" on the date plaintiff was injured (R-213). The signature by Anderson in the block marked receipt by Carrier (Lessee) was not written in until late 1974 or early 1975 (R-213-214). The trip lease was not signed by the plaintiff, but was signed by Bud Jolley, the replacement driver hired by D & L who actually delivered the load, after plaintiff was injured (R-246-248).

4. When plaintiff arrived with the D & L truck and trailer on the defendant Bethers' business premises, he was told by Bethers' personnel to assist in transferring the load. (R-301). When plaintiff learned that the load was

to be transferred he telephoned Mr. Leftwich of D & L for instructions. Leftwich told him: "If that's their procedure you do it." (R-302). Thereafter plaintiff and the defendant Shimizu proceeded to transfer the load from the trailer owned by the defendant Bethers and on to the trailer owned by D & L.

5. Approximately an hour and a half elapsed from the time plaintiff and the defendant Shimizu began transferring the load until the plaintiff was injured (R-305). No one else worked with them (Id.).

6. Shimizu and plaintiff worked together to transfer the load (R-292). In effectuating the transfer Shimizu would pick up the bundles of wood products with a forklift, while plaintiff would pick up 2" X 4" pieces of wood ("stickers") which would be placed under the bundles on the D & L owned trailer. Shimizu would pick up a bundle with the forklift and plaintiff would take "stickers" from the Bethers trailer or yard and set them on the load Shimizu was carrying. When the forklift moved next to the D & L owned trailer, plaintiff would take the "stickers" off the bundle and set them on the trailer deck so that the bundles could be placed on the "stickers" (R-303).

7. A short time prior to the accident, the tarps

to cover the load were placed on the forklift and an attempt was made to unload the tarps on the top of the load. When the tarps wouldn't come off the forks, plaintiff climbed onto the Bethers' forklift to push the tarps off (R-291).

8. Although plaintiff and Shimizu had loaded the wood products on D & L owned vehicle at the time of the accident, the tarps on the load had not been fastened to the trailer prior to plaintiff's injury (R-308). After the injury the D & L replacement driver, Bud Jolley, had to finish tarping the load and to tie it down. (R-246).

9. Immediately prior to the accident and before he had tied down the tarps, plaintiff mounted the running board of the Bethers forklift, probably to tell the defendant "Thanks for helping me to load," and to inform Shimizu to "tell Ray [Bethers] that on the way back I will drop his tarps off." (R-292).

10. At trial the plaintiff did not object to the Court giving proposition no. 4 to the jury which read:

> "At the time and place of the injury to Clark Bambrough, Clark Bambrough and Danny Shimizu were engaged in the same line of work and labor[ed] together and in such personal relations that they could exercise an influence upon each other promotive of proper caution in respect to their mutual safety and they were at the time of the injury directly operating with

each other in the business at hand, or they were operating so that mutual duties brought them into such co-association that they could exercise an influence upon each other to use proper caution and be so situated in their labor as to be able to supervise and watch the conduct of each other as to skill, diligence and carefulness." (R-30).

11. The trial jury answered proposition no. 4 in the affirmative.

12. On January 15, 1973 the defendant Shimizu was an employee of the defendant Bethers (R-251-252).

13. After the accident of January 15, 1973 plaintiff received Workmens Compensation benefits (Bambrough Dep. p. 48).

ARGUMENT

POINT I

IN PROPOSITION 4 OF THE SPECIAL VERDICT THE TRIAL JURY FOUND FACTS TO SUPPORT THE CONCLUSION THAT PLAINTIFF AND THE DEFENDANTS WERE IN THE "SAME EMPLOYMENT" FOR WORKMEN'S COMPENSATION PURPOSES. SINCE PLAINTIFF FAILED TO OBJECT TO THE SUBMISSION OF PROPOSITION 4 TO THE JURY AND SINCE COMPETENT EVIDENCE SUPPORTED THE JURY'S FINDINGS ON THAT ISSUE, THE TRIAL COURT JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT SHOULD BE AFFIRMED.

At the time of plaintiff's injury Section 35-1-62 of the Utah Code Annotated, 1953, as amended, provided:

> "When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee, or in the case of death his dependents, may claim compensation and the injured employee or his heirs or personal representatives may also have an action for damages against such third person." (emphasis added).

In 1975 this statute was amended, but it contained the language cited in the previous paragraph at the time of plaintiff's accident. See Section 35-1-62, Utah Code Annotated (Supp. 1975).

This Court has noted that "same employment" does not require that the injured person be hired or paid by a defendant in order for the injured person to be in the same employment with that defendant. In Peterson v. Fowler, 27 Utah 2d 159, 164, 493 P.2d 997, 1000 (1973) this court held:

> ". . . 'Same Employment' as used in our Workmen's Compensation Act means work of the same general type and nature as that concurrently being performed by the defendant or its employees." (emphasis added).

In that same decision this court also set forth the standard by which a trier of fact might determine whether persons were in the same employment for Workmen's Compensation purposes:

> "To be fellow servants, they must be engaged in the same line of work and labor together in such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety. They should be at the time of the injury directly operating with each other in the particular business at hand, or they must be operating so that mutual duties bring them into such co-asociation that they may exercise an influence upon each other to use proper caution and be so situated in their labor to some extent as to be able to supervise and watch the conduct of each other as to skill, diligence and carefulness. When workmen are so engaged, we think they are working in the same employment." Id. at 164, 493 P.2d at 1000. (emphasis added).

In the Peterson decision the decedent's estate sought to sue a subcontractor for plaintiff's alleged wrongful death. The decedent was hired by the general contractor, but also did work for the subcontractor. At the completion of the work the subcontractor was to reimburse the general contractor for services rendered the subcontractor by the deceased. It was unclear at the time of the decedent's death exactly what work the decedent was performing. The Supreme Court affirmed the trial court's award of summary judgment in favor of the subcontractor-respondent:

> "In the instant case if at the time of the accident the deceased was applying tile on behalf of the respondent. . .he would be an employee and plaintiffs could not maintain the action. On the other hand, if at the time of the accident he was cleaning beams and hubs on behalf of the general contractor, the plaintiffs could not maintain the action because he was engaged in

> the same employment as the employees of the respondent." Peterson, supra, at 165, 493 P.2d at 1001.

This court went on to note that the plaintiff had the burden of showing that the decedent was neither employed by nor in the same employment with the respondent. Id.

In proposition no. 4 of the special verdict the jury was asked to find whether or not the plaintiff and the defendant Shimizu were engaged in the same line of work, laboring together so that they could influence each other with respect to their mutual safety and situated so as to supervise and watch the skill, diligence and care of the other at the time of the accident. The essential factual elements of the Peterson test were thus submitted to them. The jury found as true the factual bases set forth by this court in the Peterson decision, and respondents respectfully submit that the legal conclusion required by the jury finding on proposition no. 4 is that plaintiff and the defendants were in the "same employment" pursuant to Section 31-1-62 as it existed at the time of the injury.

Plaintiff did not object to proposition no. 4 being submitted to the jury (R-328).

Furthermore, the evidence presented provided a legitimate basis for the jury's finding. It was undisputed that the defendant Shimizu was employed by the defendant Bethers. Both Bethers and D & L Corporation were in the trucking business. At the time of the accident plaintiff and Shimizu were working together on a common project, namely the transfer of the wood products from the Bethers owned vehicle to the D & L vehicle. They had worked together on that project for about an hour and a half and plaintiff admits that when he voluntarily boarded the forklift immediately prior to the accident he probably told Shimizu "Thanks for helping me to load." (R-292).

While they were working together, plaintiff from time to time would make suggestions to Shimizu on how to align the load (R-302-303). After the wood products had been placed on the trailer Bambrough had driven, he and Shimizu worked together to have the covering tarps lifted upon the load. And when the tarps would not come off the forks, plaintiff climbed onto the forklift Shimizu was operating to push the tarps off the load. And plaintiff says he probably mentioned return of the tarps to Shimizu just prior to the accident. (R-292).

These foregoing facts provide a credible basis for the finding that the two did work together at the time of the accident in such a manner as to make plaintiff and defendants in the same employment for Workmens Compensation purposes.

Indeed, even if plaintiff were correct in arguing that the trial court erred in submitting propositions 1, 2 and 3 (and defendants do not contend that any such error was committed), the jury finding on proposition no. 4, conclusively establishes a factual basis for holding that plaintiff and defendants were in the same employment. This finding would provide an independent basis for the trial court's judgment of dismissal even if the trial court had erred in submitting to the jury the propositions on whether plaintiff was an employee of the defendant Bethers.

POINT II

THERE WAS CREDIBLE EVIDENCE TO JUSTIFY THE TRIAL COURT'S FINDING THAT WORKMENS COMPENSATION WAS PLAINTIFF'S EXCLUSIVE REMEDY, AND THE TRIAL COURT DID NOT ERR IN SUBMITTING PROPOSITION 1 TO THE JURY ON A SPECIAL VERDICT.

A portion of Section 35-1-60 of the Utah Code Annotated, 1953, provides:

> "Exclusive remedy against employer, or officer, agent or employee-occupational disease excepted. 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 any officer, agent or employee of the employer and the liability of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee . . ., on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee . . ."

The language of the statute is clear and cases interpreting this section have often held that the Workmens Compensation remedy is exclusive insofar as a claim by an employee against an employer or his employee is concerned. e.g. Peterson v. Fowler, supra. Of course, the crucial question is whether there was sufficient evidence for the trial court to find that plaintiff was Bethers' employee for Workmens Compensation purposes at the time of the accident.

Section 35-1-42 of the Utah Code Annotated, 1953, provides in part:

> "Employers enumerated and defined - Regularly employed - Independent contractors. The following shall constitute employers subject to the provisions of this title:
>
> . . . .
>
> (2). . .
> Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision and control, and such work is a part or process in the trade or business of the employer, such contractor, and all persons employed by him, and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed, within the meaning of this section, employees of such original employer. Any person, firm or corporation engaged in the performance of work as an independent contractor shall be deemed an employer within the meaning of this section. The term "independent contractor," as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another, who, while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design." (emphasis supplied except for emphasis in title).

From a reading of the statute it appears that two major conditions must be met for an employee of a contractor or subcontractor to be employees of the original employer. First, the employer is to retain supervision and control over the work of the subcontractor. Second, the work of the subcontractor must be a part or process of the business of the employer. On the supervision and control issue, it is

clear that the right of control is the determinative condition, regardless of whether that right is actually exercised or not. Parkinson v. Industrial Commission, 110 Utah 309, 313-314, 172 P.2d 136 (1946); Utah Fire & Clay Company v. Industrial Commission, 86 Utah 1, 2, 40 P.2d 183, 186 (1935). See also Gallegos v. Stringham, 21 Utah 2d 139, 34, 442 P.2d 31, 34 (1968).

With respect to the first precondition, namely the right of Bethers to control plaintiff's working actions at the time of the accident, the trial jury specifically found that Bethers had that right of control. (R-29). Although plaintiff claims he never specifically consented to be Bethers employee, the record contains evidence that D & L Corporation did recognize Bethers' right to control plaintiff and consented to the exercise of that control. Plaintiff testified that when he was informed that the load would have to be transferred onto the vehicle owned by D & L, he called Mr. Leftwich of D & L and asked what he should do. (R-302). Plaintiff indicated Leftwich told him: "If that is their procedure you do it." (Id.). A clearer manifestation of D & L's acknowledgement and authorization of Bethers' right to control plaintiff during the loading and operation of the trailer is difficult to imagine.

It should be noted that plaintiff commenced working with Shimizu to effectuate the load transfer at a time designated by Bethers' employees. (R-300). Neither plaintiff nor D & L unilaterally determined when, how or in what manner the wood products would be loaded. Plaintiff indicated he balked when Bethers' personnel indicated the load would be transferred, but when he called Mr. Leftwich of D & L about that matter, Leftwich in effect told him that if Bethers wanted him to assist in transferring the load he should do it. (R-302).

Regardless of whether plaintiff himself knew he was or consented to be an employee of defendant Bethers for Workmens Compensation purposes, there is credible evidence that D & L Corporation recognized Bethers right to control plaintiff's working actions in a project duly contracted between D & L and Bethers. D & L and Bethers appear to have been in the trucking business, and D & L agreed, at least orally, to lease its equipment to Bethers for the Colorado delivery (R-207-208).

In a number of cases involving rather similar facts

to those involved in this lawsuit the Utah Supreme Court has held that persons not actually hired by a defendant, might still be his employees for Workmens Compensation purposes if he had the right to control their work and they were engaged in the work of the employer at the time of the accident. In Cook v. Peter Kiewit Sons Company, 15 Utah 2d 20, 386 P.2d 616 (1963), the plaintiff was hired by Coker Contruction Company as a miner to work on a diversion tunnel. The court found that Coker and the defendant Kiewit had contracted with each other to join their efforts in constructing the tunnel and share profits or losses from the enterprise. Apparently, plaintiff worked rather closely with Kiewit employees and was directed where to drill his jackhammer by Kiewit engineers.

The Supreme Court reversed a lower court denial of Kiewit's motion for summary judgment, and held that Coker and Kiewit, having agreed to join in the construction of the tunnel and to share profits, became partners and the two companies were regarded as the employing unit. 15 Utah 2d at 23, 386 P.2d at 617-618. The court held that employees of both companies would be considered as engaged in the same employment and that Workmens Compensation was plaintiff's exclusive remedy. Accordingly, defendant's motion for summary judgment should have been granted.

In Smith v. Alfred Brown Company, 27 Utah 2d 155, 493 P.2d 994 (1972), plaintiff, hired as a brickmason by a subcontractor of the defendant, sued the defendant general contractor for personal injuries suffered in a fall on the construction project. The agreement between the general contractor and the subcontractor provided generally that the subcontractor was to promptly and diligently prosecute the work when it became available or at such other times as the contractor should direct.

In affirming a trial court award of summary judgment in favor of the defendant general contractor the Supreme Court held:

> ". . .the trial court was justified in viewing the situation thus: that the defendant general contractor Brown had sufficient supervision and control over the 'subcontractors under him' [i.e. Ashton] that 'all persons employed by any such subcontractor' [i.e. plaintiff Smith] should be deemed an employee of the general contractor [defendant Brown] and that consequently the plaintiff would be covered by workmen's compensation as an employee of the latter and thus precluded from maintaining this suit. Accordingly the summary judgment was properly granted." (Id. at 158-159, 483 P.2d at 996.)

And in Adamson v. Okland Construction Company, 29 Utah 2d 286, 509 P.2d 805 (1973), the Supreme Court affirmed a summary judgment in favor of a defendant general contractor. In that case it appeared that the general contractor had the

right to take over the work of an electrical subcontractor (who employed the decedent) if in the general contractor's opinion the subcontractor did not proceed satisfactorily with its work. The general contractor had the right to direct work sequence by the subconstractors, to make changes in work done by them and to order work stoppages. This overall supervisory right was sufficient to make the decedent an employee of the general contractor for Workmens Compensation purposes. Okland Construction, supra at 289-290, 508 P.2d at 807-808. In that decision the court held that the right of supervision and control and not necessarily the degree to which the right was exercised was determinative Id. at 289, 508 P.2d at 807. See also Gallegos v. Stringham, supra.

In proposition no. 1 the jury was asked to answer whether:

> "Ray Bethers had the right to supervise and control the activities of Clark Bambrough in relation to the loading of the trailer and the operation of the same at the time and place of the accident January 15, 1973." (R-29).

The jury found proposition no. 1 to be true. (Id.).

The proposition as given comported with the language of Section 35-1-42(2). That section uses the term "over whose work he retains supervision and control." If, as appellant apparently concedes, Bethers had the right to supervise the loading of the cargo and operation of the trailer in his yard, (Appellants Brief p. 13), and if as plaintiff testified Leftwich told him to "If that's their procedure you do it", it would appear that Bethers had rights of both supervision and control over plaintiff.

Appellant refers to no Utah cases for its assertion that the general employer must fully and completely release control before his employees can be employees of another for Workmen's Compensation purposes. The Kiewit, supra, Smith, supra and Peterson, supra, decisions of this court seem to indicate a clear policy in this state that a person can be paid, hired and on the job for one employer, yet be an employee of another for Workmens Compensation purposes if the latter employer retains the right to supervise and control the worker's activities at the time of the injury.

There was evidence to support the finding that the respondent Bethers had supervision and control over appellant's working actions. Proposition no. 1 properly set

forth the essential factual matters relevant to employees for Workmens Compensation purposes. The judgment of dismissal based on the jury answer to proposition no. 1 should be affirmed.

POINT III

THE TRIAL COURT DID NOT ERR IN:

1) RECEIVING INTO EVIDENCE DOCUMENTS 1-D, 8-D AND 9-D;

2) RECEIVING INTO EVIDENCE DOCUMENTS 2-D, 3-D AND 4-D;

3) FAILING TO GIVE CERTAIN OF PLAINTIFF'S REQUESTED INSTRUCTIONS:

4) SUBMITTING PROPOSITIONS 2 AND 3 OF THE SPECIAL VERDICT TO THE JURY.

1. The trial court did not err in receiving into evidence Exhibit 1-D (Trip Lease dated September 7, 1972), and Exhibits 8-D and 9-D (Driver's Dailey Logs for Septmeber 7 and 8, 1972).

At trial plaintiff objected to the receipt in evidence of Exhibit 1-D, a trip lease dated September 7, 1972. That objection was based on the document's lack of relevance since it predated the accident in question by approximately four months (R-269). Although plaintiff denied the

genuiness of his signature, the defendant Bethers identified his own signature on that document (R-265). There was some indication that plaintiff's purported signature on the document 1-D was written in by D & L personnel because plaintiff had not properly turned in his paperwork (R-320).

In any event, Section 78-25-9(3) of the Utah Code Annotated provides that a writing may be proved by its subscribing witness. Since Bethers signed the document and identified his signature, a foundation for admission of the document was established. Respondent contends the document was relevant, first, because it tended to evidence a course of prior lease dealings between Bethers and D & L, and second, because it reflected on plaintiff's ability to recall. Plaintiff testified he had no recollection of a trip lease on the September, 1972 load he picked up at Bethers (R-297).

The relevance of Exhibit 1-D was buttressed by documents 8-D and 9-D, which were apparent driver daily logs prepared by plaintiff and which specifically referred to an "RB lease". Plaintiff admitted that his signature on those logs was genuine (R-323). Those documents, are also relevant to show prior dealings between D & L and Bethers.

They also were relevant to show plaintiff's prior dealings with Bethers and tended to be some evidence of his ability to recall.

2. The trial court did not err in recieving into evidence documents 2-D (Yellow Copy), 3-D (White Copy and 4-D (Pint Copy) of the Trip Lease document dated January 15, 1973.

At trial defendants offered in evidence triplicate copies of a trip lease dated January 15, 1973. Clair Anderson, Bethers then dispatcher, testified he prepared a portion of the lease and signed it in two places on January 15, 1973. (R-211-213). There was one signature of Anderson added to the lease documents in late 1974 or early 1975, after the lawsuit had been filed (R-213-214). The lease documents were also signed by Bud Jolley, the replacement driver who delivered the load plaintiff would have had he not been injured (R-233, 246-248). The lease documents applied to the delivery plaintiff was supposed to have made. (R-233-234).

The trial court received Exhibits 2-D, 3-D and 4-D into evidence, but only for the limited purpose of showing dates of and parties to the lease (R-321-322). The printed terms and conditions of the lease were not to be

considered by the jury (Id.).

Respondents contend the admitted documents were relevant to the limited purposes for which they were received. Testimony at trial dealt with dates, parties to and signatures on the lease. Bambrough's claimed lack of knowledge of the lease, would not bind D & L, since its replacement driver admitted he signed the document. The trial court had a reasonable basis to conclude the documents were relevant to the purposes for which they were received. The documents were supported by a foundation justifying their admission. Respondent also questions whether the receipt of the documents for the limited purposes permitted by the trial court had any substantial effect on the jury's finding or the court's judgment. Rule 4(b) Utah Rules of Evidence.

3. The trial court did not err in refusing to give certain of the instructions plaintiff requested.

The plaintiff-appellant objected to the trial court's refusal to give seven (7) of the instructions plaintiff requested. Respondent contends the trial court did not err in refusing to give those instructions.

In Instruction No. 2 plaintiff asked the court to instruct the jury that before Bethers could transport equipment, the lease needed to contain certain items, including a 30 day minimum time as per ICC regulations which plaintiff claims apply. However, Bethers and D & L's compliance or lack of compliance with ICC regulations, would not create or preclude a lease arrangement binding between them. The status of the contract between Bethers and D & L for Workmens Compensation purposes is a matter of state, and not federal administrative, law. Insofar as Bethers and D & L were concerned, and particularly for State Workmen's Compensation purposes, federal administrative law should not affect the essential validity of their contract with each other.

Plaintiff also claims the trial court erred in refusing to instruct that:

INSTRUCTION NO. 3

> An employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties.

Respondent contends that for the court to have given such an instruction would have been improper, since for Workmens Compensation purposes a worker can be paid and hired by a subcontractor, but still be an employee of

the general contractor. Utah Code Annotated 35-1-42; Kiewit, supra; Brown, supra. Also the proposed instruction failed to indicate that for Workmens Compensation purposes the right to control, whether exercised or not, is the material element. Parkinson, supra; Gallagos, supra.

Appellant also asked the court to instruct that:

INSTRUCTION NO. 4

> The relation of employer and employee, for Workmen's Compensation purposes, cannot exist between the Defendant Ray Bethers and a loaned employee such as the Plaintiff Clark Bambrough, without the following being present:
>
> (a) Consent on the part of Plaintiff to work for the Defendant Ray Bethers;
>
> (b) Actual entry by the Plaintiff upon the work of and for the Defendant Ray Bethers, pursuant to a contract so to do;
>
> (c) Power of the Defendant Ray Bethers to control the details of the work to be performed and to determine how the work shall be done and whether it shall stop or continue.

Respondents contend this proposed instruction was properly not given since it concludes as a matter of law that plaintiff could not be an employee for Workmens Compensation purposes unless he consented to be an employee of Bethers and there was a contract between them. Section 35-1-42(2) does not require consent of the employee and neither do decisions of this court. Brown, supra, Kiewit, supra.

Indeed, decisions of this court clearly indicate there need not be a contract between the general contractor and employees hired and paid by a subcontractor to make those persons employees of the general contractor for Workmens Compensation purposes. Brown, supra; Kiewit, supra; Peterson, supra.

Appellant also contends the court committed error in failing to give these two instructions:

INSTRUCTION NO. 5

> For Workmens Compensation purposes, an employee cannot have an employer thrust upon him against his will or without his knowledge.

INSTRUCTION NO. 6

> "Control" must be authoritative direction and control, not mere suggestions as to details or necessary cooperation.

For reasons heretofore cited Respondents contend these requested instructions did not comport with the statutes concerning and decisions of this court interpreting the Workmens Compensation law of this state.

Finally, plaintiff assigns as error the refusal of the court to give these instructions

INSTRUCTION NO. 7

> Control, or lack of control, of the employee, while of the greatest significance, is not conclusive.

INSTRUCTION NO. 8

> The mere fact that Plaintiff's regular employer, D & L Corporation, permits some division of control does not give rise to the inference that he has surrendered control.

With respect to proposed instruction no. 7 the plain language of Section 35-1-42(2) speaks against the proposition plaintiff requested the court give.

And no Utah cases counsel for defendants have been able to locate supports requested instruction 8's language. Indeed, the factual holding of this court's decisions in Okland, supra, Smith, supra seems to suggest that the law in this state is contrary to the propositions outlined in Instruction no. 8.

4. The trial court did not commit the error appellant claims it did in submitting propositions 2 and 3 to the jury on the special verdict.

Appellant claims it was error for the court not to include in propositions 2 and 3 whether plaintiff was working for defendant Bethers or D & L Corporation. However, in both propositions the jury was asked about plaintiff's actions "for and on behalf of Ray Bethers Trucking Company." For Workmens Compensation purposes the material consideration was Bethers right to control plaintiff, not who hired plaintiff, who paid him, and who plaintiff thought his employer was. In any event, the jury after having heard all the testimony

concluded in sufficient number that both propositions could be found true. Since there was ample evidence to support those propositions they should be allowed to remain undisturbed.

CONCLUSIONS

Of central importance is the fact that plaintiff failed to object to the submission of proposition no. 4 to the jury, which proposition set forth the factual test for "same employment" within the meaning of Section 35-1-62 as it read at the time of plaintiff's injury. The jury found those facts to be true, and those findings, by themselves, constitute an independent basis for sustaining the lower court judgment.

With respect to the disputed question at the time of the accident of whether appellant was an employee of the defendant Bethers, the jury appears to have been persuaded that Bethers did have the crucial right to control Bambrough's working actions at the time the injury occurred.

It is respectfully submitted that the facts found by the jury supported the trial court's dismissal of this action and are consistent with numerous Workmens Compensation decisions of this court.

The objections to the admission of the documents and the failure to give the instructions plaintiff wished, do not,

in respeondents' opinion, constitute grounds for reversing the lower court judgment or having this matter, once fully considered by the jury,retried.

The lower court judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served three copies of the foregoing Respondent's Brief, by mailing the same, postage prepaid, to Richard W. Perkins, Attorney for plaintiff-appellant, at Valley Professional Plaza, 2525 South Main Street, Suite 14, Salt Lake City, Utah 84115, this 31 day of MARCH, 1976.

James L. Wilde