

1952

# Oscar Peterson v. Claude Alkema : Brief of Appellant

Utah Supreme Court

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Ray S. McCarty; Attorney for Plaintiff and Appellant;

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## Recommended Citation

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

\_\_\_\_\_  
OSCAR PETERSEN,  
*Plaintiff and Appellant,*

— vs. —

CLAUDE ALKEMA and MRS.  
CLAUDE ALKEMA, his wife,  
*Defendants and Respondents.*

**FILED**

AUG 23 1962

Clerk, Supreme Court, Utah

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**BRIEF OF APPELLANT**  
\_\_\_\_\_

RAY S. McCARTY,  
*Attorney for Plaintiff*  
*and Appellant*

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# STATE OF UTAH

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OSCAR PETERSEN,  
*Plaintiff and Appellant,*

— vs. —

CLAUDE ALKEMA and MRS.  
CLAUDE ALKEMA, his wife,  
*Defendants and Respondents.*

No. 7868

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## BRIEF OF APPELLANT

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### STATEMENT OF THE CASE

This is an appeal from the order of the Honorable Charles G. Cowley, one of the judges of the District Court of Weber County, State of Utah, granting the defendants' motion to dismiss the first and second counts of plaintiff's complaint, and also granting the defendants a summary judgment against plaintiff as to both first and second counts in said action. The court did not prepare and file findings of fact or conclusions of law, the court having based its decision upon the pleadings, the depositions, and exhibits, and the arguments of counsel.

On September 8, 1951, the plaintiff filed the following complaint against the defendants:

(Title of Court and Cause)

## FIRST CAUSE OF ACTION

### I.

"The defendants are residents of Weber County, State of Utah, and for all times herein mentioned were the owners and operators of a fruit farm at Pleasant View in Weber County, Utah.

### II.

"On or about the 24th day of July, 1951, plaintiff was employed and working for the defendants on their fruit farm at Pleasant View, Weber County, Utah, and at said time and place it became and was plaintiff's duty under his employment to pick fruit from various and sundry trees located on said farm, which work necessitated the use of a three-legged ladder about ten feet in length furnished plaintiff by defendants for such use; that while plaintiff was stationed near the top of said ladder picking apricots, the sidings of said ladder broke in three places, causing the ladder to collapse and fall, and plaintiff to fall to the ground and to suffer the serious personal injuries, damage and loss herein complained of.

### III.

"The defendants were negligent, reckless, careless and heedless in the following particulars, to-wit:

a. The defendants failed, neglected and refused to furnish plaintiff safe tools and equipment

with which to do the work normally, reasonably and necessarily required of him as an apricot-picker, in that defendants furnished plaintiff a dangerous, unsafe, weak and insufficient ladder.

b. The defendants furnished plaintiff a dangerous, unsafe and insufficient ladder for his use in picking apricots in this: That the sidings of said ladder were weak, defective and insecure and would not bear the weight of a normal and ordinary man.

c. The defendants, during all the times mentioned herein, had the exclusive custody, control and management of their farm, and all the equipment thereon, including the ladder which broke and collapsed under plaintiff, and they are possessed of superior, if not exclusive, access to information concerning the precise cause of the sudden, unusual and unexpected breaking and collapsing of the ladder, which plaintiff was using and which caused the injuries, loss and damage to him as herein alleged, and the unusual, sudden and unexpected breaking and collapsing of said ladder was an event of such nature as would not have occurred in the ordinary course of events had the defendants exercised ordinary and reasonable care; and had the defendants exercised due and proper care in the use, management and control of their farm and the various implements, including the ladder situate thereon, the accident and occurrence herein described would not have happened, and the plaintiff would not have received the injuries, loss and damage herein complained of.

#### IV.

“The aforesaid acts of negligence and carelessness on the part of defendants, combined and

concurring, were and are the direct and proximate cause of the injuries sustained by plaintiff as herein set forth.

## V.

“As the direct and proximate result of the negligent, careless and heedless conduct of the defendants, plaintiff was caused to and did sustain the following grievous personal injuries, to-wit: A Colles fracture of the right wrist with the articulating surface of the radius at right angles to the long axis of the shaft and with a small amount of impaction of the fragments of the radius.

## VI.

“As a result of the aforementioned injuries, plaintiff has suffered continuously since the 24th day of July, 1951, from pain, stiffness and soreness in his right arm, and plaintiff has suffered severe shock to his nervous system and injury and impairment of his general health, and has suffered great mental and physical pain ever since said accident occurred, and plaintiff believes, and therefore says, that he will never again be fully recovered from the injury to his right arm and general health as herein set forth; all to his damage in the sum of \$12,500.00.

## VII.

“The plaintiff, on account of said injuries, has been obliged to incur medical expense, and will be obliged to continue to do so to the extent of at least \$350.00.”



## SECOND CAUSE OF ACTION

## I.

“Plaintiff reiterates and incorporates Paragraphs 1 to 5 inclusive of his first cause of action.

## II.

“At the time of said injury to plaintiff as above set forth, the plaintiff was in a helpless condition and unattended by any person whose duty it was to care for him other than the defendants herein, and notwithstanding that the defendants and both of them knew of the helpless condition of plaintiff and of his injuries heretofore set out, and that plaintiff would probably suffer greatly increased bodily harm unless medical aid was immediately provided, the defendants and each of them failed and neglected to furnish this plaintiff any first aid or help whatsoever, but, on the contrary, loaded him into a truck and drove approximately eight miles to Ogden, Utah, to-wit, some spot on Twenty Fifth Street in said city, and let plaintiff out of the truck, and they did not obtain for him first aid or medical aid or advise the plaintiff where to obtain such aid, but merely stated to plaintiff that they hoped he felt better in the morning. That the plaintiff did not receive medical aid until the following day, to-wit, July 25, 1951, when he was taken to the Dee Hospital in Ogden, Utah, after collapsing on the street.

## III.

“The failure of the defendants to furnish plaintiff with first aid or medical aid caused plaintiff great and unusual suffering, and caused plaintiff’s injuries to his wrist to become aggravated, and caused his condition of shock and nervousness

to become more pronounced, and lessened plaintiff's chance of complete recovery; all to plaintiff's damage in the sum of \$7,500.00.

"WHEREFORE, plaintiff demands judgment against the defendants and each of them as follows:

1. On his first cause of action, for the sum of \$12,500.00 general damages, and for reasonable medical and hospital expense incurred in the sum of \$350.00.
2. On his second cause of action, for the sum of \$7,500.00 damages.
3. For his costs herein expended, and such other and further relief as the court may deem meet and equitable in the premises." (R. 1-4)

The defendants filed their amended answer on February 25, 1952, as follows:

(Title of Court and Cause)

"Come now the defendants in the above entitled action and for amended answer to plaintiff's complaint herein, admit, deny and allege as follows:

"As to plaintiff's First Cause of Action:

1. Admit Paragraph 1.
2. Answering Paragraph 2, admit that on the 24th day of July, 1951, the plaintiff was employed by the defendants in picking apricots upon the farm of the defendants at Pleasant View in Weber County, Utah. Deny each and every other allegation set forth in Paragraph 2.
3. Deny all of Paragraph 3.
4. Deny Paragraphs 4, 5, 6 and 7.
5. Deny each and every other allegation set forth in plaintiff's First Cause of Action not herein specifically admitted.

“As to plaintiff’s Second Cause of Action :

1. Deny each and every allegation set forth in Paragraph 1 of plaintiff’s First Cause of Action as reiterated and incorporated in Paragraph 1, except defendants admit they are residents of Weber County, Utah and that they were owners and operators of a fruit farm in Pleasant View, in Weber County, Utah and that on the 24th day of July, 1951, plaintiff was employed by the defendants in picking of apricots on said farm.

2. Deny Paragraphs 2 and 3.

3. Deny each and every other allegation set forth in plaintiff’s Second Cause of Action not herein specifically admitted.

“AS A FURTHER DEFENSE THERETO, the defendants allege :

### FIRST DEFENSE

“That the First Cause of Action of plaintiff’s complaint fails to state a claim against said defendants, or either of them upon which relief can be granted.

### SECOND DEFENSE

“That the second cause of action of plaintiff’s complaint fails to state a claim against said defendants, or either of them, upon which relief can be granted.

### THIRD DEFENSE

“That if the plaintiff suffered any injuries while engaged in the employment of the defendants, that such injuries, if any, so suffered, were caused solely by the carelessness and negligence of the plaintiff and not caused by the carelessness and negligence of these defendants.

## FOURTH DEFENSE

“That the plaintiff, at the time of the alleged accident, did not exercise ordinary care and caution or prudence in the premises, and that the resulting damages and injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said plaintiff in the premises.

## FIFTH DEFENSE

“That plaintiff was, at the time of the accident, a mature man, familiar with the use of said ladder and of sufficient capacity and intelligence to appreciate danger; that said ladder, used by plaintiff, was then and there an ordinary tool, simple in construction, so that defects, if any, therein could be discovered without skill or knowledge and without intricate inspection; that the defects, if any, in said ladder could have been discovered by plaintiff, who was then and there in possession thereof and was and had been using the same, without special skill or knowledge on the part of plaintiff and without intricate inspection by him; that plaintiff was as well qualified as defendants to detect defects, if any, in said ladder and to judge of the probable danger of using the same.

## SIXTH DEFENSE

“That plaintiff, at time of the accident, was a mature man, familiar with the use of said ladder and of sufficient capacity and intelligence to appreciate danger and said ladder was then and there a simple and ordinary tool, the nature of which is easily understood; that plaintiff had used

said ladder and was familiar with it and assumed the risk of defects therein, if any there were.

“WHEREFORE, defendants pray that the plaintiff take nothing by his complaint and that it be dismissed, and that the defendants be awarded their costs.” (R. 5-7)

That thereafter the case came on for pre-trial and the court took the matter under advisement, and on May 9, 1952, made its memorandum decision as follows:

(Title of Court and Cause)

“This action having come on for pre-trial, and being taken under advisement, comes now the Court and grants Defendant’s motion to dismiss and a summary judgment entered in favor of said defendants under rule 56(b) see also “F” under said Rule.

“Costs to Defendants.

“This decision is based on the pleadings and depositions.

“Exhibit and Exhibit sheet filed.” (R. 9)

And on May 15, 1952, the court entered the following summary judgment:

(Title of Court and Cause)

“The above-entitled cause came on regularly for pre-trial and hearing upon defendants’ motion to dismiss on the 14th day of April, 1952, and for further argument as to law on pre-trial and defendants’ motion to dismiss on the 5th day of May, 1952, in Department No. 2 of said Court, Honorable Charles G. Cowley, presiding, plaintiff appearing by his Attorney, Ray S. McCarty, Esquire,

and defendants appearing by their Attorneys, Samuel C. Powell, Esquire, and Derrah B. Van Dyke, Esquire, and it having been stipulated in open Court by counsel for plaintiff and defendants that the deposition of the plaintiff and the deposition of the defendant, Claude Alkema, heretofore taken, be ordered published and read and considered by the Court, and the same being thereupon published and filed, and documentary evidence and exhibits having been received in evidence, and the Court having taken the matter under advisement, read the pleadings herein and read and considered said depositions herein, and having heard arguments of counsel for plaintiff and counsel for defendants, and being advised in the premises, and having determined that defendants' motion to dismiss should be granted and to order that a summary judgment be entered herein in favor of defendants and against plaintiff pursuant to Rule 56(b) Utah Rules of Civil Procedure:

"NOW, THEREFORE, on the pleadings and depositions herein, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants' motion to dismiss be and the same is hereby granted.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED on said pleadings and depositions, that defendants have and recover and they are hereby given summary judgment against plaintiff and said action, both first and second causes thereof, be and the same is hereby dismissed.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants have and recover their costs expended herein.



“Dated this 15th day of May, A. D. 1952.”  
(R. 10-11)

That thereafter, and within the time required by law, the plaintiff appealed to the Supreme Court of the State of Utah from the court's order granting defendants' motion to dismiss and granting them a summary judgment against the plaintiff.

## STATEMENT OF FACTS

The court's decision and judgment was based upon the pleadings and the depositions, so it becomes necessary to determine just what facts were admitted by the pleadings and what facts were developed by the depositions of the plaintiff, Oscar Petersen, and the defendant, Claude Alkema. We will refer to the page of Claude Alkema's deposition as AD ....., and Oscar Petersen's deposition as PD .....

The defendants owned and operated a fruit farm of approximately 30 acres at Pleasant View, near Ogden, Weber County, Utah, and they acquired this property in about the year 1935 or 1936, and this farm was planted in peaches, apricots, cherries and a few prunes (AD 1-3). The defendants furnished the ladders for the fruit pickers. They were regular 3-legged ladders made of wood with seven steps. They came to a point. Five of them were acquired in 1951 from Olson's. They were new. The ladder which is involved in this case, and which appears in plaintiff's Exhibits A and B attached to the Alkema deposition, was purchased around 1945 or 1946

from North Ogden Fruit Exchange. The ladders were stored in a steel shed at the orchard (AD 6).

On the 24th of July, 1951, the defendants had nine 8-foot ladders. The defendant, Claude Alkema, who weighs 240 pounds, claimed he was on this ladder the day before and that it had a leather strap on the third back leg (AD 6). There is no dispute that on the early morning of July 24, 1951, the defendant, Claude Alkema, picked up five men from the employment service on 26th and Washington Streets in Ogden for the purpose of picking apricots (PD 8 and AD 3). At that time plaintiff Petersen asked defendant Claude Alkema how much they were paying and when they were paid, and Alkema replied 30c a bushel and they were paid every night. The five of them got in the light pickup truck and the defendant, Claude Alkema, took them out to the farm (PD 8 and AD 3).

On July 24, 1951, the plaintiff was over 58 years of age, and weighed 155 pounds, a single man, and had followed mining and construction work for years. He had worked for Morrison-Knudsen for between 10 and 15 years (PD 1-4). For several years he would pick fruit when there was no other work to do. In the summer of 1951 he had been picking fruit in Davis and Weber Counties (PD 4-6). For five or six years he had picked fruit in this manner, using regular picking ladders (PD 8).

Defendant Claude Alkema stated that he arrived at the farm with the five men approximately 6:45 a.m. That he told them to go down and take a row of trees and start picking.



“\* \* \* I said, ‘There’s ladders there. Find you a ladder and go to work.’” (AD 8).

Plaintiff Petersen said that when he arrived at the farm, the defendant, Claude Alkema, told each man to take a ladder and a bucket, and that he did so (PD 8). A ladder was standing by practically every tree that had not been finished. There was a ladder in the row that was assigned to him and that was the ladder he picked (PD 21-22).

The plaintiff, on being questioned whether he examined the ladder stated:

“A. Well, I just sat it down and shook it to be sure it was tight and wouldn’t tip over and went right on up and started picking.

“Q. Did you look at the ladder and see what condition it was in?

“A. No. They are supposed to have a ladder that’s safe for us.

“Q. You never examine anything you get on?

“A. Yes. If it happened to be rickety or so, I’ll take a look, both the ladders get loose.

“Q. On this particular ladder, did you put it up to see if it was rickety?

“A. I just sat it down with the three legs and with hands like that (illustrating) and up I went.

“Q. Did you examine it when you sat it up with both hands to see if it was rickety?

“A. Yes. You do that when you set it up.

“Q. Well, you saw it wasn’t rickety?

“A. Yes. It wasn’t rickety.” (PD 9).

Petersen moved the ladder from tree to tree and he would see the ladder was set properly before he would go up on it. He did not observe any cracks in the ladder, nor did he look for them (PD 10). When he got to the trees he had to get almost to the last step. He knew it was way up high (PD 10). On this day the men were stripping the trees, and according to the defendant, Claude Alkema, the plaintiff complained of the scarcity of the apricots (AD 8-9).

Defendant Claude Alkema told the men to quit about 2:30 p.m. (AD 10). The plaintiff was on the ladder when Mr. Alkema told him to quit after he filled his basket. While plaintiff was on the last step of the ladder it broke and plaintiff was thrown to the ground (PD 11).

Exhibits A and B are pictures of the ladder and show the breaks in the stiles of the ladder. The defendant, Claude Alkema, examined the ladder on that day and saw that it was broken in three places on the side rail (AD 12). After plaintiff fell from the ladder, he, Mr. Alkema, stated that the plaintiff came up to where Mr. Alkema was and said, "I've quit. I fell over backwards, and these three top steps broke out of your ladder, and I fell over backwards and hurt my arm." (AD 11). The plaintiff then asked for cold water to bathe his arm. Alkema testified that he got several cans of water and poured on the plaintiff's arm.

Mr. Alkema testified he had graduated from a first aid course in the spring of 1951 (AD 13), and that plaintiff had told him he was hurt and that he looked at the wrist but it did not appear broken to him (AD 22). That

he poured four or five cans of cold water on it; he knew that hot packs would be better, but there were none available. He did not furnish him medical aid nor did he suggest that he have medical aid (AD 14-15).

Mr. Alkema said that when the plaintiff came up to him, he was shaking, and Mr. Alkema felt his wrist but could not see any breaks in it, and said the wrist was not swollen and that he put him and the other men in a truck and took them into Ogden and took the plaintiff to 24th and Lincoln and let him out. The plaintiff testified that the reason that the defendant Alkema poured cold water on his arm is that he could not use his right arm himself (PD 14). That when he came into town he went to the Milner Hotel, that he bought some liniment for his arm, and that he did not get a doctor because he had no money (PD 14).

That the next day he went to the employment office, and his hand was badly swollen, and the next day a policeman took him to the Dee Hospital (PD 16). That Doctor Rich Johnson took care of him.

## STATEMENT OF APPELLANT'S POINTS

### I.

The defendants were not excepted from the requirement that they, as employers, inspect and provide their employes with safe tools and appliances with which to work, notwithstanding the so-called "simple tool doctrine," and, therefore, the court erred in granting defendants a summary judgment on plaintiff's first cause of action.

## II.

The defendants had the duty to provide medical assistance and first aid to the plaintiff, and their failure to do so was actionable, and, therefore, the court erred in granting a summary judgment to defendants on plaintiff's second cause of action.

## ARGUMENT

## INTRODUCTORY COMMENTS

The lower court granted defendants' motion to dismiss and ordered that a summary judgment be entered in favor of defendants and against the plaintiff, pursuant to Rule 56(b) of the Utah Rules of Civil Procedure.

Findings of fact and conclusions of law were dispensed with in the lower court. Whether or not they are necessary may be a moot question (see Rule 41, subdivision (b)), but their value in enabling the appellant to present and pinpoint the arguments in this case could not be over-estimated. Not having them, the writer will do the best he can. Of course, the appellant knows the arguments presented in the lower court, and presumes that on the first cause of action the summary judgment was granted, to put it broadly, on the theory of the "simple tool doctrine"; or, putting it another way, that the court felt that the fruit-picking ladder was an ordinary tool, and that the plaintiff was chargeable with knowledge equal to that of his employers, the defendants, of all obvious or discoverable defects therein. As to the second

cause of action, which related to the defendants' failure to render first aid to the plaintiff, the writer does not know exactly why the court granted a summary judgment, but will assume that the court felt that the defendants were under no legal duty to render assistance or medical aid to the plaintiff.

The deposition of the plaintiff, which was considered in this case, was taken by the defendants; the deposition of the defendant, Claude Alkema, was taken by the plaintiff. In both cases they were for the purpose of discovery. The plaintiff has other testimony, and undoubtedly the defendants have other testimony and evidence, and unless as a matter of law from the undisputed and agreed facts in the case the plaintiff cannot recover on either count, then, of course, there was a case for the jury.

A summary judgment is authorized only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is and that no genuine issue remains for trial. Summary judgment should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict.

Sartor v. Arkansas Natural Gas Corp. (1944)  
321 U. S. 620, 64 S. Ct. 724, 88 L. ed. 967.

So long as there is any genuine issue of fact, a summary judgment will not be decreed.

Bender's Federal Practice Manual, p. 333.

## POINT I.

THE DEFENDANTS WERE NOT EXCEPTED FROM THE REQUIREMENT THAT THEY, AS EMPLOYERS, INSPECT AND PROVIDE THEIR EMPLOYEES WITH SAFE TOOLS AND APPLIANCES WITH WHICH TO WORK, NOTWITHSTANDING THE SO-CALLED "SIMPLE TOOL DOCTRINE."

The defendants owned and operated their fruit farm, approximately 30 acres, at Pleasant View. They depended, as one could assume from the evidence, on transient labor for fruit pickers, and for whom they furnished ladders and other paraphernalia necessary for the job. On the day in question, July 24, 1951, the defendant, Claude Alkema, picked up these five pickers, of whom the plaintiff was one, early in the morning, and took them to his orchard. He paid by the bushel. He assigned each of them a row of trees to pick. There was a ladder in each row. There is no evidence, nor was it a fact, that the plaintiff had ever worked for the defendants before, or that he was familiar with any of the defendants' equipment.

These pickers each took a ladder. The plaintiff did not stop to examine the ladder. He did not have it tested. The defendants should have done that. This ladder was five or six years old. The plaintiff had a right to assume that he would be furnished a safe ladder, suitable for the work he was to do, and the defendants must know that if they permit appliances furnished employees to become defective, their employees are likely to suffer injury, and that is exactly what happened. In the afternoon, while

the plaintiff was on the top rungs of the ladder, the ladder collapsed and he was hurled to the ground and his wrist broken.

The simple tool doctrine is well-defined in the case of *Proctor v. Town Club*, 105 U. 72, 141 P. (2) 156, wherein Justice McDonough quotes from *Newbern v. Great Atlantic & Pacific Tea Co.*, 4 Cir., 68 F. 2d 523, 525, 91 A.L.R. 784:

“ ‘It is well settled that, while it is the duty of the master, in exercise of reasonable care for the safety of the employee, to see that machinery and appliances which may cause injury to him are in reasonably safe condition, this duty does not ordinarily exist with respect to simple tools from the use of which no danger is reasonably to be apprehended or as to which the employee is in a better position than the master to discover defects. (Cases cited.) This is true, not because the employee assumes the risk of injury from defects in such tools, but because the possibility of injury is so remote as not to impose upon the master the duty of seeing that they are free from defects in the first instance or of inspecting them thereafter. The fact that the employee has better opportunity than the master to judge of the defects of such tools, that no inspection is necessary to discover such defects, and that no danger is to be apprehended which the employee cannot guard himself against, renders it unnecessary in ordinary cases that the master exercise with respect to simple tools the care that the law requires with respect to more complicated machinery. \* \* \* ’ ”



The case of *Etel v. Grubb et ux* (Sup. Ct. Wash., June 10, 1930), 288 P. 931, held that a 10-foot step-ladder supported by a tongue, used by a fruit picker, is not a simple tool within the simple tool doctrine. In this case, the court quoted from *Pacific Telephone & Telegraph Co. v. Starr*, 206 F. 157, 162, 46 L.R.A. (N.S.) 1123:

“ ‘The workman assumes those risks of danger which are ordinarily incident to the work in which he is engaged, and those which are open and obvious to the senses, and which are known to him, if he continues in the occupation. He assumes none that may arise from latent defects in appliances not apparent from casual observation, which appliances it is the duty of the master to furnish, and to exercise reasonable care with reference to their selection.’ ”

In the instant case there were no glaring, open and obvious defects that would put the plaintiff on notice that he should not use the ladder. The defects were latent and should have been discovered by the defendants, had they properly tested and inspected the ladder.

In the case of *Olson v. Kem Temple, Ancient Arabic Order of the Mystic Shrine* (Sup. Ct., North Dakota, June 17, 1950), 43 NW (2) 385, the majority opinion held that where a member of a fraternal organization volunteered to assist in decorating a pavilion for use of the organization and was injured in fall from a loose step of the step-ladder provided for his use by the organization which had no knowledge of such defect, the organization was not liable, since the stepladder was a simple tool or appliance



which the parties had equal opportunity and ability to inspect.

The dissenting opinion in this case, by Justice Christianson, seems to have grasped the real philosophy of the simple tool doctrine. This case quoted from *Corpus Juris Secundum*, on page 393 of the dissenting opinion :

“ ‘Broadly stated, it is the (positive) duty of a master to furnish his servant with suitable and safe instrumentalities wherewith, and places wherein, to do his work.’ 56 C.J.S., Master and Servant, Sec. 201, p. 900.

“ ‘It is actionable negligence on the part of a master to fail to furnish, or to fail to exercise ordinary or reasonable care to furnish, his servant with such proper tools and appliances as may be required for the reasonably safe prosecution of the work.’ 56 C.J.S., Master and Servant, Sec. 205, p. 912.”

Justice Christianson then goes on and gives the summarization by Labatt in his work on Master and Servant :

(p. 394) “ ‘It is submitted that, as has been indicated above, it is illogical and unreasonable to say that the master is free from the obligation of using ordinary care merely because the appliance to be furnished is a simple tool, but the better view is that the appliance being a simple tool, and entirely understood by the servant, the latter’s obligations to his master and to himself are increased; and cases involving injuries from simple tools furnish a broader scope for the application of the various affirmative defenses which are ordinarily avail-

able to the master.' 3 Labatt's Master and Servant, 2d Ed., Sec. 924a, pp. 2476-2484."

Both parties in the lower court depended a great deal upon our own Utah case of *Proctor v. Town Club*, supra. Justice McDonough ably discussed the simple tool doctrine and assembled the various cases and annotations dealing with that question. He quoted from Labatt on Master and Servant, supra, as quoted by Justice Frick in *Russell v. Borden's Condensed Milk Co.*, 53 U. 457, 174 P. 663, on page 159 of the Pacific citation of the Proctor case. Continuing with the Proctor case on page 159, Justice McDonough said:

"Nevertheless, we may assume for the purposes of this case, without so deciding, that as to a simple as well as to a more complex tool or instrumentality, a master who furnishes to his workmen regularly employed, such tool as an incident of his regular business, has the duty of prudently inspecting it or be liable for injuries resulting from defects which inspection would have revealed; unless the servant has knowledge of such defect and is aware of and appreciates the dangers arising from its use, or unless the defect and danger are so open and obvious that an ordinarily prudent person would have observed and appreciated them."

In *Fisher v. M-K Express Co.* (Mo. App., 1942), 158 SW (2) 458, it is stated:

"Mere knowledge of the danger of a place to work or of the appliances on the part of the

servant will not defeat an action for personal injuries suffered by the servant unless the danger is so glaring, open and obvious as to threaten immediate and almost certain injury or unless the danger is so glaring, open and obvious that a man of ordinary prudence would not attempt to occupy or use the place or appliances.”

The case of *Moran v. Zenith Oil Co.* (Dist. Ct. of App., 2d Dist., Div. 2, Calif., June 7, 1949), 206 P(2) 679, aptly states the rule as to latent defects in equipment. The court said on page 681:

“When the occupant of land knowingly permits a person to enter the premises for the purpose of performing acts which the workman has been employed to do, the proprietor is obliged to exercise reasonable care for the protection of the toiler. He must supply a reasonably safe place in which the work is to be done and must furnish and maintain such tools and appliances as are necessary and reasonably safe for use in the operations. A laborer so employed is chargeable with neither a concealed nor a latent defect in the equipment supplied. In the event he is injured as a result of a latent defect in the instrumentalities furnished him of which he is ignorant, he may recover damages for resulting injuries, if it is shown that the employer, licensor or proprietor knew or by the exercise of reasonable care should have known of the defect and has failed to effect a repair thereof or to warn the workman. *Miller v. Pacific Constructors, Inc.*, 68 Cal. App. 2d 529, 545, 157 P. 2d 57.”

Our court, as recently as this year, in the case of *Reynolds v. American Foundry & Machine Co.*, ..... Utah ....., 239 P(2) 209, at page 210, subscribed to the doctrine set out in the Restatement of Torts, paragraph 392:

“Chattel Dangerous For Intended Use. One who supplies to another, directly or through a third person, a chattel to be used for the supplier’s business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should expect to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by persons for whose use the chattel is supplied:

“(a) \* \* \*

“(b) if the supplier’s failure to give to those whom he should expect to use the chattel the information required by the rule stated in paragraph 388 is due to his failure to exercise reasonable care to discover its dangerous character or condition.”

In this case the defendants hauled the employes to their farm by truck. They assigned each picker a row of trees to strip of the fruit. At each row there was a ladder. That was the ladder to be used by the picker for that row. Each of these pickers, including the plaintiff, had a right to assume and expect that his ladder was safe and fit for the use intended. These pickers should not be expected on their own time to minutely inspect each ladder. That duty rested on the defendants. The defendants knew that ladders, like all tools in constant use, must eventually become defective and unsafe for use. The ladder in question had been used for five or six years, and the defend-

ants knew that its life of usefulness was about ended. Therefore, they had the duty of regularly inspecting these ladders, and if a different crew came each day to pick, each ladder should have been inspected either at the end of each day's work or in the morning before the work began. Under the better reasoned cases definitely this ladder was not what would be considered a simple tool, and even if it were, under the circumstances as exist in the case the defendants would still not be relieved from inspecting and providing the plaintiff with a safe ladder.

If the plaintiff had been assigned a ladder and he used the same ladder day after day, that might change the picture somewhat, and if, as in the *Proctor v. Town Club* case, the ladder was not used as a part of the defendants' business but was merely loaned to the plaintiff as an accommodation, the answer might be different, or if the defects in the ladder had been so glaring and obvious that the plaintiff could not have helped but see them and he persisted in using the ladder and was injured, then again he could not recover. But none of those conditions existed in the instant case. This case came squarely under Justice McDonough's statement in the *Proctor v. Town Club* case, *supra*, on page 22 of this brief.

By the authority of *Proctor v. Town Club* alone, the court's order granting defendants a summary judgment on the first cause of action should be reversed.

## POINT II.

THE DEFENDANTS HAD THE DUTY TO PROVIDE MEDICAL ASSISTANCE AND FIRST AID TO THE PLAINTIFF, AND THEIR FAILURE TO DO SO WAS ACTIONABLE.



The plaintiff suffered grievous injuries caused by the collapse and falling of the ladder furnished by the defendants. He was seven or eight miles from town. He was unattended by any friend whose duty it was to take care of him, other than the defendants. The defendants knew of his helpless and pitiable condition. The defendant, Claude Alkema, had graduated from a first aid course in the spring of 1951, yet all he did to aid this suffering plaintiff was to pour four or five cans of cold water on his wrist. He not only failed to furnish him medical aid, but did not even suggest that he seek it. The defendant, Claude Alkema, put the plaintiff and the other men in a truck and took them to Ogden, where he let them off on 24th and Lincoln Streets. Being fully aware of the plaintiff's condition, he did not give him any first aid, did not take him to a physician, or even take him to the vicinity of a hospital. He made no effort to put medical care and assistance during this emergency within the reach of this injured employee.

In the case of *Szabo v. Pennsylvania R. Co.*, (N.J., Jan. 4, 1945), 40 Atl. (2) 562, on page 563, the court said:

“It is conceded that in this and other jurisdictions the law is, that in the absence of a contract or a statute, there rests no duty upon an employer to provide medical service or other means of cure to an ill, diseased or injured employee, even though it result from the negligence of the master, *Koviacs v. Edison Portland Cement Company*, 128 A. 542, 3 N.J. Misc. 368; 39 C.J. 240, sec. 348.

“In our judgment there is a sound and wise exception to this rule, founded upon humane instincts.

“That exception is, that where one engaged in the work of his master receives injuries, whether or not due to the negligence of the master, rendering him helpless to provide for his own care, dictates of humanity, duty and fair dealing require that the master put in the reach of such stricken employee such medical care and other assistance as the emergency, thus created, may in reason require, so that the stricken employee may have his life saved or may avoid further bodily harm. This duty arises out of strict necessity and urgent exigency. It arises with the emergency and expires with it.

“This precept probably had its inception in the code of moral conduct, but, like many others, such as furnishing the employee with a safe place in which to work, and proper tools with which to labor, has become a legal duty incorporated in every contract of hiring, by legal inference, notwithstanding a lack of specific provision or statutory requirement. \* \* \* (citing cases)”

See also : 56 C.J.S. 815, Sec. 162; 212 SW 345;  
35 Am. Juris. 537-538, Sec. 109.

The defendant, Claude Alkema, could at least have taken this man to some doctor's office or even the emergency hospital if he wished to avoid the expense or the embarrassment of asking a doctor to give free treatment for one of his injured employes, but in this case, he deliberately abandoned this stricken man on the streets of Ogden, knowing that he could not take care of himself.

The facts in this case come squarely within the above rule, where the master is obliged to give emergency treatment to his injured employe. As in Point I, the facts are such that it is clearly a question for the jury to decide, and the court definitely erred in granting defendants' motion for a summary judgment on this second cause of action.

### CONCLUSION

In conclusion, the plaintiff contends that the court's order of summary judgment was contrary to law and unsupported by the evidence.

The court, in granting a summary judgment, was bound to look at the evidence in the light most favorable to the plaintiff; however, if the lower court had viewed the evidence most favorable to the defendants, he still, under the law as set forth in the cases, and especially the Utah case of Proctor v. Town Club, *supra*, would not have been justified in granting the summary judgment on the first cause of action.

The facts in the second cause of action come squarely within that rule of law that holds that when an employe, while engaged in the line of his duty, is rendered helpless, the dictates of humanity, duty and fair dealing demand that the employer furnish medical assistance.

Therefore, the judgment of the lower court should be reversed.

Respectfully submitted,

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appellant.*