

1988

Kenneth Riddle v. Alan Mays and Mountain States Insulation Corp. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH RIDDLE,)	
)	
Plaintiff/Appellant,)	
	)	Case No. 880204
vs.)	
	)	Category 14(b)
ALAN MAYS and MOUNTAIN)	
STATES INSULATION CORP., a)	
Utah corporation,)	
)	
Defendants/Respondents.))	

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FIFTH JUDICIAL DISTRICT COURT
OF IRON COUNTY, STATE OF UTAH,
THE HONORABLE J. PHILLIP EVES PRESIDING

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The plaintiff/appellant, Kenneth Riddle, pursuant to Rule 24(a) of the Rules of the Utah Supreme Court, submits the following Brief.

JURISDICTION

This Court has jurisdiction to decide this appeal pursuant to Utah Code Ann. §78-2-2(3)(j)(1988) and Rule 3(a) of the Rules of the Utah Supreme Court. This is an appeal from a final Order and Judgment of the Fifth Judicial District Court in and for Iron County, State of Utah, the Honorable J. Phillip Eves presiding. The Order and Judgment entered by the trial court granted the defendants' Motion for Summary Judgment and denied the plaintiff's Cross-Motion for Summary Judgment. The trial court concluded, as a matter of law, that the plaintiff's complaint was barred by the exclusive remedy provision of Utah Code Ann. §35-1-60 (1987).

STATEMENT OF ISSUES

The following issues are presented to this Court for review:

1. Did the district court err in concluding, as a matter of law, that Ken Riddle, an employee of Owens-Corning, may not pursue a claim for personal injuries against Alan

Mays, an employee of a subcontractor of Owens-Corning, such claim being barred by the exclusive remedy provision of Utah Code Ann. §35-1-60?

2. Did the trial court err by failing to conclude, as a matter of law, that Ken Riddle, an employee of Owens-Corning, may pursue a claim for personal injuries against Alan Mays, an employee of a subcontractor of Owens-Corning, such claim not being barred by the exclusive remedy provision of Utah Code Ann. §35-1-60?

DETERMINATIVE STATUTES

This Court's interpretation of the following statutes is determinative of the issues presented for review. Pursuant to Rule 24(a)(6) of the Rules of the Utah Supreme Court, these statutes are set out verbatim in Appendix A of the Addendum to this Brief.

1. Utah Code Ann. §35-1-42(3)(b) (1987);
2. Utah Code Ann. §35-1-60 (1987);
3. Utah Code Ann. §35-1-62 (1987).

STATEMENT OF THE CASE

A. Nature of the Case.

This is a negligence action brought by the plaintiff against the defendants for injuries sustained by the plaintiff in a truck wreck on January 2, 1985 at the Intermountain Power Project ("IPP"). At the time of the accident, the plaintiff was sitting in a parked truck which was hit by a truck driven by the defendant Alan Mays. Both men were on the job, within the scope of their employment, when the accident happened. The plaintiff was employed by Owens-Corning Fiberglass Corporation ("Owens-Corning"), an insulation subcontractor at IPP to install insulation and paneling and to erect a warehouse. The defendant Mays was employed by Mountain States Insulation Corp. ("MSI"), a subcontractor of Owens-Corning, providing labor to erect the warehouse. The plaintiff's Complaint seeks special and general damages from the defendants based upon the negligence of the defendant Mays, acting within the scope and course of his employment with the defendant MSI.

B. Course of Proceedings.

After the plaintiff's Complaint was filed and some discovery conducted, the defendants moved for summary judgment on the grounds that the plaintiff's Complaint was barred by the

exclusive remedy provision of Utah Code Ann. §35-1-60. The plaintiff filed a Cross-Motion for Summary Judgment that, as a matter of law, his Complaint was not barred by that exclusive remedy provision.

After reviewing the memoranda submitted by the parties and hearing oral argument, the Honorable J. Phillip Eves of the Fifth Judicial District Court of Iron County, State of Utah, granted the defendants' Motion for Summary Judgment and denied the plaintiff's Cross-Motion for Summary Judgment. These rulings are set forth in Orders dated, respectively, May 4, 1988 and June 15, 1988.

The transcript of the April 19, 1988 hearing at which Judge Eves issued his decision is attached as Appendix B of the Addendum to this Brief pursuant to Rule 24(f) of the Rules of the Utah Supreme Court.

C. Statement of Relevant Facts.

The issues to be decided by this Court are based on facts essentially not in dispute. Those facts are:

1. Bechtel was the general contractor at IPP. (R. p. 322; Appendix C, page 1.)

2. Owens-Corning was an insulation subcontractor at IPP to install insulation and paneling and to erect a

warehouse. (R. pp. 322 and 371(3); Riddle Deposition, pages 11 and 15; Reporter's Transcript, Appendix B, p. 3.)

3. The plaintiff, Kenneth Riddle ("Riddle"), was employed by Owens-Corning. (R. pp. 310, 323 and 371(3); Riddle Deposition, pp 10 and 15; Reporter's Transcript, Appendix B, p. 3.)

4. Owens-Corning subcontracted with Mountain States Insulation ("MSI") for MSI to provide labor to erect the warehouse. (R. pp. 310, 323 and 371(6); Riddle Deposition, p. 18; Recorder's Transcript, Appendix B, p. 6; Appendix D, p. 2.)

5. The defendant Alan Mays ("Mays") was an employee of the defendant MSI. (R. pp. 1, 310, 323 and 371(6); Riddle Deposition, pp. 19 and 94; Reporter's Transcript, Appendix B, p. 6; Appendix D, p. 2.)

6. The plaintiff was injured at IPP when the parked truck he was sitting in was hit by a truck driven by the defendant Alan Mays. (R. pp. 1-4 and 323.)

7. Both Riddle and Mays were on the job, within the scope of their employment, when the accident happened. (R. pp 1, 310, 323; Appendix C, p. 2; Appendix D, p. 2.)

Additional facts material to this Court's determination of this appeal are found in the defendants' Memorandum in Support of its Motion for Summary Judgment and

the plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of his Cross-Motion for Summary Judgment. Those memoranda are attached as Appendix C and Appendix D of the Addendum to this Brief.

SUMMARY OF ARGUMENTS

The plaintiff contends that the trial court erred in concluding, as a matter of law, that the plaintiff's Complaint was barred by the exclusive remedy provision of Utah Code Ann. §35-1-60. The plaintiff's arguments are based on the language and history of Utah Code Ann. §35-1-42(3)(b) ("Section 42"), defining those liable for worker's compensation benefits and Utah Code Ann. §35-1-62 ("Section 62"), defining those parties against whom an injured worker may pursue tort claims. The plaintiff's arguments are also based on the decisions of this Court construing those statutes, with particular attention to the effect of the 1975 Legislative amendments to Section 62.

Before the 1975 amendments to Section 62, this Court had been applying the Section 42 expanded definition of "statutory employer" to determine those immune from tort liability under Section 62. The effect of those decisions was to insulate from tort liability virtually everyone on the

jobsite. The 1975 Legislative amendments to Section 62 clarified that the definition of "statutory employer" in Section 42 was not to be used in determining who is or is not subject to tort liability under Section 62.

The 1975 amendments to Section 62 preserved an injured worker's tort claim against anyone on the jobsite not the actual employer of the injured worker. The plaintiff's actual employer is Owens-Corning. The plaintiff is allowed to pursue his claim against the defendants, as MSI is a subcontractor of Owens-Corning. This issue was addressed by this Court in Shupe v. Wasatch Electric Co., 546 P.2d 896 (Utah 1976). The Shupe decision controls this appeal by holding that an injured worker may pursue tort claims against a subcontractor of his actual employer.

ARGUMENT

THE PLAINTIFF'S CLAIMS AGAINST THE DEFENDANTS ARE NOT, AS A MATTER OF LAW, BARRED BY THE EXCLUSIVE REMEDY PROVISION OF UTAH CODE ANN. §35-1-60

A. The Language and Legislative History of Utah Code Ann. §35-1-62 and the Shupe Decision of This Court Allow the Plaintiff's Claim to Proceed.

The determination of the issues on appeal in this case requires understanding the purposes of and relationship between Utah Code Ann. §35-1-42(3)(b) ("Section 42") and Utah

Code Ann. §35-1-62 ("Section 62") as they relate to the exclusive remedy provision of Utah Code Ann. §35-1-60 ("Section 60"). Section 42 and Section 62 have distinct purposes. Section 42 defines those liable for worker's compensation benefits and reads as follows:

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 this work is a part or process in the trade or business of the employer, the contractor, all persons employed by him, all subcontractors under him, and all persons employed by any of these subcontractors, are considered employees of the original employer.

Section 62 defines those parties against whom an injured worker may pursue tort claims and reads, in pertinent part, as follows:

When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said employer, the injured employee, or in 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. . . .

For the purposes of this section and notwithstanding the provisions of section 35-1-42, the injured employee or his heirs or personal representatives may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or

their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

Section 42 represents a class of statutes known as "statutory employer" statutes. The statutes are designed to allow injured workers to reach beyond irresponsible, uninsured actual employers to receive worker's compensation benefits if they are injured on the job. These "statutory employer" statutes impose ultimate liability for benefits on contractors exercising the requisite supervision and control over the work of the injured worker. Jacobson v. Industrial Commission, 738 P.2d 658 (Utah Ct.App. 1987). The entire "statutory employer" scheme demonstrates a desire on the part of the Legislature to extend the protection and scope of worker's compensation benefits to those who might not be deemed employees under the common law. Pinter Construction Co. v. Frisby, 678 P.2d 305 (Utah 1984). Because the purpose of "statutory employer" statutes is to broaden those parties from whom an injured worker may seek compensation benefits, this Court has stated that Section 42 should be construed broadly in favor of protecting the injured worker to ensure that he or she receives the appropriate benefits. Bennett v. Industrial Commission, 726 P.2d 427 (Utah 1986).

Section 42, therefore, expands the definition of those liable for worker's compensation benefits beyond the worker's actual employer. The "statutory employer" concept provides assurance that benefits will be available to an injured worker if his actual employer proves irresponsible and doesn't have worker's compensation insurance. It pressures general contractors to make sure the subcontractors on the project are insured. The concept is salutary as it increases the possibilities that any worker injured on a construction project will be able to tap into worker's compensation benefits.

Section 42 does not address tort liability. As stated by Justice Maughan in his dissenting opinion in Shupe v. Wasatch Electric Company, Inc., 546 P.2d 896, 899 (Utah 1976):

The Legislature in enacting Section 35-1-42 was not concerned with third-party tort liability; its purpose was to establish a general statutory definition of an employer, to assure that a general contractor would guarantee compensation for the employees of a subcontractor.

Section 62, on the other hand, allows tort claims by injured workers against third parties not in an actual employer-employee relationship with the injured worker. The language of Section 62, defining the parties against whom a

tort claim may be pursued, has changed over the years to effect the intent of the Legislature.

Before 1939, Section 62 allowed an injured worker to pursue tort claims against a negligent "third person." In 1939, the "third person" language was changed to allow tort claims against "another person not in the same employment" as the injured employee. This 1939 change in the language of Section 62 was designed to protect the injured worker's actual employer and co-employees from tort claims because the actual employer was liable to the injured worker for worker's compensation benefits.

After the 1939 amendments to Section 62, allowing tort claims against "another person not in the same employment" as the injured employee, something unforeseen and unintended by the Legislature happened. To determine who was "in the same employment" as the injured worker under Section 62 and thus immune from tort liability under Section 60, this Court began applying the "statutory employer" definition of Section 42. In other words, this Court applied the expansive definition of employer found in Section 42, used to define those liable for worker's compensation benefits, to determine who was in the same employment as the injured worker and immune from tort liability under Section 62.

The practical effect of these decisions was to insulate from tort liability everybody on the jobsite. As a practical matter under Section 42, everyone on a project had a common statutory employer, usually the general contractor. Therefore, all were "statutory co-employees" deemed to be "in the same employment" under Section 62 and unable to pursue tort claims. The exclusive remedy provision of Section 60 was applied to bar tort claims whether the injured worker was suing a contractor "upstream" or "downstream."

For the purposes of this Brief, "upstream" contractors are those contractors who would qualify as statutory employers of an injured worker because of the supervision and control exercised over the work of the injured worker's actual employer. "Downstream" contractors are other contractors on the project who do not exercise supervision or control over the injured worker's actual employer and who, consequently, could not be responsible for the injured worker's worker's compensation benefits.

Examples of the Utah Supreme Court decisions barring tort claims of injured workers against those not their actual employers, by applying the Section 42 "statutory employer" language, include: Gallegos v. Stringham, 21 Utah 2d 139, 442 P.2d 31 (1968)(tort claim of employee of general contractor

against excavation subcontractor barred; Smith v. Alfred Brown Co., 27 Utah 2d 155, 493 P.2d 994 (1972)(tort claim of employee of masonry subcontractor against general contractor barred); Peterson v. Fowler, 27 Utah 2d 159, 493 P.2d 997 (1972)(claim of employee of general contractor against ceiling tile subcontractor barred); Adamson v. Okland Construction Company, 29 Utah 2d 286, 508 P.2d 805 (1973)(tort claim of employee of electrical subcontractor against general contractor barred).

In 1975, the Utah Legislature amended Section 62 to clarify those subject to third-party tort liability. The Legislature was aware of the decisions of this Court applying the Section 42 employer definition to the "same employment" language of Section 62 and the generalized immunity that interpretation had created on the jobsite. The "same employment" language of Section 62 was, therefore, amended to read that a tort claim could be maintained by an injured worker against "a person other than an employer, officer, agent, or employee of said employer." The Legislature also added the following significant language to Section 62:

For the purposes of this section and notwithstanding the provisions of section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an

employee-employer relationship with the injured or deceased employee at the time of his injury or death. (Emphasis added.)

The language and legislative intent of these 1975 amendments are clear. The expansive definition of "statutory employer" in Section 42, used to determine liability for compensation benefits, is not to be used in determining who is or is not subject to tort liability under Section 62. The judicially-created interplay between Section 42 and Section 62 was expressly eliminated by the Legislature. The injured worker's tort claim was preserved against all those "not occupying an employer-employee relationship" with the injured employee.

The plaintiff contends that this 1975 amendment allows an injured worker to pursue tort claims against anyone on the jobsite other than his actual employer. This would include "upstream" contractors who may qualify as the injured worker's "statutory employer," as well as "downstream" contractors exercising no supervision or control over the injured worker.

The decisions of this Court interpreting the 1975 amendments to Section 62 have created some confusion as to the parties on the jobsite against whom an injured worker may pursue tort claims.

The first opportunity for this Court to address the 1975 amendments to Section 62 came in Shupe v. Wasatch Electric Co., 546 P.2d 896 (Utah 1976). In that case, the heirs of the deceased employee of a general contractor brought a wrongful death action against an electrical subcontractor. The accident causing the general contractor's employee's death happened before the 1975 amendments to Section 62 became effective. Applying the pre-1975 "same employment" language and following the judicial precedent of Adamson, Smith, Peterson and Gallegos, the trial court found that the general contractor's employee and the subcontractor were "in the same employment" and granted summary judgment in favor of the subcontractor based on the exclusive remedy provision of Section 60. On appeal, this Court addressed the effect of the 1975 amendments to Section 62.

Justice Tucker, noting that the Legislature was "undoubtedly aware of the decisions of this court construing the terms 'same employment'," stated that, "the amendment, if applicable, would leave the plaintiffs in court." Id. at 898. The summary judgment in favor of the subcontractor, like that granted in this case, would, therefore, have been reversed if the 1975 amendments to Section 62 had applied. The Court held, however, that the amendments had no retroactive application,

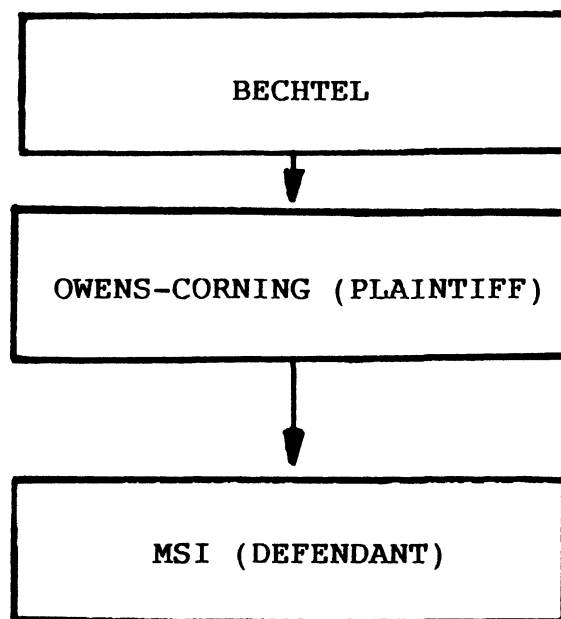
that the pre-1975 "same employment" language applied and, therefore, affirmed the trial court.

The plaintiff here contends that the Shupe decision controls this appeal. The 1975 amendment language does apply to this case and, under Shupe, an injured worker may pursue a claim against a subcontractor of his employer. MSI is a subcontractor of Owens-Corning, the plaintiff's actual employer. Under Shupe, the exclusive remedy provision of Section 60 does not bar the plaintiff's claim. Ken Riddle may, as a matter of law, pursue his claim against MSI and Mays.

In 1978, this Court decided Hinds v. Herm Hughes & Sons, Inc., 577 P.2d 561 (Utah 1978). The Hinds decision does not control this appeal, but needs to be addressed because it was raised in the trial court and because of the confusion it has created regarding third-party tort claims.

The relationship of the parties in Hinds is similar to the relationship of the parties to this appeal. The difference in the two cases is the position, in the contractor hierarchy, occupied by the injured worker. In this case, Bechtel was the general contractor at IPP. Owens-Corning, the plaintiff's actual employer, was an insulation subcontractor

who subcontracted with MSI, Mays's actual employer, for labor. The schematic of that relationship is as follows:



In Hinds, Sprout Waldron & Company was the general contractor. Herm Hughes & Sons ("Hughes") was the subcontractor to construct a warehouse for the general contractor. Hughes contracted with Mark Hayes Masonry ("Hayes") to construct the masonry walls in the warehouse. Hinds, an employee of Hayes, filed a tort claim when he was injured by the alleged negligence of an employee of Hughes.

The case on appeal would be the same as Hinds if Alan Mays, an employee of MSI, were pursuing a claim against the plaintiff, an employee of Owens-Corning. That's not the case

here. The Hinds decision should be limited to its facts and does not control this appeal.

The plaintiff contends that the 1975 amendments to Section 62 allow tort claims against anyone on the jobsite not the actual employer of the injured worker. This would include claims against a party qualifying as the injured worker's "statutory employer" under Section 42. This Court in Hinds, however, held that when considering "upstream" tort claims, the "statutory employer" definition of Section 42 is relevant in determining who is an employer and immune from tort liability under Section 62. By again injecting the Section 42 definition of "statutory employer" into the determination of those immune from tort claims under Section 62, the Court disregarded the language and intent of the Legislature in enacting the 1975 amendment to Section 62. Regarding "upstream" tort claims, the Hinds decision throws the law back to its pre-1975 status.

Hinds was improperly decided. The proper interpretation of the 1975 amendments to Section 62 is expressed by Justice Wilkins in his dissenting opinion in Hinds. He states:

The 1975 amendment of "employer, officer, agent or employee of such employer" was inserted to define those persons who then and thenceforward would be immune from third-party civil action and is a manifestation of legislative intent to

eliminate from immunity those persons who fell under the umbrella of statutory employer prior to the amendment. And, as further evidence of this intent, the Legislature added the paragraph which begins with "For purposes of this section and notwithstanding the provisions of section 35-1-42. . . ."

Because of these amendments, the only persons who now enjoy immunity from civil action should be the direct and actual employer (and, of course, his officers, agents and employees) of the injured workman.

Id. at 566.

This Court should overrule the Hinds decision and hold that third-party tort claims may proceed against anyone not the actual employer of the injured worker, even those qualifying as the injured worker's statutory employer. Such action is not, however, required to reverse the trial court's granting of the defendant's Motion for Summary Judgment in this case.

The Hinds case involved an "upstream" claim against a party who may have qualified as the injured worker's "statutory employer." That is not the case on appeal here. MSI exercised no supervision or control over the plaintiff and, as such, could not qualify as the plaintiff's "statutory employer." MSI could not, therefore, be responsible to the plaintiff for

worker's compensation benefits and should not benefit from the exclusive remedy provision of Section 60.

To affirm the trial court in this case would render the 1975 amendment to Section 62 meaningless. As stated in Hinds, the 1975 amendment "enables an employee to sue a tortfeasor, not his employer (or the employer's agent, etc.), even though the injured person and the tortfeasor may be engaged in the same employment." Id. at 562. MSI argues that it is immune from tort liability because the plaintiff and Mays, an employee of MSI, are statutory co-employees under Section 42. Under the expansive language of Section 42, all workers on the jobsite are statutory employees of the general contractor. Under those circumstances, everyone on the jobsite would be immune from tort liability. The 1975 amendments to Section 62, specifically allowing tort claims against non-employers, would be meaningless. If the 1975 amendments are to have any purpose, the plaintiff must be allowed to pursue his claim against MSI, a subcontractor of the plaintiff's actual employer.

Barring the plaintiff's claim does not comport with the policies underlying the Workers' Compensation Act. An employer is granted immunity from suit because, in being subject to providing worker's compensation benefits, the

employer assures qualifying workers a recovery. Subcontractors like MSI, with no supervision or control over the plaintiff, have no liability for compensation benefits to the plaintiff and, therefore, no policy for extending immunity exists. The defendants should not be allowed to benefit from the exclusive remedy provision of Section 60. If such benefit is allowed, the defendants have neither the potential obligation to pay worker's compensation benefits to the plaintiff, nor do they have any exposure to the plaintiff for tort liability. That type of protection was never contemplated by the Legislature and should not be upheld by this Court.

B. Assuming That the Issue of Owens-Corning's Control Over MSI is Relevant to the Determination of This Appeal, Genuine Issues of Fact Exist Which Require Remand for Further Proceedings.

MSI's Motion for Summary Judgment focused on the supervision and control exercised by Owens-Corning over MSI. The plaintiff argues that, for the purposes of this appeal, the control, if any, exercised by Owens-Corning over MSI is irrelevant. MSI, as a "downstream" subcontractor exercising no control over the plaintiff, is not entitled to the exclusive remedy defense. MSI can escape tort liability in this case only by showing that it was the actual employer or, under Hinds, the statutory employer (although the plaintiff disagrees with the Hinds majority), of Riddle. Clearly, MSI was not the

actual employer of Riddle. Owens-Corning was. Whether MSI was the "statutory employer" of the plaintiff depends on the supervision and control MSI exercised over Riddle, not vice versa. As a subcontractor of Owens-Corning, MSI had no right of control over Riddle. MSI cannot qualify as the plaintiff's statutory employer and cannot, therefore, benefit from the exclusive remedy provision of Section 60.

If this Court determines that the issue of Owens-Corning's control over MSI is somehow relevant in deciding the issues on appeal, genuine issues of fact were presented to the trial court regarding that control which require the reversal of the trial court ruling and the remand of this case for further proceedings.

The question of control is a question of fact for the jury. Moloso v. State, 644 P.2d 205 (Alaska 1982). It is the right to control rather than the actual exercise of control that determines the relationship between the parties. Pinter, supra, at 309. The right to control is usually found in the language of a written contract between the parties. No such written contract exists between Owens-Corning and MSI and, therefore, the right to control must be determined by other factors.

Many factors have been applied in determining the right to control. Among those factors are actual supervision of the worker, the extent of the supervision, the method of payment, the furnishing of equipment for the worker, and the right to terminate the worker. Bennett v. Industrial Commission, 726 P.2d 427 (Utah 1986).

Ken Riddle testified at his deposition that: (1) he did not supervise the work of Alan Mays (p.19); (2) Maynard Crossland, a part owner of MSI, supervised and instructed Mays (p.19); (3) Riddle had no authority to fire Mays without the approval of Maynard Crossland (p.94); and (4) MSI, not Owens-Corning, paid Mays from MSI's payroll (p.95). It only takes one sworn statement under oath to dispose of the averments on the other side of the controversy and create an issue of fact. W.W. and W.B. Gardner, Inc. v. Mann, 680 P.2d 23, 24 (Utah 1984). The sworn deposition testimony of the plaintiff is sufficient to create issues of fact regarding Owens-Corning's right to control MSI and summary judgment was, therefore, inappropriate.

CONCLUSION

The language and intent of the 1975 amendments to Section 62 allow the plaintiff to pursue his claim against the defendants as a matter of law. That result is governed by this Court's decision in Shupe. While the plaintiff asserts that Hinds was wrongly decided and should be overruled, Hinds does not govern this appeal. MSI could not qualify as the plaintiff's "statutory employer" and, regardless of the Hinds decision, the plaintiff's claim against MSI is specifically allowed under Shupe and the language of Section 62. This Court should reverse the trial court ruling granting the defendants' Motion for Summary Judgment and denying the plaintiff's Cross-Motion for Summary Judgment, and remand this case for trial on the plaintiff's negligence claim against the defendants.

Owens-Corning's control over MSI is irrelevant to this appeal. Under Hinds, it is MSI's supervision and control over Owens-Corning and the plaintiff, which was none, that would be relevant to MSI's immunity. If this Court determines, however, that Owens-Corning's supervision and control over MSI is relevant, genuine issues of fact were presented to the trial court requiring reversal of the

granting of the defendant's Motion for Summary Judgment and
remand for further proceedings.

DATED this 26th day of October, 1988.

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GORDON K. JENSEN

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPELLANT'S BRIEF (Riddle v. Mays, et al.) was mailed, U.S. Mail, postage prepaid, this 26th day of October, 1988, to the following:

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/ek

ADDENDUM

APPENDIX A

APPENDIX A-1

1-42. Employers enumerated and defined - Regularly employed - Independent contractors.

The following constitute employers subject to the provisions of this title:

(1) The state, and each county, city, town, and school district in the state.

(2)(a) Every person, firm, and 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, except:

(i) agricultural employers: (A) whose employees are all members of the immediate family of the employer, which employer has a proprietary interest in the farm, the inclusion of any immediate family member under the provisions of this title being at the option of the employer; or (B) who employ five

fewer persons other than immediate family members for 40 hours or more per week per employee for 13 consecutive weeks during any part of the preceding 12 months; and

(ii) domestic employers who do not employ one employee or more than one employee at least 40 hours per week.

(b) Employers of agricultural laborers and domestic servants have the right to come under the terms of this title by complying with the provisions of this title and the rules of the commission.

(3) As used in this section:

(a) "Regularly" includes 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.

(b) 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 this work is a part or process in the trade or business of the employer, the contractor, all persons employed by him, all subcontractors under him, and all persons employed by any of these subcontractors, are considered employees of the original employer.

(c) Any person, firm, or corporation engaged in the performance of work as an independent contractor is considered an employer.

(d) "Independent contractor" means 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.

1986

35-1-60. 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 the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities 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 or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, 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. Nothing in this section, however, shall prevent an employee (or his dependents) from filing a claim with the industrial commission of Utah for compensation in those cases within the provisions of the Utah Occupational Disease Disability Act, as amended.

History: L. 1917, ch. 100, § 76; C.L. 1917, § 3132; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-57; L. 1949, ch. 52, § 1.

Cross-References. — Employment of children, § 34-23-1 et seq

Utah Occupational Disease Disability Law, § 35-2-1 et seq

Meaning of "this act". — See the note under the same catchline following § 35-1-46

35-1-62. Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of said employer — Rights of employer or insurance carrier in cause of action — Maintenance of action — Notice of intention to proceed against third party — Right to maintain action not involving employee-employer relationship — Disbursement of proceeds of recovery.

When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said employer, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission. Before proceeding against the third party, the injured employee, or, in case of death, his heirs, shall give written notice of such intention to the carrier or other person obligated for the compensation payments, in order to give such person a reasonable opportunity to enter an appearance in the proceeding.

For the purposes of this section and notwithstanding the provisions of Section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. Any such fee chargeable to the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in Subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

History: L. 1917, ch. 100, § 72; C.L. 1917, L. 1945, ch. 65, § 1; 1971, ch. 76, § 3; 1973, § 3133; L. 1921, ch. 100, § 1; R.S. 1933, ch. 67, § 7; 1975, ch. 101, § 3.
42-1-58; L. 1939, ch. 51, § 1; C. 1943, 42-1-58;

APPENDIX B

APPENDIX B

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF IRON, STATE OF UTAH

HON. J. PHILIP EVES, Judge

KENNETH RIDDLE,

Plaintiff,

vs.

Civil No. 86-268

ALAN MAYS and MOUNTAIN
STATES INSULATION CORP., a
Utah corporation,

Defendants.

REPORTER'S HEARING TRANSCRIPT

Tuesday, April 19, 1988

APPEARANCES OF COUNSEL:

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Reported By: PAUL G. MCMULLIN, CSR, RDR

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OFFICIAL COURT REPORTER

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1 PAROWAN, UTAH; TUESDAY, APRIL 19, 1988

2 -oOo-

3
4 THE COURT: 86-268, Riddle versus Mays and Mountain
5 States Insulation.

6 All right. Counsel, will you identify
7 yourselves.

8 MR. HAYES: Your Honor, Nelson Hayes appearing for
9 the defendants, Mays and Mountain States Insulation.

10 MR. JENSEN: Gordon Jensen appearing for Kenneth
11 Riddle, the plaintiff.

12 MR. HAYES: Your Honor, it's my motion to dismiss
13 the case on the basis of workmen's compensation being an
14 exclusive remedy. I think in fairness with what has been
15 offered, I'm not going to spend a lot of time. I think
16 we've briefed the subject.

17 I think it's clear that there is -- one thing
18 that is clear is that there are -- there is no real
19 clarity in that area of the law.

20 THE COURT: I love arguments like that.

21 MR. HAYES: Well, Judge Murphy -- they've attached
22 a copy of Judge Murphy's decision. And if you read it,
23 you find that he has some real problems in -- with the
24 case law telling him he should go one way. And he goes a
25 different way based on what he perceives is a legislative

1 intent.

2 The direction I'm going is I think our case
3 is distinguishable between that case and the other cases
4 that plaintiffs have cited and falls squarely within the
5 provisions of the statute. And just let me outline what
6 the relationships are.

7 Owens-Corning is a contractor at Bechtel, and
8 they're involved in insulation projects there. They hire
9 Mr. Riddle, the plaintiff in the case, and he comes out
10 from Missouri. And his responsibilities are erecting some
11 scaffolding and to build a warehouse for Owens-Corning.

12 THE COURT: Where was he building that? At the IPP
13 project?

14 MR. HAYES: At the IPP project. I don't know why
15 the case is here in this court. But irrespective --

16 THE COURT: I'm not sure either.

17 MR. HAYES: But irrespective of why, it's here.

18 After he's out here for a short period of
19 time, he contacts his nephew, Mr. Mays, my client. He
20 contacts his nephew and tells him to come out; that he's
21 got employment for him here with Owens-Corning
22 Corporation.

23 Mr. Mays comes out and spends approximately
24 three weeks working for Owens-Corning on the same work
25 that Mr. Riddle was doing, the erecting of scaffolding and

1 building the warehouse. He's more of a "who me?" or a "go
2 get this" type of a person as opposed to a skilled
3 laborer.

4 THE COURT: But was actually being paid by
5 Owens-Corning and a regularly paid employee?

6 MR. HAYES: Yes. And at some point, unbeknownst to
7 Mr. Riddle, a contract developed by Owens-Corning -- or
8 he's not even sure there's a contract -- between
9 Owens-Corning and Mountain States Insulation.

10 And he says in his deposition -- he says, "I
11 don't know that there was a contract."

12 I asked him, "Well, let's assume there was a
13 contract, for a minute. When did they start doing the
14 work?"

15 He answered, "I'm not sure."

16 THE COURT: "They" being who?

17 MR. HAYES: Mountain States Insulation.

18 THE COURT: All right.

19 MR. HAYES: "Stacey Eskelin and Maynard Crossland
20 drove to the warehouse. He informed me who he was, and
21 that they were going to be performing all the work on the
22 project for Owens-Corning Fiberglass."

23 The testimony was that at that point,
24 Mr. Mays, my client, became an employee of Mountain States
25 Insulation, doing the exact same work that he had been

1 doing moments before for Owens-Corning Fiberglass.

2 They proceed with Mr. Riddle not performing
3 any of the physical functions or the physical labor -- the
4 plaintiff -- but merely as a supervisor. And he testified
5 as part of our memorandum, that his responsibilities were
6 supervision for not only the construction but also for
7 safety of what was taking place; that he had
8 responsibilities of being on the site every day and making
9 sure that what was being done wasn't just for -- wasn't
10 just for what the design was, but to make sure it was done
11 properly. And he had authority to make them redo it if it
12 wasn't done properly.

13 The reason this is all material is that to
14 fit in with the provisions of the statute, it's necessary
15 that there be supervision or control over the contractor's
16 work. And we think that is quite clear right out of the
17 mouth of Mr. Riddle himself. We haven't had to go to
18 Mr. Mays or anyone else. We've gone right to Mr. Riddle.
19 In his deposition, he said, "Yes. I supervised and
20 controlled what was done."

21 THE COURT: By whom?

22 MR. HAYES: By Mountain States Insulation. And
23 Mr. Mays, in particular, but other Mountain States
24 Insulation employees. They were doing the same thing that
25 he had been doing previously, erecting this scaffolding

1 and building this warehouse.

2 THE COURT: Who was Mountain States Insulation
3 working for? Were they employed by Corning?

4 MR. HAYES: Corning, right. They were a
5 subcontractor to Owens-Corning.

6 THE COURT: All right.

7 MR. HAYES: And they then took over the employment
8 or the employer responsibilities of Mr. Mays.

9 THE COURT: All right.

10 MR. HAYES: We have the one, then -- the one key.
11 And there's a whole bunch of provisions, but I'm not going
12 to take the time to read that. I think we've laid them
13 out in our memorandum where he talks about his supervision
14 of that work and to the extent of being responsible for
15 the safety that was taking place and the actual
16 construction.

17 The second part has to do with that the work
18 done by the contractor has to be part or process in the
19 trade or business of the employer. This is a classic case
20 to the part that I just read. One day he's doing it, and
21 the next day some people arrive, and they're now doing the
22 exact same thing that he had been doing previously, and
23 now his function is just to supervise what they're doing.
24 He's an expert in this area and goes around the country
25 and erects this scaffolding for this insulation purpose.

1 So we clearly fall within the category of
2 35-1-42, which establishes for workmen's compensation, the
3 "statutory employer."

4 Now, our argument is not that Mountain States
5 Insulation was an employer of Mr. Riddle. That's not our
6 argument. Our argument is that Owens-Corning was the
7 employer of not only Mountain States Insulation but also
8 Mr. Mays.

9 Clearly if Mr. Mays had been the one that was
10 injured as opposed to Mr. Riddle, he would have been able
11 to look to Owens-Corning should have Mountain States
12 Insulation not had appropriate or accessible workmen's
13 compensation.

14 Clearly Mr. Mays, under the definition of the
15 statute, is an employee of Owens-Corning. By the statute,
16 35-1-60, it also provides that corporations,
17 subcontractors, contractors and their employees can be
18 employees of a contractor for the purposes of the act.

19 So under the provisions of the statute,
20 Mountain States Insulation is also an employee of
21 Owens-Corning for the purposes of workmen's comp.

22 Even if we don't find them -- or even if we
23 don't -- or if the Court shouldn't find that Mountain
24 States Insulation is an employee, clearly Mays is. And
25 the only way they can get to Mountain States Insulation in

1 the third-party claim is to claim imputed liability
2 through the process of respondeat superior. If they can't
3 get to Mr. Mays because he's an employee or a co-employee
4 with Mr. Riddle, then they certainly can't get to Mountain
5 States Insulation because they have to act through their
6 employees.

7 Now they raise the argument in this case that
8 the statute was amended, and that 35-1-62 eliminates this
9 kind of claim. The statute reads as follows: "When an
10 injury or death for which compensation is payable under
11 this title shall have been caused by the wrongful act or
12 neglect of a person other than an employer, officer,
13 agent" -- and more critical -- "or employee of said
14 employer."

15 It's clearly carved out that the act has to
16 be by someone other than their employer. Of course
17 Mr. Riddle can't sue Owens-Corning. He can't sue their
18 officers or agents, or he can't sue an employee of said
19 employer.

20 Mr. Mays, being an employee of said employer,
21 is thus immune from suit. If he's immune from suit,
22 there's no circumventing that to go around him and sue
23 Mountain States Insulation, claiming that "although we
24 can't sue the co-employee, we can sue the co-employee's
25 employer," so to speak.

1 The reason that that -- this reasoning is
2 proper is the cases cited by plaintiffs have to do with
3 the idea that everyone on a project like IPP would thus be
4 immune from suit if they were -- if it would follow our
5 rationale. Or that was their argument. If you follow my
6 rationale, then everyone is immune from suit.

7 That doesn't follow because in these
8 contexts, you have this fellow servant or fellow employee
9 context that has to fit into it where that the work that
10 is being done places them in such close proximity, that
11 there is risk of negligent harm.

12 In this case, we have exactly that. We have
13 Mr. Riddle supervising Mr. Mays and the other employees.
14 They're in close proximity; they're doing the same work.
15 It's not like someone else on the other side of the plant
16 performing some other function on the IPP project under
17 the umbrella of Bechtel, the main contractor. These
18 provisions are carved out specifically so that those
19 people working closely together and under each other's
20 supervision have the protection of workmen's
21 compensation.

22 Now, there are some suggestions in
23 Plaintiff's brief -- and I think I should respond to it
24 now -- having to do with this concept of up the ladder or
25 down the ladder -- that there's some distinction there.

1 And I don't think that's a legitimate distinction.

2 And the reason I don't think it's a
3 legitimate distinction is if, in fact, Mr. Mays had been
4 the one injured in this case, he would clearly be barred
5 from suing Mr. Riddle. There's no doubt about it. He
6 would be barred because Mr. Riddle was in that supervisory
7 position over him, and he was doing the exact same work
8 that Mr. Riddle had been doing previously. To suggest
9 that Mr. Mays can't sue and Mr. Riddle can sue begs the
10 whole concept of fairness.

11 The Supreme Court, in the case of Smith
12 versus Alfred Brown, made an interesting statement
13 regarding that. They said: "It would be quite
14 inconsistent with our ideas of even-handed justice to
15 apply a liberal interpretation of the act in order to
16 assure coverage to employees, but if it appears that there
17 is other coverage, to then reverse the policy and apply a
18 restricted view to exclude coverage in order to allow an
19 employee to sue an employer. We think the ends of justice
20 will best be served and the beneficial purposes of the act
21 will be best accomplished for employees and employers
22 alike, if the statute is applied in a uniform manner,
23 whoever's rights may be at stake."

24 I think that's the whole concept. To allow
25 Mr. Riddle to sue Mr. Mays and Mountain States Insulation

1 and not let the reverse happen on the basis of some rigid
2 concept of going up and down the ladder, I think is
3 unfair.

4 Justice Murphy -- and I'm not suggesting, and
5 I don't believe Plaintiff's counsel is suggesting that the
6 decision of someone in the Third District has any
7 precedential value. But even Judge Murphy recognized that
8 this idea of up and down the ladder was totally
9 inconsistent with the findings in Hinds versus Herm
10 Hughes.

11 In that case, they allowed to happen just
12 exactly what we're asking the Court to allow to happen in
13 this case. And the only reason that he deviated or went
14 away from it is that he felt like it was inconsistent with
15 legislative intent.

16 We don't think so. We don't think that the
17 legislature intended an unfair result. We think this is
18 the classic case where Mr. Mays is a co-employee with
19 Mr. Riddle, and that he should just take and has received
20 workmen's compensation benefits for his injury. He should
21 take those and be barred from third-party action.

22 Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. JENSEN: Gordon Jensen, representing the
25 plaintiff, Your Honor.

1 THE COURT: Yes.

2 MR. JENSEN: I've tried to explain in my memo what
3 I understand this whole concept to be. And I think to
4 understand exactly where we're going, it's important to
5 know the different concepts that are being presented in
6 35-1-42, which is -- which defines parties who are liable
7 to pay workmen's compensation benefits, and 35-1-62, which
8 defines the parties who are subject to tort liability for
9 accidents that happen on a job site.

10 Section 42, in defining those people who are
11 subject to pay out workmen's comp benefits, is very, very
12 broad and should be. Because the purpose of that
13 particular statute is to protect anybody on the job site
14 from irresponsible employers who don't have worker's
15 compensation insurance. They can then look up the ladder
16 and tag onto any other above them contractor or general
17 contractor whose work is supervised by that contractor or
18 who exercises the control and is part and parcel of that
19 work that we've talked about that Mr. Hayes has mentioned.

20 The courts have held for a long time that 42
21 should be read very broadly because it's a remedial
22 statute. It is meant to provide relief for people who get
23 hurt on the job.

24 Section 62, on the other hand, defines those
25 people who are subject to tort liability from accidents

1 that occur on a project. And the history of that statute
2 is really interesting. It shows kind of a mess that we're
3 in right now with regard to what the law has done and what
4 the Supreme Court has decided in cases like this.

5 Before 1939, it simply said that you can
6 pursue a claim against any third party who causes your
7 injury. In 19 --

8 THE COURT: If it will help you, I've read that --
9 I've read that portion of your brief, and I understand the
10 development that you've traced there.

11 MR. JENSEN: Thank you. Let me jump, then, to what
12 has happened kind of recently that's kind of put the thing
13 into kind of a problem.

14 After 1975, it's the plaintiff's position
15 that the amendments that were made in Section 62 were
16 designed to do away with any ambiguity of jumping back and
17 forth between Section 42 and Section 62. And that the
18 amendment to Section 62 specifically said: "For the
19 purposes of this section, and notwithstanding the
20 provisions of Section 35-1-42, the injured employee may
21 also maintain an action for damages against
22 subcontractors, general contractors, independent
23 contractors not occupying an employer/employee
24 relationship with the injured or deceased employee."

25 It's the plaintiff's position that that

1 amendment allowed a claim against anyone on the project;
2 not the injured employee's actual employer. And that
3 included a claim against a statutory employer up the
4 ladder. He could pursue the claim.

5 What happened unfortunately in the Shupe
6 decision -- which I think is an important decision, which
7 is the first decision the Supreme Court decided after the
8 1975 amendment -- it presented a fact situation just like
9 the one we have here. A general contractor's employee was
10 hurt by a subcontractor's employee, and they pursued the
11 claim against the subcontractor.

12 The trial court, relying on all of the
13 previous opinions which had read the language "same
14 employment" as basically encompassing everybody on the job
15 site, granted the motion for summary judgment and said,
16 "You can't pursue your claim against the subcontractor."
17 They appealed that to the Supreme Court.

18 In the interim, from the time of the accident
19 until the appeal, this statute had been amended. The
20 Court said, "In that case, if we're governed by the
21 amended language of Section 62, we've got to reverse this
22 summary judgment because it specifically says you can
23 pursue this claim against the subcontractor." And it
24 changed that "same employment" language that kind of made
25 everybody on the project in the same employment immune

1 from tort liability.

2 The Court, however, held that the pre-1975
3 "same employment" language governed; that the amendment
4 was not retroactive, and they affirmed the motion for
5 summary judgment.

6 It's our position that the reasoning of the
7 Supreme Court now -- certainly the 1975 amendment
8 language -- applies to this case. And any --

9 THE COURT: Have there been any later cases decided
10 on that point?

11 MR. JENSEN: On the particular down the ladder, a
12 general suing a subcontractor situation, I have not found
13 a later decision.

14 The only decision that's been decided that we
15 have found is the Hinds versus Herm Hughes decision, which
16 is an unfortunate case because it throws everything --

17 THE COURT: Because it doesn't go your way?

18 MR. JENSEN: No. I think it -- I don't think it
19 damages our position here. And Mr. Hayes stated that the
20 Hinds --

21 THE COURT: You think it's factually
22 distinguishable?

23 MR. JENSEN: Yes. Certainly. The big distinction
24 is in Hinds versus Herm Hughes, it was a subcontractor
25 pursuing a claim against an up-the-ladder contractor -- a

1 general.

2 In that case, the Court said, "We think
3 whether you can pursue your claim up the ladder depends on
4 whether or not this contractor is your statutory
5 employer." Then they threw it back to the definition of
6 42 and said, "If he's a statutory employer, then we're
7 going to say that your claim is barred," and they sent it
8 back for a factual determination on whether or not that
9 general contractor was the injured party's statutory
10 employer.

11 I don't think Hinds versus Herm Hughes,
12 while -- if Mays were pursuing a claim against
13 Owens-Corning, Hinds versus Herm Hughes would be
14 precedent, I believe. He is suing up the ladder, and he
15 is making a claim.

16 The Supreme Court has held that when making a
17 claim like that, whether that person is a statutory
18 employer is important, and we're going to determine that.

19 So if it were Ken Riddle pursuing a claim
20 against Bechtel, or if it were Alan Mays pursuing a claim
21 against Owens-Corning, I would be in trouble. Because
22 Hinds versus Herm Hughes says, "If you're a statutory
23 employer under those circumstances, we think that is
24 important."

25 This is a case that was not -- the case that

1 we're dealing with here was not addressed in Hinds versus
2 Herm Hughes. We're going down the ladder. And I want to
3 tell you, Your Honor, why I believe that is critical in
4 this particular case.

5 I think the Shupe reasoning that you can
6 pursue a claim against your employer's subcontractor has
7 not been changed by Hinds versus Herm Hughes. And it
8 still governs, and it governs this particular case.

9 Mr. Hayes said that Hinds versus Herm Hughes
10 was this case. It simply isn't this case at all. We're
11 going up in Hinds versus Herm Hughes, and we're going down
12 in this case. I want to explain why I think that is very
13 important.

14 THE COURT: Why do you think we're going down?

15 MR. JENSEN: Because Mountain States Insulation is
16 a subcontractor of Owens-Corning. I don't believe there's
17 an allegation -- and Mr. Hayes can correct me if I'm
18 wrong -- that Alan Mays is the actual employee -- I mean
19 there were actual contractive employment payments running
20 back and forth with Owens-Corning. He was at one time an
21 Owens-Corning employee. That employment terminated after
22 a three-week period or something, and then he went on and
23 became an employee of Mountain States Insulation. He was
24 not paid by Owens-Corning. He was not on Owens-Corning's
25 payroll at all. He was a Mountain States Insulation

1 employee.

2 THE COURT: But Mountain States was in a sense --
3 in the statutory sense, the employee of Owens-Corning,
4 wasn't it?

5 MR. JENSEN: I believe, Your Honor, that
6 Owens-Corning -- and I don't disagree that Owens-Corning
7 would probably qualify as Mountain States' statutory
8 employer. And that would be important if Mays were
9 pursuing a claim against Owens-Corning.

10 THE COURT: Well, doesn't that make -- speaking
11 statutorily, doesn't that make Mays and Riddle
12 co-employees of Owens-Corning?

13 MR. JENSEN: It does for purposes of worker's
14 compensation benefits if Mr. Mays were pursuing workmen's
15 comp benefits. Because if Mountain States Insulation was
16 insolvent or didn't have workmen's comp benefits, then he
17 could under Section 42, because of the remedial nature of
18 that statute, go as far up the ladder as he could go.

19 THE COURT: Then what do we do about the first line
20 of this 35-1-62 that says you can't pursue this kind of
21 action against a co-employee?

22 MR. JENSEN: What it says here -- are you reading
23 62 or --

24 THE COURT: Yes. 62. "When an injury or death for
25 which compensation is payable under this title shall have

1 been caused by the wrongful act or neglect of a person
2 other than an employer, officer, agent, or employee of
3 said employer."

4 MR. JENSEN: We believe that what they are talking
5 about, particularly in light of 35-1-62, that says: "For
6 the purposes of this section" -- if you'll read further
7 down there.

8 THE COURT: Yeah. That's the next page.

9 MR. JENSEN: For purposes of pursuing that
10 third-party claim and notwithstanding the provisions of
11 35-1-42 -- meaning notwithstanding that definition of
12 "employer" -- you can pursue a claim against anybody who
13 is not in a direct employee/employer relationship with the
14 injured employee.

15 Because our position, Your Honor, is that
16 those two statutes must be separated. And that's why the
17 Hinds versus Herm Hughes decision -- that was the whole
18 purpose of the 1975 amendment was to put an end to this
19 kind of argument that says, "You're a statutory employee
20 for this purpose, but you're not a statutory employer or
21 statutory employer does or doesn't apply on a third-party
22 claim. Let's put an end to that."

23 In the 1975 amendment language,
24 notwithstanding the definition of "statutory employer," an
25 injured employee can pursue a claim against anybody not in

1 a direct employer/employee relationship with that injured
2 employee.

3 And then in the Hinds versus Herm Hughes
4 decision, as far as suing somebody up the ladder --

5 THE COURT: Let me just stop you right there. What
6 you're telling me is, then, if you and I work for the same
7 boss, and I injure you, you can sue me?

8 MR. JENSEN: Absolutely not.

9 THE COURT: Why not?

10 MR. JENSEN: Because you and I are co-employees of
11 the same actual employer.

12 THE COURT: But we're not in an employee/employer
13 relationship. But I'm in an employee/employer
14 relationship with this --

15 MR. JENSEN: I agree that co-employees of the same
16 employer cannot pursue claims against each other.

17 THE COURT: And what I'm saying is what is the
18 difference between that situation and the Riddle/Mountain
19 States Insulation situation where Mays is actually just an
20 agent of the subcontractor? He's an employee of the
21 subcontractor?

22 MR. JENSEN: Because Alan Mays is not in an
23 employer/employee relationship -- actual employer/employee
24 relationship with Owens-Corning.

25 THE COURT: Okay.

1 MR. JENSEN: He may be in a statutory employer
2 relationship, but is not in an actual employer/employee
3 relationship. And this is -- it kind of becomes important
4 when you think about what can happen and the fear.

5 THE COURT: Where is the definition of
6 employer/employee relationship as it's used in 62?

7 MR. JENSEN: It is our position and the legislative
8 intent -- if you'll read that memo -- that the legislative
9 intent of that employer/employee relationship is actually
10 contractual. I'm your employee, and I am on your payroll.

11 THE COURT: What do you cite for that proposition?

12 MR. JENSEN: The legislative history of that
13 statute.

14 THE COURT: Read it to me again. I've read the
15 memo.

16 MR. JENSEN: "This language 'not in the same
17 employment'" -- this is when he was talking about doing
18 away with this language. And this is, Your Honor, Paul
19 Kunz, an AFL/CIO representative.

20 "This language 'not in the same employment'
21 has resulted" --

22 THE COURT: That doesn't sound like legislative
23 intent. That sounds like some labor organizer's
24 interpretation.

25 MR. JENSEN: What he was doing -- they were asking

1 for the definition of what the intent of this statute
2 was -- what the purpose was. And I suppose -- I don't
3 know who sponsored the change, but this is when he came
4 and said --

5 THE COURT: I remember reading his statement, but
6 you can go ahead.

7 MR. JENSEN: "The object of the change is a matter
8 of clarification so that the injured man will know that of
9 course he has no right of action against his own
10 employer. But when a stranger comes on the job, whether
11 he is a subcontractor, or whether it be a stranger of any
12 kind, that stranger is subject to the same rules of safety
13 that any other stranger would be."

14 Your Honor, it becomes kind of clear when you
15 think of -- now, Mr. Hayes mentioned -- it just doesn't
16 seem fair, this up and down the ladder thing.

17 It supports fairness to allow this claim to
18 go forward for this reason. Mr. Riddle could never
19 recover worker's compensation benefits from Mountain
20 States Insulation. They exercised no supervisory capacity
21 or control over Ken Riddle. And that is the definition of
22 a statutory employer for worker's compensation purposes.
23 They would never have to pay worker's comp benefits to Ken
24 Riddle.

25 THE COURT: But he can get them from Owens-Corning.

1 MR. JENSEN: He could get them from his own
2 employer. What they're asking now is that "As far as Ken
3 Riddle is concerned, we cannot be responsible under the
4 statute for worker's compensation benefits, and now we're
5 telling you that we cannot be responsible for tort
6 liability for Ken Riddle either."

7 They have no obligation to pay benefits; they
8 have no tort liability. Certainly that kind of protection
9 was never contemplated by the statute.

10 The whole purpose of the exclusive remedy
11 provision is that when you have an employer who is subject
12 to worker's compensation benefit payments, that that ought
13 to be -- or someone who qualifies as that -- they ought to
14 be immune from tort liability. Up the ladder people like
15 Owens-Corning; like Bechtel are responsible for worker's
16 compensation benefits; therefore, they should be entitled
17 to this immunity.

18 Were Alan Mays pursuing a claim against
19 Owens-Corning, they would be subject to pay him worker's
20 compensation benefits, and therefore, that immunity ought
21 to apply.

22 There is no way that Mountain States would
23 ever be subject to pay worker's compensation benefits to
24 Ken Riddle. And now they're not going to pay that, and
25 now they say we also don't have any tort immunity.

1 THE COURT: But if we go back to my previous
2 statement, though, if you and I were working for the same
3 boss, and I injure you, I don't pay worker's compensation
4 either, but I enjoy the protections. What is the
5 difference?

6 MR. JENSEN: The difference is if I am injured by
7 his employer or by someone down the ladder, it's the
8 purpose of the benefit -- what is the equity or the
9 fairness in providing them the benefit of tort immunity
10 when I may have workmen's comp benefits from my own
11 employer?

12 THE COURT: And what is the -- I guess the problem
13 I'm having is distinguishing between me and you being
14 employed for the same person and Mountain States and
15 Riddle being employed for the same person. It seems to me
16 it's the same case.

17 MR. JENSEN: Under "statutory employer," Your
18 Honor -- and I think the -- this is the argument that has
19 created so much confusion -- I cannot -- I mean Mays
20 may -- Mays and I -- if I am Ken Riddle, under that broad
21 Section 42 definition of "statutory employer," we may be
22 able to claim compensation benefits from Owens-Corning --
23 both of us.

24 THE COURT: I understand that. I understand that.
25 But you made the argument that there was some inequity in

1 the fact that Riddle couldn't get employment compensation
2 benefits from Mountain States. I don't see that as
3 anything inequitable. It's the same situation. If you
4 and I are employed for the same boss, I injure you, you
5 have to get your money from the boss, not from me.

6 MR. JENSEN: But if I am injured by an employee of
7 Mountain States -- for example, if I'm injured by you, and
8 you are an employee with Owens-Corning -- because I can
9 collect workmen's comp benefits from Owens-Corning, I
10 can't pursue a claim against you to recover for my
11 injuries. If I'm injured by a Mountain States employee, I
12 can't recover workmen's comp benefits from them, and the
13 exclusive remedy applies to my employer, but I ought to be
14 able to pursue a tort claim against that negligent
15 employee of Mountain States. The exclusive remedy
16 provision shouldn't bar that because they don't have to
17 provide benefits.

18 It's our position that the whole "statutory
19 employer" question and the issue of Owens-Corning and Ken
20 Riddle's control over Alan Mays and Mountain States is
21 only applicable were Alan Mays pursuing a claim against
22 Owens-Corning. Then the question of whether his claim
23 would be barred as an up-the-ladder statutory employer
24 would be relevant.

25 THE COURT: All right. I think I understand your

1 position. I wish I knew the answer.

2 MR. HAYES: Could I just point a couple things
3 out?

4 THE COURT: Are you finished, Mr. Jensen?

5 MR. JENSEN: I just -- I guess I just want to say
6 that it is kind of frustrating because of some of the
7 questions that have been -- we're kind of in the same
8 dilemma, I think, that Judge Murphy was in in his
9 decision.

10 He said that "I understand what I think the
11 '75 language was supposed to do, and it was to preserve
12 all claims." But now the Supreme Court has said that this
13 issue of "statutory employer" is relevant in determining a
14 claim -- it is the plaintiff's position only if you're
15 pursuing a claim up the ladder -- and that is why he
16 denied that motion.

17 He said: "To grant this motion" -- "to grant
18 this motion, completely obliterates anything that the 1975
19 amendment was supposed to do."

20 There is not a situation where you could
21 pursue a third-party claim on a job site. There's not a
22 situation. The whole language of Section 62 becomes void
23 because you cannot pursue a claim. Because everybody
24 starting from the lowest level subcontractor all the way
25 to Bechtel -- everybody technically is a statutory

1 co-employee of that general contractor. All the way down
2 the line there is immunity. And that was what the '75
3 amendments were supposed to remedy, and now we're back in
4 that situation again. If we grant this motion, we're back
5 in a situation where nobody can pursue a third-party tort
6 claim against anybody on the job site. Certainly not the
7 intent of the legislature.

8 THE COURT: Well, I don't quite view it that way.
9 I don't think to grant the motion in this case would
10 dictate that result. I mean I don't think that granting
11 this motion would necessarily mean that nobody on that job
12 site would be responsible to Mr. Riddle if they hit him.

13 MR. JENSEN: Could you -- I cannot think of a
14 situation --

15 THE COURT: I can. Anybody that does not work for
16 Owens-Corning.

17 MR. HAYES: The supervision and work done is part
18 of the process of trade. Everyone outside of that --

19 THE COURT: Anybody who does not work for
20 Owens-Corning.

21 MR. JENSEN: If you will look at the cases -- the
22 Smith decision and the cases that were decided before the
23 1975 amendments -- they held that a general contractor
24 is -- a general contractor is deemed to have supervision
25 and control over everybody on the project.

1 THE COURT: I'm aware of that. I'm not applying
2 the 42 test. I'm saying that anybody who is not an actual
3 employee of Owens-Corning who injured an employee of
4 Owens-Corning under the 62 language that you cited could
5 probably be sued.

6 MR. JENSEN: That's exactly what Alan Mays is.

7 THE COURT: That's where I differ with you.

8 MR. JENSEN: I don't understand, then.

9 THE COURT: I think Alan Mays is an employee of
10 Owens-Corning.

11 MR. JENSEN: Under the "statutory employer"
12 definition?

13 THE COURT: Well, even more under that -- more than
14 that, in view of the fact that he was an -- he was working
15 for an entity that was clearly in a contractual
16 relationship with Owens-Corning -- an actual employee, if
17 you want to call it that, under a contractual
18 relationship, receiving direct payments.

19 I don't think -- given what you've said
20 there, Mr. Riddle can't pursue any claim against Mountain
21 States; so, what is -- that is your position; is that
22 correct?

23 MR. JENSEN: No. I think he can pursue any claim
24 he wants against Mountain States.

25 THE COURT: Well, my feeling is that he wouldn't be

1 able to because they're employed by the same employer.
2 Even though one may be deemed an independent contractor,
3 there's an actual employment relationship there.

4 MR. JENSEN: How would that differ from any
5 other -- and I certainly don't want to be argumentative.

6 THE COURT: No. This is a puzzle to me. So any
7 help you can give me would be appreciated.

8 MR. JENSEN: How would that differ from any other
9 subcontracted relationship on the project? I don't
10 understand the difference between Owens-Corning
11 subcontracting out certain insulation installation and any
12 other contractor subcontracting out labor on any other
13 part of their project.

14 THE COURT: Well, I see a distinction there. I
15 think you can draw a distinction there.

16 MR. HAYES: Well, that's why Hinds, I think -- you
17 know, he doesn't agree with me that Hinds tells us that.
18 But the reason that Hinds does is the Court goes back and
19 looks and says, "Well, do you want to go up the ladder or
20 down the ladder?"

21 They're saying if Mr. Mays is in this
22 position, he can get his workmen's compensation from
23 Owens-Corning, but because he's an employee, he can't sue
24 Owens-Corning. That's why Hinds is important to this
25 particular case.

1 The Court looked for the determination of
2 whether he could sue Owens-Corning to Section 42 to say
3 he's an employee. He can't, and that's why it applies to
4 this case. And that is a decision after Shupe where the
5 Court in dicta said "We're not considering what the
6 amendments would do, this is what we're going to do based
7 on the old case that was dictated." And then they came out
8 with Hinds and said, "This is how we're going to decide
9 these cases on who is an employee."

10 The other thing I think important is equity.
11 And he's saying that the equity is against us because he
12 can't sue MCI. The reason he can't sue MCI is that -- it
13 has to do with this concept of supervision. They are
14 under the supervision of Owens-Corning. That is why it is
15 equitable. If someone is telling you what to do out there
16 and how to do it, they're the employer, and they're the
17 ones responsible. Why should MCI get stuck when they're
18 not the one that is calling the shots, even though they're
19 a separate and distinct entity on the contract?

20 It's a tough question, but I think this case
21 fits in nicely to Section 62 where it says if you're an
22 employee, you're barred from suing a fellow employee. I
23 think it fits right there.

24 THE COURT: Okay.

25 MR. JENSEN: Well, Your Honor, I think we made our

1 position pretty clear.

2 THE COURT: Well, I'll tell you what. As I read
3 your briefs, I read, of course, the defendants' brief
4 first and thought "Well, good point. I ought to grant
5 that motion." And then I read yours and thought "No, I
6 shouldn't." And I'm back to my original position.

7 I'm going to grant the motion to dismiss,
8 deny the motion for summary judgment, and let the Court of
9 Appeals figure it out.

10 MR. JENSEN: Can we just clarify should it be
11 designed like a motion for summary judgment rather than a
12 motion to dismiss? I think, you know --

13 THE COURT: Well, it's entitled a "Motion to
14 Dismiss." I guess in actuality, it's a motion for summary
15 judgment.

16 MR. HAYES: Yes. When we use the deposition of
17 Mr. Riddle, I think -- and that's fine. I'll prepare the
18 order.

19 THE COURT: All right.

20 MR. JENSEN: Just to know how to designate an
21 appeal --

22 THE COURT: Now, I've decided opposite from Judge
23 Murphy, haven't I?

24 MR. JENSEN: Yes, you have.

25 THE COURT: Good. The Court of Appeals is going to

1 have to give us some answers.

2 MR. JENSEN: Thank you, Your Honor.

3 MR. HAYES: Thank you, Your Honor.

4 THE COURT: Thank you, gentlemen.

5 (Whereupon the proceedings in the
6 above-entitled matter were concluded.)

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C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

I, PAUL G. MCMULLIN, CSR, RPR, a Notary
Public, in and for the County of Washington, State of
Utah, do hereby certify:

That, the foregoing matter, to wit, KENNETH
RIDDLE VS. ALAN MAYS, and MOUNTAIN STATES INSULATION
CORP., a Utah corporation, Civil No. 86-268, was taken
down by me in shorthand at the time and place therein
named and thereafter reduced to computerized transcription,
under my direction.

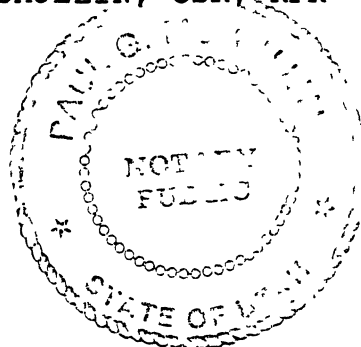
I further testify that I am not interested in
the event of the action.

WITNESS my hand and seal this 18th day of
July, 1988.

Paul G. McMullin

PAUL G. MCMULLIN, CSR, RPR

RESIDING AT: St. George, Utah
MY COMMISSION EXPIRES: 6-17-91



APPENDIX C

APPENDIX C

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IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH

KENNETH RIDDLE,)	
)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM
	)	IN OPPOSITION TO
vs.	)	DEFENDANTS' MOTION TO
	)	DISMISS AND IN SUPPORT
	)	OF HIS CROSS-MOTION FOR
ALAN MAYS, and MOUNTAIN	)	SUMMARY JUDGMENT
STATES INSULATION CORP.,)	
a Utah corporation,	)	Civil No. 86-268
	)	Judge J. Phillip Eves
Defendant.)	

The plaintiff submits this Memorandum in Opposition to the Defendants' Motion to Dismiss and in support of his Cross-Motion for Summary Judgment that, as a matter of law, the defense of exclusive remedy is not available to the defendants.

STATEMENT OF MATERIAL FACTS

1. Bechtel was the general contractor at the Intermountain Power Project ("IPP").
2. Owens-Corning Fiberglass Corporation ("Owens-Corning") was an insulation subcontractor at IPP to install

insulation and paneling and to erect a warehouse. (Riddle depo., pp.11,15).

3. The plaintiff, Kenneth Riddle, was employed by Owens-Corning. (Riddle depo., pp.10,15).

4. Owens-Corning sub-subcontracted with Mountain States Insulation Corp. ("MSI") for MSI to provide labor to erect the warehouse. (Riddle depo., p.18).

5. The defendant Alan Mays was an employee of MSI. (Defendants' Statement of Facts; Riddle depo., pp.19,94).

6. The plaintiff was injured at IPP when the parked truck he was sitting in was hit by a truck driven by the defendant Alan Mays. Both men were working when the accident happened.

ARGUMENT

POINT I

APPLICABLE STATUTES, CASE LAW AND
LEGISLATIVE HISTORY ALLOW THE PLAINTIFF'S
CLAIM AGAINST MSI AND, AS A MATTER OF
LAW, THE EXCLUSIVE REMEDY DEFENSE
IS NOT AVAILABLE TO MSI

MSI claims that the plaintiff and MSI are statutory co-employees of Owens-Corning and, therefore, the plaintiff's tort claim against MSI is barred by the exclusive remedy provision of Utah Code Ann. § 35-1-60. MSI bases its claim on the language of Utah Code Ann. § 35-1-42(3)(b) ("Section

42"). The defendants' memorandum does not, however, address the effect of Utah Code Ann. §35-1-62 ("Section 62"). A clear understanding of the relationship between these two statutory provisions is essential in deciding the issues presented by these motions. Section 42 and Section 62 have distinct purposes. Section 42 defines those liable for worker's compensation benefits. Section 62 defines those parties against whom an injured worker may pursue tort claims.

Section 42 represents a class of statutes known as "statutory employer" statutes. The purpose of such statutes is to allow injured workers to reach beyond irresponsible, uninsured employers by imposing ultimate liability for benefits on "up the ladder" contractors. Jacobson v. Industrial Commission, 738 P.2d 658 (Utah App. 1987). The entire "statutory employer" scheme indicates a desire on the part of the legislature to extend the protection of worker's compensation benefits to those who might not be deemed employees under the common law. Pinter Construction Co. v. Frisby, 678 P.2d 305 (Utah 1984). The remedial purpose of the Worker's Compensation Act supports the conclusion that Section 42 should be construed in favor of protecting the injured employee. Bennett v. Industrial Comm., 726 P.2d 427 (Utah 1986).

Section 42, therefore, expands the definition of those liable for worker's compensation benefits beyond the injured worker's actual employer. It creates the concept of the "statutory employer" who, although not the actual employer of the injured worker, so controls and supervises that worker's actual employer as to become liable for compensation benefits. This concept provides more assurance that benefits will be available to an injured worker if his actual employer proves irresponsible and uninsured. It also pressures general contractors to make sure subcontractors are insured.

Section 62 allows tort claims by injured employees against third parties. Before 1939, Section 62 allowed an injured worker to pursue tort claims against a negligent "third person." In 1939, the "third person" language was changed to allow claims against "another person not in the same employment" as the injured employee. This was designed to protect the injured worker's actual employer and co-employees because the employer was liable to the injured worker for worker's compensation benefits under Section 42.

After the 1939 amendments to Section 62, something unforeseen and unintended by the legislature began to happen. To determine who was "in the same employment" as the injured worker under Section 62, the Utah Supreme Court began

applying the "statutory employer" definition of Section 42. In other words, the Court applied the Section 42 expanded definition of employer, used to define those liable to pay worker's compensation benefits, to determine who was "in the same employment" as the injured worker and, therefore, immune from tort liability under Section 62. The practical effect of these court decisions was to insulate from tort liability everybody on the construction project. This was because, as a practical matter, under Section 42, all workmen on a project had a common statutory employer, usually the general contractor. Therefore, all were deemed to be "in the same employment" under Section 62 and unable to pursue claims against each other, whether up or down the ladder. See Adamson v. Okland Construction Co., 29 Utah 2d 286, 508 P.2d 805 (1973); Smith v. Brown, 27 Utah 2d 155, 493 P.2d 994 (1972); Gallegos v. Stringham, 21 Utah 2d 139, 442 P.2d 31 (1968). Section 62, specifically allowing third party claims, was becoming meaningless.

In 1975, the Utah Legislature moved to reestablish its initial intent and to remedy the injustice created by these judicial decisions. At that time, the Legislature amended Section 62 to clarify who was subject to third-party liability suits. The "same employment" language, which had

created generalized immunity, was changed to read that a tort claim could be maintained against a person "other than an employer, officer, agent or employee of said employer." Then, in a very significant addition, the Legislature added the following language to Section 62:

For the purposes of this section and notwithstanding the provisions of section 35-1-42, the injured employee . . . may also maintain an action for damages against subcontractors, general contractors, independent contractors . . . not occupying an employer-employee relationship with the injured or deceased employee . . . [Emphasis added.]

The language and legislative intent of these 1975 amendments are clear. The liberal definition of "statutory employer" in Section 42, used to determine liability for compensation benefits, is not to be used in determining who is or is not subject to tort liability under Section 62. The judicially-created interplay between Section 42 and Section 62 was expressly eliminated. The injured worker's tort claim was preserved against all those "not occupying an employer--employee relationship" with the injured employee.

The legislative history of the 1975 amendments is equally clear that only the employee's actual employer was to be protected from tort liability. On February 25, 1975, the Senate moved to a Committee of the Whole to have the

amendments explained by Mr. Paul Kunz, an AFL-CIO representative. He stated, in part:

Kunz: . . . [T]his language . . . "not in the same employment" has resulted in a number of court decisions that have completely eliminated the protection that the worker had. . . . [T]he object of the change . . . is a matter of clarification so that the injured man will know that of course he has no right of action against his own employer, but when a stranger comes on the job, whether it be a subcontractor . . . or whether it be a stranger of any kind, that stranger is subject to the same rules of safety . . . that any other stranger would be.

In Shupe v. Wasatch Electric Co., 546 P.2d 896 (Utah 1976), the Utah Supreme Court addressed the 1975 amendments to Section 62 as they relate to an injured worker's ability to sue "downstream" subcontractors (such as MSI in this case). In Shupe, the heirs of a deceased employee of the general contractor brought a wrongful death action against a subcontractor. The accident happened before the 1975 amendments which eliminated the "same employment" language from Section 62.

Applying the "same employment" language and following the judicial precedent of Adamson, Smith, etc., the trial court found that the general contractor's employee and the subcontractor were "in the same employment" and granted summary judgment in favor of the subcontractor based on

exclusive remedy. On appeal, the Utah Supreme Court explained that the summary judgment in favor of the subcontractor would have to be reversed if the 1975 amendments to Section 62, specifically allowing tort claims against non-employers, applied. The Court held the amendments not retroactive and affirmed.

The bottom line of the Shupe decision is that after 1975, an injured worker may sue a subcontractor of his employer. The exclusive remedy defense does not apply to the subcontractor. Riddle may, therefore, pursue his claim against MSI as a matter of law.

The plaintiff acknowledges that after Shupe, the majority in Hinds v. Hermes Hughes, Inc., 577 P.2d 561 (Utah 1978) held that, when considering "up-the-ladder" tort claims, the "statutory employer" definition of Section 42 is relevant in determining who is an employer and immune from tort liability under Section 62. Hinds is an unfortunate decision. Regarding suing "up the ladder," it throws the law back to its pre-1975 status. It fails to acknowledge the language and intent of the Legislature in enacting the 1975 amendment to Section 62, and overlooks the language of Shupe.

Regardless of the consequences Hinds may have on "up-the-ladder" tort claims, it does not affect the plaintiff's ability to pursue his claim against MSI. The clear

language of Shupe, allowing "downstream" tort claims, was not altered by the Hinds decision.

To grant the defendants' motion would render the 1975 amendment to Section 62 meaningless. As stated in Hinds, the 1975 amendment "enables an employee to sue a tortfeasor, not his employer (or the employer's agent, etc.), even though the injured person and the tortfeasor may be engaged in the same employment." Id. at 562. MSI argues that it is immune from tort liability because Riddle and MSI are statutory co-employees under Section 42. Under the liberal language of Section 42, all workers on the jobsite are statutory employees of "up-the-ladder" contractors. Under those circumstances, everyone on the jobsite would be immune from tort liability and the 1975 amendment to Section 62, specifically allowing tort claims against non-employers, would be meaningless. So would the Shupe and Hinds opinions, which provide that an injured worker is able to sue a tortfeasor who is not his employer.

Finally, MSI's position does not comport with the quid pro quo concept behind the Worker's Compensation Act. The concept is that statutory employers are granted immunity from suit because, in being subject to providing worker's compensation, they assure qualifying workers a recovery. Downstream subcontractors like MSI, with no supervision or

control over the plaintiff, have no liability for compensation benefits to the plaintiff and, therefore, there is no quid pro quo. MSI is not entitled to benefit from the exclusive remedy provision of the worker's compensation statute. If such benefit is allowed, MSI has neither the obligation to pay compensation benefits nor any exposure to tort liability. That type of protection was never contemplated by the Act.

The issues presented by these motions were recently addressed by Judge Michael Murphy of the Third Judicial District Court. A copy of Judge Murphy's Summary Decision and Order in that matter is attached for the Court's review. In that case, Judge Murphy denied a motion for summary judgment made, as is the case here, by a "downstream" subcontractor alleging that the plaintiff and the subcontractor were statutory co-employees under Section 42 and that the plaintiff's exclusive remedy was worker's compensation. Judge Murphy then granted the plaintiff's motion that, as a matter of law, the exclusive remedy defense was not available to the subcontractor.

Based on the above arguments, the defendants' motion to dismiss should be denied and this Court should rule, as a matter of law, that the defense of exclusive remedy is not available to MSI.

POINT II

ASSUMING, WITHOUT ADMITTING, THAT THE ISSUE
OF OWENS-CORNING'S CONTROL OVER MSI IS RELEVANT
TO THE DETERMINATION OF THE DEFENDANTS' MOTION,
GENUINE ISSUES OF FACT EXIST WHICH PRECLUDE
SUMMARY JUDGMENT

Point II is to be considered only if the Court rejects the plaintiff's position in Point I. MSI's motion focuses on the supervision and control exercised by Owens-Corning over MSI. The plaintiff argues that, for the purposes of this motion, the control, if any, exercised by Owens-Corning over MSI is irrelevant. As explained in Point I of this memorandum, MSI, as a "downstream" subcontractor exercising no control over the plaintiff, is not entitled to the exclusive remedy defense. The only way MSI can escape tort liability in this case is to show that it was the actual employer or, under Hinds, the statutory employer (although the plaintiff disagrees with the Hinds majority), of Riddle. Clearly, MSI was not the actual employer of Riddle. Whether MSI was a "statutory employer" depends on the supervision and control it exercised over Riddle. As a downstream subcontractor, MSI had no right of control over the Riddle. Owens-Corning's control over MSI is irrelevant.

If, despite this argument, this Court determines that the issue of Owens-Corning's control over MSI is somehow relevant in deciding the defendants' motion, genuine issues

of fact exist regarding that control which preclude summary judgment. The question of control is a question of fact for the jury. Moloso v. State, 644 P.2d 205 (Alaska 1982).

As stated by the defendants, it is the right to control rather than the actual exercise of control that determines the relationship between the parties. Pinter, supra at 309. The right to control is usually found in the language of a written contract between the parties. No such written contract exists between Owens-Corning and MSI and, therefore, the right to control must be determined by other factors.

Many factors have been applied in determining the right to control. Among those factors are actual supervision of the worker, the extent of the supervision, the method of payment, the furnishing of equipment for the worker, and the right to terminate the worker. Bennett v. Industrial Commission, 726 P.2d 427 (Utah 1986).

Ken Riddle testified at his deposition that: (1) he did not supervise the work of Alan Mays (p.19); (2) Maynard Crossland, a part owner of MSI, supervised and instructed Mays (p.19); (3) Riddle had no authority to fire Mays without the approval of Maynard Crossland (p.94); and (4) MSI, not Owens-Corning, paid Mays from MSI's payroll (p.95). It only takes one sworn statement under oath to

dispose of the averments on the other side of the controversy and create an issue of fact. W.W. and W.B. Gardner, Inc. v. Mann, 680 P.2d 23, 24 (Utah 1984). The sworn deposition testimony of the plaintiff is sufficient to create issues of fact regarding Owens-Corning's right to control MSI and precludes the granting of defendant's motion.

CONCLUSION

Based on Point I, MSI, as a matter of law, is not entitled to the defense of exclusive remedy. The defendants' motion should be denied and the plaintiff's cross-motion for summary judgment disposing, as a matter of law, of the exclusive remedy defense, should be granted.

Owens-Corning's control over MSI is irrelevant to the issues to be decided by this Court. Should the Court, however, determine that Owens-Corning's control over MSI is somehow relevant, the defendants' motion should be denied because genuine issues of fact exist regarding that control.

DATED this 11th day of March,
1988.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

By: Gordon K. Jensen
GORDON K. JENSEN

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of
the foregoing (Riddle v. Mays, et al.) hand delivered this
11 day of March, 1988, to the following:

Nelson Hayes
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street
Salt Lake City, UT 84110

Gordon F. Jensen

shall be criminally liable as a party for such conduct.

You are instructed that the term "Distribution for Value" means to deliver a controlled substance in exchange for compensation, consideration, or item of value, or a promise therefor.

You are instructed that under the law marijuana is a controlled substance.

The first paragraph of Instruction 6B incorporates, in haec verba, provisions of 76-2-202. It is applicable here, because the Controlled Substance Act does not specifically provide otherwise, nor does its context otherwise require.

Instruction 6A defines a misdemeanor, Instruction 6 a felony. The jury was given two verdicts, one responding to Instruction 6A and one responding to Instruction 6. The jury, having an opportunity to consider both, elected to return a verdict in response to No. 6.

[2] A further contention of defendant is that it was improper to give Instruction 6B since there was no factual basis on which to ground an instruction concerning aiding and abetting. *State v. Baum*¹ is cited as authority for this contention. The case is distinguishable from the present one, in that here there was conflicting evidence from which the jury could have found defendant aided and abetted. In *Baum* it was otherwise, the court noting:

. . . There was no evidence to show, and no one claimed, that the defendant but aided or abetted in the commission of the offense, or, not being present, advised or encouraged its commission.

In view of there being no such evidence, the court held that to give such a charge was misleading and harmful.

Here there was testimony of the undercover agent that his discussions preceding the sale, were with defendant, but at the time of the sale one Gooch brought the package from the kitchen and demanded an

extra \$5 as a condition to transfer. Defendant testified he was not involved with the transaction, although he was present, and for unknown reasons the agent handed the money to him. Since all parties agreed that Gooch was an active participant in the sale, and the evidence concerning defendant's role was sharply conflicting, an instruction on aiding and abetting was proper.

HENRIOD, C. J., and ELLETT, CROCKETT and TUCKETT, JJ., concur.



Elna A. SHUPE, and Yavette Shupe, by and through her guardian ad litem, Elna A. Shupe, Plaintiffs and Appellants,

v.

WASATCH ELECTRIC COMPANY, INC., a Utah Corporation, and Esco Corporation, an Oregon Corporation, Defendants and Respondents.

No. 14117.

Supreme Court of Utah.

Feb. 20, 1976.

Wrongful death action was brought against electrical subcontractor by wife and daughter of deceased employee of general contractor. The Third District Court, Salt Lake County, Stewart M. Hanson, J., granted defense motion for summary judgment and plaintiffs appealed. The Supreme Court. Tuckett, J., held that deceased was in "same employment" within prior statute to effect that, when death for which compensation is payable shall have been caused by wrongful act or neglect of another person not in same employment, dependents may claim compensation and his heirs or personal representatives may also have action for damages against such

third person and that later statutory amendment authorizing personal representatives of deceased employee to maintain action against subcontractor not occupying employee-employer relationship with deceased could not apply.

Affirmed.

Maughan, J., dissented and filed opinion.

1. Workmen's Compensation \Rightarrow 2166

General contractor's workman, who was electrocuted, was in the "same employment" as electrical subcontractor, with-in prior statute providing that when death for which compensation is payable shall have been caused by wrongful act or neglect of another person not in same employment, his dependents may claim compensation and his heirs or personal representatives may also have action for damages against such third persons; thus wife and daughter of deceased workman were not entitled to recover from subcontractor on theory that electrocution had been due to subcontractor's negligence. U.C.A. 1953, 35-1-42, 35-1-62, 68-3-3.

2. Workmen's Compensation \Rightarrow 58

Statute providing that injured employee or his heirs or personal representatives may maintain action for damages against subcontractors, general contractors, independent contractors, property owners or other lessees or assigns, not occupying an employee-employer relationship with deceased employee at time of his death did not apply retroactively to case of death of general contractor's employee who was electrocuted allegedly as result of neglect of electrical subcontractor. U.C.A. 1953, 35-1-62, 68-3-3.

TUCKETT, Justice:

This is a wrongful death action brought by the plaintiffs who are the wife and daughter of a deceased workman who was in the employ of Christiansen Brothers Construction Company. The district court granted a motion for summary judgment by the defendants, and the plaintiffs appeal.

Christiansen Brothers Construction Company was a general contractor engaged in the construction of condominiums in Salt Lake City, Utah. The defendant Wasatch Electric Company was a subcontractor who agreed to design, furnish and install all the necessary electrical wiring and equipment at the construction site. Prior to July 19, 1974, Wasatch had installed electrical cables for the purpose of supplying power to a crane owned and operated by Esco Corporation. On July 19, 1974, Tom Shupe, a carpenter, was employed by the general contractor and was performing carpentry work on the construction site. The electrical cable had been draped over certain metal forms and reinforcing steel. Due to defective or insufficient insulation of the cables, electrical energy escaped from the cables and energized certain metal cement forms that Shupe was working with, resulting in his electrocution.

[1] Plaintiffs filed their complaint pursuant to the provisions of Section 35-1-62, U.C.A. 1953, the pertinent part of which reads as follows:

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 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.

D. Clayton Fairbourn, Salt Lake City, for plaintiffs and appellants.

Richard H. Moffat, Salt Lake City, for defendants and respondents.

The term "same employment" used in the statute has been defined by this court in a

number of prior decisions. The case of *Adamson v. Okland Construction Co.*¹ was a wrongful death case wherein the plaintiff's decedent who was an employee of a subcontractor sought to recover from the general contractor. Likewise in *Smith v. Alfred Brown Co.*² the plaintiff, an employee of the subcontractor, sued the general contractor to recover for injury sustained on the job. In both of those cases the general contractor, by the terms of the contracts, retained supervision and control over the subcontractors. The provisions of Section 35-1-42, U.C.A.1953, which defines employers who are subject to the provisions of the Workmen's Compensation Act, provides coverage for the employees of subcontractors where supervision or control is retained by the employer who employed the subcontractor, and all such persons employed by such subcontractors shall be deemed to be employees of the original employer. In *Smith* and *Adamson* above referred to the contract provisions providing for control and supervision of subcontractors for the general contractor are quite similar to contract provisions in this case. We do not believe that in this case the plaintiffs' decedent was an employee of the general contractor rather than being an employee of the subcontractor as was the case in *Smith* and *Adamson*, is a sufficient distinction to take the case out of the rule enunciated in those cases.

The legislature, undoubtedly being aware of the decisions of this court construing the terms "same employment" in 1975 amended Section 35-1-62, U.C.A.1953, by adding the following provision:

For the purposes of this section and notwithstanding the provisions of Section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages

against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

The amendment if applicable would leave the plaintiffs in court.

The defendants contend that the amendment can have only retrospective effect and that the amendment was adopted and became effective after the plaintiffs' cause of action arose. The early case of *Mercur Gold M. & M. Co. v. Spry*³ dealt with the problem in the following language:

Constitutions, as well as statutes, should operate prospectively only, unless the words employed show a clear intention that they should have a retrospective effect. This rule of construction as to statutes 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.

The rule in that case has been codified in Section 68-3-3, U.C.A.1953, which reads as follows:

No part of these revised statutes is retroactive, unless expressly so declared.

[2] The amendment above referred to provides a cause of action on behalf of an injured workman against individuals not covered by the statute prior to its amendment. To apply the statute retroactively would compel a new class of individuals to assume risks which did not exist prior to the amendment, and we are of the opinion that retroactive application would deny equal protection to a new class brought within the terms of the statute as amended so as to deprive them of equal protection of the laws.

1. 29 Utah 2d 286, 508 P.2d 805.

2. 27 Utah 2d 155, 493 P.2d 994.

3. 16 Utah 222, 52 P. 382; *In re Ingraham's Estate*, 106 Utah 337, 148 P.2d 340; *Petty v. Clark*, 113 Utah 205, 192 P.2d 536.

The other contentions of the plaintiffs as grounds for a reversal we deem to be without merit.

The judgment of the court below is affirmed. No costs awarded.

HENRIOD, C. J., and CROCKETT, J., concur.

MAUGHAN, Justice (dissenting):

For the following reasons, I dissent:

The issue in this matter is whether under Section 35-1-62, U.C.A.1953, a subcontractor is a third person "not in the same employment," with an employee of a general contractor. The majority opinion relies on *Adamson v. Okland Construction Company*¹ and *Smith v. Alfred Brown Company*² and holds them applicable in the instant fact situation. In both these cases, a general contractor was held to be the statutory employer under Section 35-1-42(2) of the employees of a subcontractor and therefore not within the exception set forth in Section 35-1-62—distinguishable situations.

The language of Section 35-1-42 clearly shows the legislative intent. The initial sentence provides:

The following shall constitute employers subject to the provisions of this title: Title is the key word here. Thus the definitions of Section 42 insofar as a "statutory employer" is involved is to be applied to the entire act. In contrast, subsection 2 provides those who are to be deemed "statutory employees" are made so only for the purposes of that section. Section is here the key word. The pertinent provisions of subsection 2 are:

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, shall be deemed, within the meaning of this section, employees of such original employer. . . .

The legislature specifically has expressed an intention that its definition of a statutory employer remain constant throughout the Workmen's Compensation Act. In contrast, its definition of who are statutory employees is expressly confined to those provisions wherein the responsibility flowing to them from the statutory employer is set forth.

The definition of a third person "not in the same employment" is not the subject of 35-1-42(2). The concept of "all persons in the same employment" does not include subcontractors, and their employees, on the same project; thus they are not immune as co-employees of an employee of a general contractor.³

The legislature in enacting Section 35-1-42 was not concerned with third-party tort liability; its purpose was to establish a general statutory definition of an employer, to assure that a general contractor would guarantee compensation for the employees of a subcontractor. Where a statute such as Section 35-1-42 makes the general contractor the employer for purposes of the compensation statute certainly he should enjoy the regular immunity of an employer from third-party suit when the facts are such that he could be made liable for compensation. The majority of courts have so held.⁴

. . . the overall responsibility of the general contractor for getting subcontractors insured, and his latent liability for compensation if he does not, should be sufficient to remove him from the category of "third party." He is under a continuing potential liability; he has thus assumed a burden in exchange for which he might well be entitled to

1. 29 Utah 2d 256, 508 P.2d 803 (1973).

2. 27 Utah 2d 153, 493 P.2d 994 (1972).

3. 2 Larson's Workmen's Compensation Law, Section 72.20, pp. 14-44 to 14-46.

4. Id., Section 72.31 p. 14-47.

immunity from damage suits, regardless of whether on the facts of a particular case actual liability exists. This burden may also be translated into financial terms. . . . The general contractor, by insisting that the subcontractor carry compensation insurance, imposes a cost on the subcontractor which the subcontractor will pass on to the contractor in his charges under the subcontract.⁵

When the positions are reversed, and an employee of the general contractor, or the general contractor himself as subrogee sues the subcontractor in negligence, the great majority of jurisdictions have held that the subcontractor is a third party amenable to suit. The reason for the difference in result is forthright: the general contractor has a statutory liability to the subcontractor's employee, actual or potential, while the subcontractor has no comparable statutory liability to the general contractor's employee.⁶

*Frohlick Crane Service, Inc. v. Mack*⁷ is factually similar to the instant action. There, an employee of the general contractor sued the subcontractor for negligence. The trial court dismissed the action on the ground that plaintiff was suing his co-employee, and such suit was not permissible under a statute which permits an employee to bring an action against a person "not in the same employ." The ruling of the trial court was predicated on a statute which provided that an employer, who contracts part of his work to a subcontractor, is deemed to be the employer of the subcontractor and his employees for Workmen's Compensation purposes.

The Supreme Court of Colorado stated that to treat the two parties as co-employees would be exalting form over substance,

for statutory interpretation must be governed by legislative intent. The purpose of the Workmen's Compensation Act was to afford compensation for work-related injuries, regardless of fault. The employer, in return for his responsibility under the act is granted immunity for common-law claims, but the act does not shield third-party tortfeasors. To prevent an employer from avoiding responsibility under the act by contracting his work to an uninsured contractor, the statute provides that a subcontractor and his employees are deemed to be the employees of such an employer. These provisions do not indicate a legislative intention that a subcontractor should be free of responsibility for his own negligence. The court held, in accordance with the great weight of authority, that subcontractors are subject to suit by employees of the general contractor.

A valuable common-law right should not be deemed destroyed by a statute, except by explicit language. The instant action is not a case where the claimant's right to compensation is dependent upon labeling the general contractor as a statutory employer.

The proper interpretation of the phrase "not in the same employment" (35-1-62), in the absence of a true employer-employee relationship, renders a subcontractor a third party not immune to a common-law negligence action by an employee of the general contractor.

This cause should be reversed, and remanded for trial on its merits.

ELLETT, J., concurs in the views expressed in the dissenting opinion of Mr. Justice Maughan.

5. Id., Section 72.21, pp. 14-55 to 14-56.

6. Id., Section 72.22, pp. 14-66 to 14-68.

7. Colo., 510 P.2d 891 (1973).

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

R. BRENT BARBOUR,	:	SUMMARY DECISION
	:	AND ORDER
Plaintiff,	:	
vs.	:	CIVIL NO. C-86-2386
WESTERN SHEET METAL, INC.,	:	
et al.,	:	
Defendants.	:	
<hr/>		
PAULSEN ENGINEERING &	:	
CONSTRUCTION COMPANY,	:	
Third Party Plaintiff,	:	
vs.	:	
MECHANICAL CONSTRUCTION, INC.,	:	
Third Party Defendant.	:	
<hr/>		
CATE EQUIPMENT COMPANY,	:	
Third Party Plaintiff,	:	
vs.	:	
MECHANICAL CONSTRUCTION, INC.,	:	
Third Party Defendant.	:	

Defendant Western Sheet Metal, Inc. ("Western") has filed a Motion for Summary Judgment on the grounds that plaintiff and Western are statutory co-employees under Section 35-1-42(3)(b),

Utah Code Ann., and plaintiff's exclusive remedy under Section 35-1-60 is workers' compensation. The court took the matter under advisement following a hearing on February 22, 1988.

Paulsen Engineering & Construction Company ("Paulsen") was the general contractor on the project where plaintiff was injured. Paulsen subcontracted with Mechanical Construction, Inc. ("MCI") for plumbing services. MCI in turn subcontracted with Western for construction of heating, ventilation and air conditioning facilities. Plaintiff was an employee of MCI.

This court previously granted Paulsen's Motion for Summary Judgment on the grounds that Paulsen was a statutory employee and Hinds v. Herm Hughes & Sons, Inc., 577 P.2d 561 (Utah 1978) mandated workers' compensation as plaintiff's exclusive remedy. Western now argues that the inexorable extension of the ruling on Paulsen's motion requires the granting of its motion. The resolution of this issue presents a very difficult balancing of this court's obligation to adhere to both judicial precedent and clear legislative mandate. This resolution must begin with an analysis of the Hinds decision.

As acknowledged in this court's previous ruling, the majority opinion in Hinds did not ignore the 1975 amendments to Section 35-1-62, Utah Code Ann. The Court quoted the amended section and then indicated its import:

This amendment enables an employee to sue a tortfeasor, not his employer (or the employer's agent, etc.), even though the injured person and the tortfeasor may be engaged in the same employment. Hinds v. Herm Hughes & Sons, Inc., supra at 562.

Even though it appeared that Section 35-1-62, as amended, would allow the employee/plaintiff to sue the statutory employer who was not his actual employer, the Court did not apply Section 35-1-62 to override Sections 35-1-42 and -60. No explanation was given by the Court and the decision presented no analytical framework for lower courts to determine the applicability of Section 35-1-62 in cases presenting different fact situations. One matter, however, is clear, i.e., the Court indirectly acknowledged the amendments to Section 35-1-62 effected a change in the doctrine flowing from the previous statutory language "not in the same employment."

Section 35-1-62, as amended, then, must be considered by this court as effecting some change in the previous statutory scheme as interpreted by the Utah Supreme Court. If this court were to determine that the Hinds decision and this court's previous ruling on the Paulsen motion required the granting of Western's motion for summary judgment, the 1975 amendments to Section 35-1-62 would have no effect whatsoever, and immunity would blanket the workplace. The Hinds decision by its reference to Section 35-1-62 suggests otherwise but fails to provide the

analytical framework to determine the nature and extent of the amendments' effect.

This court is left with judicial precedent indicating the 1975 amendments constitute some legislative change and a statutory enactment dictating that plaintiff is not precluded from proceeding against Western. In this circumstance, the court must adhere to the latter legislative dictates and deny Western's motion. Such adherence is perhaps incongruous with and not the logical extension of the Supreme Court's failure to apply Section 35-1-62, as amended, in Hinds.¹ It is, however, consistent with the legislative mandate as it applies to this plaintiff and this defendant. Any incongruity is not created by the statutory scheme but by the Hinds decision. Such incongruity caused by a judicial repeal of a portion of the 1975 amendments, however, is

¹The quid pro quo concept has been suggested as a reconciliation of this court's ruling today with the Hinds decision. The concept has been relied upon and significant in many Utah Supreme Court decisions addressing workers' compensation. The quid pro quo concept is this: statutory employers are granted immunity from suit because in being subject to workers' compensation they assure qualifying workers of moderate recovery. Since contractors such as Western have no liability under workers' compensation for workers such as plaintiff, there is no quid pro quo. It is suggested, then, that contractors such as Western situated downstream from the claimant should not benefit from the exclusive remedy provision of the workers' compensation statutes. The court acknowledges this suggestion as a possible reconciliation but does not adopt it as a basis for its ruling.

not a reason for this court to deem the amendments completely repealed.²

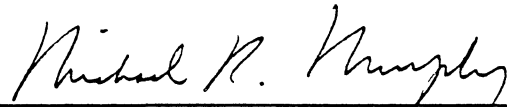
As indicated in this court's ruling on the Paulsen motion, employers may well have planned their affairs over the last ten years in reliance on Hinds. Nevertheless, in light of the dicta in Shupe v. Wasatch Electric Co., 546 P.2d 896 (Utah 1976) and uncertainly as to the reach of Hinds beyond the exact facts there presented, it is not so clear that a business could reasonably plan its affairs in reliance on workers' compensation being the exclusive remedy when an enterprise is downstream in the contractual hierarchy. Nevertheless, given the language of Section 35-1-62, as amended, this court does not believe the "upstream-downstream" argument of plaintiff is a legitimate basis to distinguish Hinds. Additionally, the court does not rely on

²Any such incongruity is quite obviously not unique to Anglo-American jurisprudence and the judiciary's interpretation of statutory schemes. For example, in 1922 the United States Supreme Court decided that professional baseball was not within the scope of the federal antitrust laws. This was confirmed 31 years later because of the profession's longstanding reliance, stare decisis, and deference to legislative correction. Toolson v. New York Yankees, 346 U.S. 356 (1953). As a practical matter, then, the ruling had evolved into a judicially created exemption. Other professional sports such as softball, football and boxing have never been afforded the same exemption. The United States Supreme Court itself has acknowledged the differing treatment as possibly "unrealistic, inconsistent or illogical." Nevertheless, the Court has refused to overrule the exemption for baseball even though conceding that the exemption for baseball would never have been created in the 1950's. Radovich v. National Football League, 352 U.S. 445, 452 (1957).


Shupe as authority for its denial of Western's Motion. The court does note, however, the hierarchical comparison of the instant case to the facts in Hinds and Shupe. The facts in Hinds are comparable to the relation which plaintiff bears to Paulsen; the facts in Shupe are comparable to the relation which plaintiff bears to Western.

For the reasons set forth herein, defendant Western's Motion for Summary Judgment is denied, and plaintiff is granted its requested Summary Judgment on Western's affirmative defense that workers' compensation is plaintiff's exclusive remedy. The court has taken an additional day beyond that promised to issue its decision. The additional time was necessary for the court to both resolve the issue and give the parties at least a summary articulation of the reasons for the ruling.

Dated this 24th day of February, 1988.



MICHAEL R. MURPHY
DISTRICT COURT JUDGE

ATTEST
H. D. ...
BY 
County Clerk

APPENDIX D

APPENDIX D

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR IRON COUNTY, STATE OF UTAH

KENNETH RIDDLE,	)	ALAN MAYS AND MOUNTAIN
	)	STATES INSULATION
Plaintiff,	)	CORPORATION'S MEMORANDUM
	)	IN SUPPORT OF MOTION
vs.	)	TO DISMISS
)	
ALAN MAYS, and MOUNTAIN STATES)	
INSULATION CORP., a Utah)	
corporation,)	
	)	Civil No. 86-268
Defendant.	)	Judge J. Phillip Eves

Defendants Alan Mays and Mountain States Insulation, by and through their counsel of record, Nelson Hayes, RICHARDS, BRANDT, MILLER & NELSON, hereby respectfully submit this Memorandum of Points and Authorities in Support of their Motion to Dismiss.

INTRODUCTION

Alan Mays and Mountain States Insulation are filing a Motion to Dismiss plaintiff Kenneth Riddle's Complaint.

STATEMENT OF FACTS

Plaintiff Kenneth Riddle, an employee of Owens-Corning, was sitting in his parked truck when he claims he was hit by a truck driven by defendant Alan Mays, a Mountain States Insulation (hereinafter "MSI") employee. The accident occurred at the site of the Intermountain Power Project (hereinafter "IPP") in Delta, Utah. Both men were working at the time the accident occurred. As a result of the accident, plaintiff claims that he injured his head and neck.

At the time of the accident, Owens-Corning was doing construction for the IPP. It had contracted out the construction of a warehouse at the project to MSI. Mr. Mays was an employee of MSI, working on the IPP warehouse. Owens-Corning authorized Mr. Riddle to supervise the warehouse construction, and in particular, to oversee the safety aspects.

ARGUMENT

OWENS-CORNING IS THE STATUTORY EMPLOYER OF
ALAN MAYS AND MOUNTAIN STATES INSULATION.

Under the Utah Workmen's Compensation Act, workmen's compensation is the exclusive remedy of an employee not only against the employer, but also against any employees of the same employer. Utah Code Ann. §35-1-60 (1953 as amended). The Act defines "employee" broadly, to include not only traditionally defined employees, but also contractors, subcontractors and their respective employees:

Where an employer procures any work to be
done wholly or in part for him by a

contractor over whose work he retains supervision or control, this work is part or process in the trade or business of the employer, the contractor, all persons employed by him, all subcontractors under him, and all persons employed by any of these subcontractors, are considered employees of the original employer.

Utah Code Ann. §35-1-42(3)(b) (1953 as amended). This broad definition of the employer-employee relationship is known as the "statutory employer" doctrine.

Thus, contractors and their employees may be "employees" of the original employer for workmen's compensation purposes. When an employer, such as Owens-Corning, hires a contractor, such as MSI, both the contractor and all of the contractor's employees may qualify as employees of the original employer. In order for a contractor and its employees to be "employees" of the employer for workmen's compensation purposes, (1) the employer must retain "some supervision or control over the contractor's work," and (2) the work done by the contractor must be "part or process in the trade or business of the employer." Bennett v. Industrial Commission of Utah, 726 P.2d 427, 431 (Utah 1986).

The facts indicate that Owens-Corning retained control and supervision over the work MSI was hired to do at the IPP, and that building the warehouse, which Owens-Corning hired MSI to do, was part or process of Owens-Corning's business. Therefore, MSI and Alan Mays are "employees" of Owens-Corning for workmen's compensation purposes, and as such, may not be sued by Kenneth Riddle, another Owens-Corning

employee.

A. Owens-Corning had the Right to Supervise and Control MSI's Work.

The Utah Supreme Court in Pinter Construction Co. v. Frisby analyzed the degree of control an employer must exercise for purposes of §35-1-42. Pinter Construction Co. v. Frisby, 678 P.2d 305, 308-9 (Utah 1984). The issue in Pinter was whether Clifford Frisby, hired by Pinter Construction Co. to install metal siding on a maintenance building, was an "employee" for workmen's compensation purposes. The Court held that he was, citing several factors as evidence of control:

Pinter's control over Frisby was evidenced on at least four occasions when Pinter directed Frisby to get on with the work and expressed concern about the deadlines for finishing the job. Pinter's assertion of some control over Frisby's activities indicates that Pinter in fact had the right to control and could have done so frequently. It is not the actual exercise of control that determines whether an employer-employee relationship exists; it is the right to control that is determinative.

Pinter at 308-9. The Court also found that (1) the employer providing the material for the job, (2) inspections and consultations by the employer's employees, and (3) the employer's supervisor overseeing the contractor's work, were evidence of actual control by the employer. Pinter at 308.

In the instant case, the evidence shows that Owens-Corning had the right to control the MSI warehouse project, and therefore MSI is an "employee" of Owens-Corning

for workmen's compensation purposes. Owens-Corning's employee, Kenneth Riddle, met with the MSI supervisor, Maynard Crossland, on a daily basis. Mr. Riddle would also be on the job, overseeing the progress of the warehouse, as MSI and Mr. Mays were working. Mr. Riddle's testimony clearly establishes not only Owens-Corning's right to control and direct MSI's work, but its actual control over the MSI project:

Q And you were in the job when he [Alan Mays] was performing his activities?

A Yes.

Q You were there and you would oversee what was happening?

A Exactly.

Q As Mountain States would perform their work?

A Right.

Q And if it wasn't being done properly, you had authority to require that it be done properly?

A Exactly.

Q And you had authority to, as a result of your involvement with Owens-Corning and your knowledge of OSHA regulations and so on and so forth, you had authority to make sure that it was done safely?

A Yes.

Q And you could tell Mr. Crossland or the people who worked under him how to do the work if it wasn't being done safely?

A Yes.

Q And if it was being done improperly, you could require that they do it properly?

A Yes.

Riddle Depo., pp. 21-22.

Therefore, the conduct of Owens-Corning and MSI clearly shows that Owens-Corning had the right to control and in fact actually controlled MSI's work such that their relationship was that of employer-employee for purposes of workmen's compensation. Pursuant to §35-1-42, the statutory employer doctrine, if MSI, as contractor, is an "employee" of Owens-Corning for workmen's compensation purposes, it follows that Mr. Mays is also an "employee" of Owens-Corning.

B. The Construction of the Warehouse by MSI is Part or Process of Owens-Corning's Business.

The second prong of the workmen's compensation test for the employer-employee relationship, "process in the trade or business," was defined by the Utah Supreme Court in Lee v. Chevron Oil Co.:

All those operations which entered directly into the successful performance of the commercial function of the principal employer If the work is of such character that it ordinarily or appropriately would be performed by the

principal employer's own employees in the prosecution of its business, or as a central part in the maintenance thereof, it is a part of [sic] process of his work.

Lee v. Chevron Oil Co., 565 P.2d at 1131. The facts establish that the work performed by MSI, the construction of the warehouse, was in fact the kind of work usually performed by Owens-Corning's own employees. In fact, Owens-Corning began to construct the warehouse itself. After three weeks, Owens-Corning decided to contract out the project to MSI. The construction of the warehouse was an essential part of Owens-Corning's business, which was to build the IPP.

Mr. Mays himself was originally employed by Owens-Corning to build the warehouse. Then, when Owens-Corning decided to contract out the warehouse construction, Mr. Mays continued doing the same work he was doing for Owens-Corning but was paid by MSI. In both circumstances, he was supervised by Mr. Riddle, an employee of Owens-Corning.

Therefore, the evidence shows that the construction of the warehouse at the IPP was not only essential to Owens-Corning's business, but was an activity originally carried on by Owens-Corning's own employees. Accordingly, the construction of the warehouse by MSI was part or process of Owens-Corning's business.

C. If Owens-Corning is a Statutory Employer of MSI, MSI, Alan Mays and Kenneth Riddle are all Employees of Owens-Corning.

Section 35-1-60 precludes employees who have received workmen's compensation benefits not only from suing their

employer, but also from suing other employees of the same employer. Since Owens-Corning is a statutory employer of MSI and Alan Mays, pursuant to §35-1-42, Kenneth Riddle cannot bring suit against MSI or Alan Mays after receiving workmen's compensation benefits from Owens-Corning. The Utah Supreme Court has held "a worker can be hired and paid by a subcontractor but still be an employee of the general contractor." Bambrough v. Bethers, 552 P.2d 1286, 1291 (Utah 1976). If an employee has the same employer as another employee, "he is entitled to and must accept workmen's compensation and cannot maintain an action against either of them [the employer or another employee of the same employer] for negligence in causing his injuries." Bambrough at 1289. See also Gallegos v. Stringham, 442 P.2d 31 (Utah 1968) (plaintiff and defendant held to be working for the same employer, and therefore plaintiff cannot recover outside workmen's compensation).

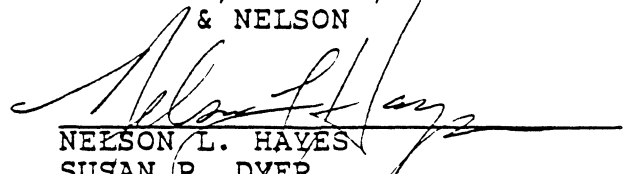
CONCLUSION

Based on the foregoing, Owens-Corning satisfies the requirements of the statutory employer doctrine. Owens-Corning had the right to supervise and control the work performed by MSI. In addition, the construction of the warehouse performed by MSI was a part or process of Owens-Corning's business. Accordingly, Owens-Corning is a statutory employer of both MSI and Alan Mays, and therefore neither MSI nor Alan Mays May be

sued by another Owens-Corning employee, Kenneth Riddle.

RESPECTFULLY SUBMITTED this 23rd day of February,
1988.

RICHARDS, BRANDT, MILLER
& NELSON

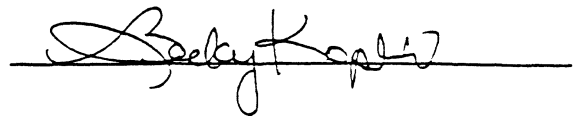


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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the
foregoing instrument was mailed on this 23rd day of February,
1988 to the following counsel of record:

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