

2001

Elna A. Shupe, Yavette Shupe, Elna A. Shupe v. Wasatch Electric Company Inc., Esco Corporation : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

D Clayton Fairbourn; Hendriksen, Fairbourn and Tate; Attorney for Appellants.

Richard H Moffat, John L Young; Moffat, Welling, Paulsen & Burningham; Attorney for Respondents.

Recommended Citation

Brief of Respondent, *Elna A. Shupe, Yavette Shupe, Elna A. Shupe v. Wasatch Electric Company Inc., Esco Corporation*, No. 14117.00 (Utah Supreme Court, 2001).

https://digitalcommons.law.byu.edu/byu_sc2/1221

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

RECEIVED
LAW LIBRARY

IN THE SUPREME COURT
OF THE STATE OF UTAH

04 FEB 1976

---0000000---

BIRCHAM YOUNG UNIVERSITY
J. REUBEN CLARK LAW SCHOOL

ELNA A. SHUPE, and
YAVETTE SHUPE, by
and through her Guardian
Ad Litem, ELNA A. SHUPE,

Plaintiffs and
Appellants,

- vs -

WASATCH ELECTRIC COMPANY,
INC., a Utah corporation,
and ESCO CORPORATION, an
Oregon corporation,

Defendants and
Respondents.

Civil No. 14117

---0000000---

BRIEF OF RESPONDENT, WASATCH ELECTRIC COMPANY, INC.

Richard H. Moffat
John L. Young
Moffat, Welling, Paulsen &
Birmingham
Ninth Floor Tribune Building
Salt Lake City, Utah 84111
Telephone: 521-7500
Attorneys for Respondent

D. Clayton Fairbourn
Henriksen, Fairbourn & Tate
320 South Fifth East
Salt Lake City, Utah 84102
Telephone: 521-4145
Attorney for Appellants

FILED
SEP 29 1975

Clk. Supreme Court, Utah

TABLE OF CONTENTS

STATEMENT OF THE KIND OF CASE. 1

DISPOSITION IN LOWER COURT 1

RELIEF SOUGHT ON APPEAL. 1

STATEMENT OF FACTS 1

ARGUMENT 2

POINT I. THE DISTRICT COURT WAS CORRECT IN DISMISSING
THE APPELLANTS' COMPLAINT AND HOLDING THAT THE
COMPLAINT FAILED TO STATE A CAUSE OF ACTION UPON
WHICH RELIEF CAN BE GRANTED BY VIRTUE OF THE WORK-
MEN'S COMPENSATION LAWS OF THE STATE OF UTAH 2

A. APPELLANTS' DECEDENT WAS IN THE SAME
EMPLOYMENT AS THE RESPONDENT, WASATCH ELECT-
RIC COMPANY, AND APPELLANTS' SOLE REMEDY IS
THEREFORE LIMITED TO COMPENSATION UNDER THE
WORKMEN'S COMPENSATION SYSTEM OF THE LAWS OF
THE STATE OF UTAH 2

B. THERE ARE NO DISPUTED ISSUES OF FACT
RELEVANT TO THE QUESTIONS NOW BEFORE THE COURT. . . 7

POINT II. THE DISTRICT COURT WAS CORRECT IN REFUSING TO
APPLY SECTION 35-1-63 U.C.A. (1953, AS AMENDED IN
1953) RETROSPECTIVELY. 7

POINT III. THE DISTRICT COURT'S DECISION DOES NOT VIOLATE
THE APPELLANTS' FOURTEENTH AMENDMENT RIGHTS GRANTED
BY THE CONSTITUTION OF THE UNITED STATES OF AMERICA. .10

CONCLUSION13

CASES CITED

Adanson v. Okland Construction Company, 29 Utah
2d 286, 508 P. 2d 805 (1973) 3, 4, 5, 6, 7, 12

Buckingham Transport Co. v. Industrial Comm. 93
U. 342, 72 P. 2d 1077 (1937)12

In Re Ingrum's Estate, 106 Ut. 337, 148 P. 2d
340 (1944)8, 9

<u>Ortega v. Salt Lake Wet Wash Laundry</u> , 108 U. 1, 156 P. 2d 885 (1945)	12
<u>Park Utah Consol. Mines v. Industrial Comma.</u> , 84 U. 481, 36 P. 2d 979 (1943)	12
<u>Petty v. Clark</u> , 113 Utah 205 192 P. 2d 589 (1948) . . .7, 8, 9	
<u>Smith v. Brown</u> , 27 Utah 2d 155, 493 P. 2d 994 (1972)	3
<u>United Air Lines Transport Corp. v. Industrial Commission</u> , 107 U. 52, 151 P. 2d 591 (1944)	12

STATUTES CITED

Section 35-1-42, U.C.A. (1953, as amended)	3, 5, 6
Section 35-1-62, U.C.A. (1953, as amended) . . . 2, 7, 8, 9, 10	
Section 35-1-63, U.C.A. (1953, as amended 1975)	13
16 Am. Jur. 2d Constitutional Law, Section 488.	10
16 Am. Jur. 2d Constitutional Law, Section 494.	11
16 Am. Jur. 2d Constitutional Law, Section 495.	11
16 Am. Jur. 2d Constitutional Law, Section 496.	11

IN THE SUPREME COURT
OF THE STATE OF UTAH

---0000000---

ELNA A. SHUPE, and
YAVETTE SHUPE, by
and through her Guardian
ad Litem, ELNA A. SHUPE,

Plaintiffs and
Appellants,

- vs -

WASATCH ELECTRIC COMPANY, :
INC., a Utah corporation, :
and ESCO CORPORATION, an :
Oregon corporation, :

Defendants and
Respondents. :

Civil No. 14117

---0000000---

BRIEF OF RESPONDENT, WASATCH ELECTRIC COMPANY, INC.

STATEMENT OF THE KIND OF CASE

The Respondent agrees with the Statement of the Kind of
Case as set forth in the Appellants' Brief.

DISPOSITION IN LOWER COURT

The Respondent agrees with the statement of the Appellants
with regard to the disposition in the lower Court.

RELIEF SOUGHT ON APPEAL

The Respondent seeks to have the Judgment entered by
the lower Court dismissing Appellants' Complaint affirmed in the
entirety.

STATEMENT OF FACTS

The Statement of Facts set forth in the Brief of the

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR, may contain errors.

ARGUMENT

POINT I

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE APPELLANTS' COMPLAINT AND HOLDING THAT THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED BY VIRTUE OF THE WORKMEN'S COMPENSATION LAWS OF THE STATE OF UTAH.

A. APPELLANTS' DECEDENT WAS IN THE SAME EMPLOYMENT AS THE RESPONDENT, WASATCH ELECTRIC COMPANY, AND APPELLANTS' SOLE REMEDY IS THEREFORE LIMITED TO COMPENSATION UNDER THE WORKMEN'S COMPENSATION SYSTEM OF THE LAWS OF THE STATE OF UTAH.

The Appellants' decedent was an employee of Christiansen Brothers, Inc., the general contractor on the Canyon Road Towers Condominium project, in Salt Lake City, Utah. At the time of the accident in question, the Respondent was a subcontractor of Christiansen Brothers, Inc. pursuant to a "subcontract Agreement" entered into on April 25, 1974, whereby the Respondent subcontracted with Christiansen Brothers, Inc. to design, furnish and install all electrical work on said project. (R 22-25). The vital issue with which the Court is here confronted is whether the general contractor, Christiansen Brothers, Inc., having engaged the Respondent as a subcontractor, retained sufficient supervision or control over the subcontractor such that all persons employed by the Respondent (subcontractor) should be deemed to be employees of such original employer (Christiansen Brothers, Inc.).

The Appellants herein assert a cause of action under the provisions of Section 35-1-62 U.C.A. (1953, as amended) which provides, inter alia, that:

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, . . . , his heirs or personal representative may also have an action for damages against such third person. (emphasis added)

This statute would, of course, give an additional cause of action to such persons over and above their claim for Workmen's Compensation under the laws of the State of Utah.

In the case of Smith v. Brown, 27 Utah 2d 155, 493 P. 2d 994 (1972), the Utah Supreme Court set forth the principles which should be considered in applying the Workmen's Compensation Act to an analogous problem. These same considerations were again set forth in the case of Adamson v. Okland Construction Company, 29 Utah 2d 286, 508 P. 2d 805 (1973). The Court reiterated in Adamson that:

The purpose of the Act is to provide speedy and certain compensation for workmen and their dependents and to avoid the delay, expense and uncertainty which were involved prior to the Act; and the concomitant purpose of protecting the employer from the hazards of exorbitant and in some instances perhaps ruinous liability. Those principals are applicable here and correlated to them is the proposition that the act should be liberally construed and applied to provide coverage and effectuate those purposes.

Fundamental standards of justice dictate that it would be inconsistent to apply the act liberally in favor of the injured workman in order to find coverage by one employer on a project, and then to reverse that policy and adopt a restrictive view to exclude coverage of another employer on the project so that a suit could be maintained against him.

The specific provisions of the Workmen's Compensation Act governing the situation here are set forth in Section 35-1-42 U.C.A. (1953, as amended) which provides, inter alia, that:

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.

Directing the Court's attention to Section 3 of the "Subcontract Agreement" in question here (R 23), it is provided, inter alia, that:

The Subcontractor shall prosecute his work with due diligence so as not to delay the work of the Contractor or other Subcontractors, and in the event that the Subcontractor neglects and/or fails to supply the necessary labor and/or materials, tools, implements, equipment, etc., in the opinion of the Contractor, then the Contractor shall notify the Subcontractor in writing setting forth the deficiency and/or delinquency, and five days after date of such written notice, the Contractor shall have the right if he so desires to take over the work of the Subcontractor in full, and exclude the Subcontractor from any further participation in the work covered by this agreement; or, at his option, the Contractor may take over such portion of the Subcontractor's work as the Contractor shall deem to be in the best interest of the Contractor, and permit the Subcontractor to continue with the remaining portions of the work.

It should be further noted that Section 13 of the "Subcontract Agreement" (R 25) allows the general contractor certain discretion with regard to the scheduling of the work to be performed by the Respondent and others performing work on the project.

In Adamson, this Court was confronted with a very similar factual situation as that which now confronts the Court. The Plaintiff therein sued Oakland Construction for the wrongful death of Robert L. Adamson, who was electricuted while doing electrical

work in the construction of a hospital in Ogden, Utah. Oakland Construction Company, the general contractor, had entered into a subcontract with an electrical subcontractor, said subcontractor being the employer of the decedent. In referring to the provisions of Section 35-1-42 U.C.A. (1953, as amended) this Court held that it did not seem open to any doubt that the work of the electrical installation by the subcontractor was a part or process in the trade or business of the general contractor, that being the construction of the hospital. The vital question with which the Court was concerned however, was whether the general contractor, having engaged a subcontractor, retained sufficient supervision and control over that subcontractor under the provision of the above referenced statute. The Court there held that the test to be applied is the "right to supervise and control, and not necessarily the degree to which that right is in fact exercised".

The contract with which the Court was concerned in Adamson provided that if, in the opinion of the general contractor, the work of the subcontractor did not proceed satisfactorily, then after appropriate notice, the general contractor has the right if he so desires to take over the work of the subcontractor in full. The general contractor in Adamson also had the right to direct the sequence of work by the subcontractors, to make changes in the work done by them, and the right to order work stoppages. These provisions are essentially identical to the powers of the general contractor, Christiansen Brothers, Inc., in the case now before the Court.

The Court, in Adamson, held that the lower Court was correct in rejecting the Plaintiffs' contention that Oakland was a wrongdoer not in the same employment as the decedent and in holding that the Workmen's Compensation was therefore Plaintiffs' exclusive remedy as against these employers. Summary Judgment of the lower Court was affirmed.

The case which now confronts the Court is virtually identical to the Adamson case. The Appellants have attempted to distinguish Adamson on the ground that the Appellants' decedent was an employee of its general contractor rather than an employee of the subcontractor. However, under the reasoning of the Court in Adamson, as well as Smith, this distinction is totally unreasonable and invalid. As the Appellants admit in their Brief, it must be kept in mind that the test to be applied in these situations is the right of the general contractor to supervise and control the subcontractor, and not necessarily the degree to which the right is in fact exercised. Thus, if by virtue of the terms of the "Subcontract Agreement", the general contractor had the right to exercise sufficient supervision and control over the Respondent, then the employees of the Respondent are in the same position as the employees of the general contractor, Christiansen Brothers, Inc. Therefore, no distinction can be drawn as between the two positions. Appellants references to provisions for an independent contractor by virtue of Section 31-1-42 U.C.A. (1953, as amended) are irrelevant here.

B. THERE ARE NO DISPUTED ISSUES OF FACT RELEVANT TO THE QUESTIONS NOW BEFORE THE COURT.

The Appellants have attempted to raise issues of fact in the case at Bar which are entirely irrelevant under the law of this State. The Appellants clearly admit in Point I of their argument that, as articulated by this Court in Adamson, it should be kept in mind that the test to be applied in these cases is the right to supervise and control, and not necessarily the degree to around and attempt to argue issues of fact as to whether or not the decedent was an employee of a given contractor or whether the contractor was a subcontractor or independent contractor. It is clear from the Complaint on file herein, as well as the Brief filed by the Appellants, that the Appellants' decedent was an employee of the general contractor, Christiansen Brothers, Inc. It is further clear from the uncontroverted Affidavit filed by the Respondent (R 19-25) that the Respondent was a subcontractor to the employer of the Appellants' decedent.

Given these uncontroverted facts, the remaining determination that the Court must make is whether the Appellants have a cause of action by virtue of the provisions of Section 35-1-62 U.C.A. (1953, as amended). As discussed in Point I A above, Appellants do not have such a cause of action.

POINT II

THE DISTRICT COURT WAS CORRECT IN REFUSING TO APPLY SECTION 35-1-63 U.C.A. (1953, AS AMENDED IN 1975) RETROSPECTIVELY.

The Appellants have correctly pointed out that the case of Petty v. Clark, 113 Utah 205 192 P. 2d 589 (1948) held

that:

Where a statute remedial in nature is amended providing a different remedy, all actions pending will be covered by the new statutory provision.

However, the Appellants' argument that Senate Bill #26, passed by the Utah State Legislature in 1975, amending Section 35-1-62 U.C.A., falls within the purview of Petty is totally non sequitur. Quite clearly, we are here concerned with an amendment by the Utah Legislature which in fact grants a cause of action which heretofore did not exist. Therefore, this is not merely a remedial statute which grants a different remedy for an existing cause of action.

The Appellants alleged in the Complaint a cause of action based in tort. It is clear that the rights of the parties are established at the time that the alleged tort, from which the litigation arises, occurs. If there is no cause of action available at the time that the accident occurred, one is not created at a later date by the adoption of a statute allowing a new cause of action.

The general rule of construction, as it has been applied by the Utah Supreme Court, is that an act effecting substantive rights will not be given retroactive effect, unless the act clearly requires it. In this case, the statute is silent as to whether or not the statute is to be applied retrospectively. Representative of the Utah Supreme Court's position, is In Re Ingram's Estate, 106 Utah 337, 148 P. 2d 340 (1944), where the Court held that a 1943 law applying to estates was not retroactive and stated:

That this Court is committed to the general rule cannot be questioned, for in the case of Mercur Gold Mining and Milling v. Spry, County Collector, 16 Utah 222, 52 Pac. 382, 384, Judge Miner said: 'Constitutions as well as statutes, should operate prospectively only, unless the words employed show a clear intention that they should have a retroactive effect. This rule of construction should always be adhered to, unless there be something on the face of the statute putting it beyond doubt that the legislature meant it to operate retrospectively.' We are convinced that the general rule must apply as Section 80-12-7, Laws of Utah 1943, is not a procedural enactment, but is substantive in its effect.

* * * * *

Had the Legislature intended Section 80-12-7, Laws of Utah 1943, to have a retroactive effect, it is reasonable to suppose that they would have made such a declaration in the amendment.

* * * * *

We are forced to the conclusion that the intention of the Legislature is doubtful and that Judge Miner's pronouncement of the law, above mentioned, is applicable to the situation before us.

The Utah Supreme Court's pronouncement on substantive law seems adamantly clear and the new amendments to Section 35-1-62 U.C.A. (1953, as amended) should not be applied retrospectively. In determining whether or not this amendment effects substantive law, we must consider more thoroughly the Court's decision in the case of Petty v. Clark, supra, where the Court, in defining substantive law, stated:

Substantive law is defined as the positive law which creates, defines and regulates the rights and duties of the parties and

which may give rise to a cause of action, as distinctive from adjective law which pertains to and prescribed the practice and procedure or the legal machinery by which the substantive law is determined or made effective.

Obviously, this amendment effects dramatically the substantive law of the rights of injured workmen under the Workmen's Compensation Laws of the State of Utah. This amendment establishes additional rights and causes of action where none existed under the prior law of the State. Being substantive in nature, it therefore cannot be applied retrospectively here.

POINT III

THE DISTRICT COURT'S DECISION DOES NOT VIOLATE THE APPELLANTS' FOURTEENTH AMENDMENT RIGHTS GRANTED BY THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

The Appellants have suggested in their Brief that the classifications established by Sections 35-1-62 U.C.A. (1953, as amended), are unconstitutional. The Appellants argue that there is no rational basis upon which such distinction or classification can be made and, secondly, that the fundamental right of access to the State Court has been denied.

The guiding principle most often cited by the Courts is that the constitutional guarantee of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. 16 Am. Jur. 2d Constitutional Law, Section 488. The rule is well settled that a State may classify persons and objects for the purpose of legislation and pass laws

applicable only to persons or objects within a designated class. A differentiation, however, is not necessarily a discrimination. The guarantee of the Fourteenth Amendment does not intend to take from the States the right and power to classify the subjects of legislation. It does not prohibit or prevent classification, provided such classification of persons and things is reasonable for the purpose of the legislation, is based on proper and justifiable distinctions, considering the purpose of the law, is not clearly arbitrary, and is not a subterfuge to shield one class or unduly to burden another or to oppress unlawfully in its administration. 16 Am. Jur. 2d Constitutional Law Section 494.

One of the basic principles involved in considering the validity of legislation assailed under equality provisions of the Federal and State Constitutions is that, in the exercise of its power to make classifications for the purpose of enacting laws over matters within its jurisdiction, a State is recognized as enjoying a wide range of discretion. 16 Am. Jur. 2d Constitutional Law Section 495. The authorities state with unanimity that the question of classification is primarily for the legislature and that it can never become a judicial question except for the purpose of determining, in any given situation, whether the legislative action is clearly unreasonable. 16 Am. Jr. 2d Constitutional Law Section 496.

The basic constitutionality of the Workmen's Compensation laws of the State of Utah has been upheld on several occasions.

Park Utah Consol. Mines Company v. Industrial Comm., 84 U. 481, 36 P. 2d 979 (1934); United Air Lines Transport Corp. v. Industrial Comm., 107 U. 52, 151 P. 2d 591 (1944); Buckingham Transport Company v. Industrial Commission, 93 U. 342, 72 P. 2d 1077 (1937); and Ortega v. Salt Lake Wet Wash Laundry, 108 U. 1, 156 P. 2d 835 (1945).

One need only to return to the reasoning of this Court set forth in Adamson v. Oakland Construction Company, supra, to find the reasonable and rational basis for the classification of which Appellants complain. As the Court said in that case, the purpose of the act is to provide speedy and certain compensation for workmen and their dependants and to avoid the delay, expense and uncertainty which were involved prior to the act; and the concomitant purpose of protecting the employer from the hazards of exorbitant and in some instances perhaps ruinous liabilities. Correlated with those principles is the proposition that the act should be liberally construed and applied to provide coverage and effectuate those purposes. Fundamental standards of justice dictate that it would be inconsistent to apply the act liberally in favor of the injured workmen in order to find coverage by one employer on a project, and then to reverse that policy and adopt a restrictive view to exclude coverage of another employer on the same project so that a suit could be maintained against him. Appellants' contentions are clearly the opposite of this proposition.

The reasoning in Adamson clearly establishes the rational

and reasonable basis upon which the Section in question is based. Subsequent changes in the Section by the Utah State Legislature do not in any way reflect a decision that the statute was unconstitutional as it existed prior to the amendment and Appellants have cited no authority in support of such proposition.

The Appellants in this case certainly have not been denied the right to access to the State Court. The argument presented by the Appellants that they have been denied access to the State Court when a cause of action was not stated by their Complaint, is obviously unsupportable.

CONCLUSION

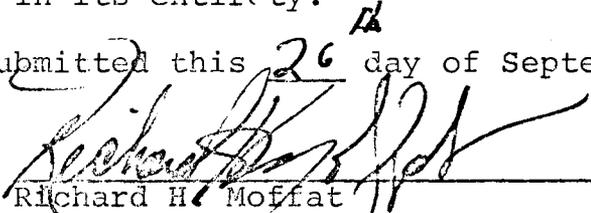
In conclusion, the Respondent respectfully submits that the District Court was correct in holding that the Appellants' Complaint failed to state a cause of action upon which relief could be granted under the provisions of the Workmen's Compensation laws of the State of Utah. The Appellants' decedent was in the same employment as the Respondent at the time of the accident and therefore the Appellants' sole remedy is compensation under the Workmen's Compensation system in this State. Clearly, there are no disputed issues of fact relevant to the question presented to the Court in this case.

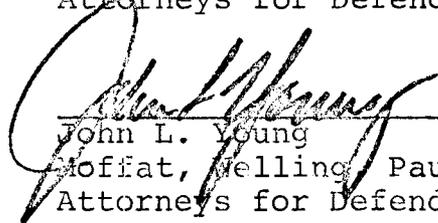
The Respondent further submits that the District Court was correct in refusing to apply Section 35-1-63 U.C.A. (1953, as amended in 1975) retrospectively in this case. This amendment by the 1975 session of the Utah Legislature clearly was substantive in nature and not merely remedial and the amendment itself does not provide for retrospective application.

Further the District Court's decision in this case does not violate the Appellants' Fourteenth Amendment rights guaranteed by the Constitution of the United States of America. The classification of workers and employers under the Workmen's Compensation laws of the State of Utah are based upon reasonable and rational grounds that have consistently withstood constitution attack.

Therefore, the Respondent respectfully submits that the District Court's decision in dismissing Appellants' Complaint herein should be affirmed in its entirety.

Respectfully submitted this ¹⁴26 day of September, 1975.


Richard H. Moffat
Moffat, Welling, Paulsen & Burningham
Attorneys for Defendant-Respondent


John L. Young
Moffat, Welling, Paulsen & Burningham
Attorneys for Defendant-Respondent