

1976

William Timothy Savage v. Industrial Commission of Utah et al : Brief of Plaintiff

Utah Supreme Court

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Louis M. Haynie; Attorney for Plaintiff;

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM TIMOTHY SAVAGE, AKA)
TIM SAVAGE, AKA W. T. SAVAGE,)
DBA SAVAGE CONSTRUCTION, and)
W. T. SAVAGE CONCRETE, INC.,)

Plaintiffs)

-vs-)

Case No. 14603

INDUSTRIAL COMMISSION OF UTAH,)
GARY WAYNE HILLIS, EXQUISITE)
HOMEBUILDERS, INC., and THE)
STATE INSURANCE FUND,)

Defendants)

BRIEF OF PLAINTIFF

PETITION FOR RELIEF FROM ORDER OF INDUSTRIAL COMMISSION

Louis M. Haynie,
1847 West 2300 South
Salt Lake City, Utah

Attorney for Plaintiff

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM TIMOTHY SAVAGE, aka)
TIM SAVAGE, aka W. T. SAVAGE, :
dba SAVAGE CONSTRUCTION, and)
W. T. SAVAGE CONCRETE INC., :
)

Plaintiff, :
)

-vs- :
)

Case No. 14603

INDUSTRIAL COMMISSION OF UTAH, :
GARY WAYNE HILLIS, EXQUISITE)
HOMEBUILDERS, INC., and THE :
STATE INSURANCE FUND,)
)

Defendant.)

BRIEF OF PLAINTIFF

PETITION FOR RELIEF FROM ORDER OF INDUSTRIAL COMMISSION

Louis M. Haynie :
1847 West 2300 South
Salt Lake City, Utah 84119

Attorney for Plaintiffs

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
RELIEF SOUGHT BY PLAINTIFF	1
STATEMENT OF FACTS	2
ARGUMENT	4
CONCLUSION	5
STATUTES CITED (35-1-42)	4

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM TIMOTHY SAVAGE, et al)
 :
) Plaintiffs,)

-vs-

) Case No. 14603
:
)

INDUSTRIAL COMMISSION OF UTAH,)
et al,)
):
) Defendants.:
)

BRIEF OF PETITIONER

NATURE OF THE CASE

Plaintiffs filed this complaint in the Supreme Court as the Court of original jurisdiction to expunge the order of the Industrial Commission.

RELIEF SOUGHT BY PLAINTIFF

The Plaintiffs were ordered by the Industrial Commission to pay to the Defendant Gary Wayne Hillis an amount claimed by him as damages from an industrial accident. The Plaintiff by this proceeding requests the Court to vacate the prior order as against all Plaintiffs and to rule as a matter of law that the statutory employer of Mr. Hillis was Exquisite Home Builders, Inc. and not the Plaintiffs.

STATEMENT OF FACTS

On October 1, 1974, the Defendant, Gary Wayne Hillis, fell from a roof of a house being constructed by Exquisite Homes, another Defendant herein, and as a result of the fall Mr. Hillis was injured.

Notwithstanding the fact that Hillis claimed the Plaintiff, Tim Savage, as his employer (TR 32, Line 8) and continued to look upon Savage as his employer up to the date of Hearing, a review of the record would indicate otherwise. Starting with page 34 of the transcript we find that some time in September the said Hillis and Tim Savage went out looking for work together and in the course of this looking for work they went out and talked to a Mr. Miles Schoepp who was a supervisor with Exquisite Homes. Further, Mr. Hillis indicates that he called Mr. Savage (TR 34, Line 18) and asked him to come over because the said Hillis knew the subcontractor working for Exquisite Homes was a school teacher returning to that occupation and that the said Hillis thought Exquisite Homes would need some help.

As a result of this call by Mr. Hillis, Mr. Hillis and Mr. Savage went over and visited on the project with a Mr. Miles Schoepp, the general superintendent of Exquisite Homes. In that conversation Mr. Schoepp indicated that Hillis and Savage could have the cement work as soon as the present cement finisher left the job (TR 36, Lines 9 thru 16).

On the 30th of September, 1974, Mr. Schoepp contacted Mr. Hillis, advised him that Mr. Savage was out of town, and asked him to come and do some cement work (TR 37). This was followed up by instructions from Mr. Schoepp that a certain "Craig" would tell him what to do (TR 39, Lines 1 & 2) (TR 40, Lines 5 thru 10).

A further review of the record indicates that the work on that particular chimney was finished by Savage or someone in his employ and that Mr. Savage paid him for the work that he had done (TR 44, Lines 8 thru 19).

The record also indicates that Mr. Savage never did have a conversation about employing Mr. Hillis on this job (TR 45, Lines 5 thru 8), although a further review of page 45 of the transcript would indicate that there were preliminary discussions concerning the fact that Mr. Hillis would be paid \$6.00 per hour in the event that he ended up working for Savage. Transcript pages 49 and 50 indicate that the reason the arrangement was worked out by Mr. Hillis with Mr. Savage was that Mr. Hillis wanted to be a subcontractor but could not do so without a license. For this reason he contacted Mr. Savage for this purpose.

The only contact between Mr. Hillis and the job after the preliminary arrangements had been made by which both Mr. Hillis and Mr. Savage would do the work was the contract on September 30, 1974, in which Mr. Schoepp called Mr. Hillis and asked him to come to the project and do some work and the instruction given by Craig, an Exquisite Homes employee, con-

cerning the type of work which should be done. There was no contact made by Mr. Savage in connection with this work whatsoever prior to the time of the injury.

ARGUMENT

Title 35-1-42 is quoted in part as follows:

The following shall constitute employers subject to the provision of this title:

(2) Every person, firm and private corporation, including every public utility, having in service one or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written.

The term "regularly" as herein used shall include all employments in the usual course of the trade, business, profession or occupation of the employer, whether continuous throughout the year or for only a portion of the year.

Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or 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.

It cannot be argued that Mr. Savage regularly employed anyone in his same business inasmuch as he was not operating his cement business at the time of the enquiry made to Exquisite

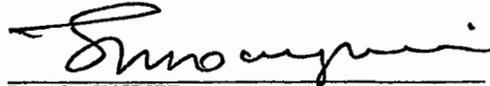
Homes by himself and Mr. Hillis in September of 1974. Although there were preliminary discussions concerning the arrangement by which they might work on this project and the amount of money which Mr. Hillis might receive, there was no contract of hire either expressed or implied that the Plaintiff would hire Mr. Hillis. Mr. Schoepp called Hillis on the night of September 30, and asked him to come to work the next day. The record does indicate some direction being given to Mr. Hillis when he arrived on the job on the morning of October 1, by both Mr. Schoepp and his employee, Craig, and the question of whether or not Mr. Hillis was in fact an independent contractor or an employee of Exquisite Homes should be decided as a matter of law based on the record, but it would appear from the reading of the last paragraph of 35-1-42, particularly as it relates to the supervision of employees of the subcontractor by the general contractor that Exquisite Homes clearly falls within the purview of the defined term "statutory employer".

The fact the Mr. Savage paid cash to Mr. Hillis after the work was done and after Mr. Hillis had been injured in no way creates the condition of employer-employee as between them on the date of the injury and one cannot become an employer by acquiescence or by the creation of an employer-employee relationship which did not exist at the time simply by words used thereafter. This seems to be the rationale of the Industrial Commission; otherwise they could not have concluded that Mr. Savage was the employer of Mr. Hillis on the date of the injury.

CONCLUSION

In conclusion, the Plaintiffs and each of them respectfully urge the Court to reverse the findings of the Industrial Commission and enter it's Order accordingly to the effect that neither William Timothy Savage, Savage Construction Company, nor W. T. Savage Concrete, Inc. was the employer of Gary Wayne Hillis on the first day of October, 1974, but in fact the statutory employer of Mr. Hillis was Exquisite Homes. The Plaintiff should be released from any requirement to pay any money to Mr. Hillis and the proper source of remedy for Mr. Hillis should be statutory employer and it's insurance company, The State Insurance Fund.

DATED this 29 day of September, 1976.



L. M. HAYNIE
Attorney for Plaintiffs

MAILING CERTIFICATE

I hereby certify that I mailed three copies of the foregoing Brief to Mr. Robert Moore, Attorney for the Industrial Commission and The State Insurance Fund, 10 West Broadway, Salt Lake City, Utah 84101, this 29 day of September, 1976, and a copy thereof to Mr. Gary Wayne Hillis, 3995 South 1555 West, Salt Lake City, Utah, and to Exquisite Homebuilders, 3443 South State Street, Salt Lake City, Utah, this 29 day of September, 1976.

