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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

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The appellant submits the following Reply Brief pursuant to Rule 24(c) of the Rules of the Utah Supreme Court.

ARGUMENT

POINT I

(REPLYING TO RESPONDENTS' POINT I)

RIDDLE'S CLAIM IS NOT BARRED BY UTAH CODE ANN. §35-1-60

The respondents rely on statutory language which has been specifically amended to support their claim that Riddle's claim is barred by Utah Code Ann. §35-1-60 ("Section 60"). They cite Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976) for the proposition that "a worker can be hired and paid by a subcontractor, but still be an employee of the general contractor." The Court in Bambrough cites Smith v. Brown, 493 P.2d 994 (Utah 1972) as authority for that holding.

Both Bambrough and Smith were decided under the "same employment" language of Utah Code Ann. §35-1-62 ("Section 62"). As explained in the Appellant's Brief, before 1975, this Court used the expansive definition of "statutory employer" of Utah Code Ann. §35-1-42 ("Section 42") to determine who was "in the same employment" under Section 62 and immune from tort liability. It was this judicial interpretation that, in 1975, prompted the Legislature to amend Section 62 to clarify those subject to tort liability.

Decisions like Bambrough, decided before the 1975 amendment language, are not properly relied upon in determining the issues before this Court on this appeal.

The respondents claim that "Riddle and Mays are co-employees of Owens-Corning." (Respondents' Brief, p. 7.) This claim can only be based on the statutory employer definition of Section 42. Certainly, Owens-Corning was not the actual employer of Mays when this accident happened. That Owens-Corning was once the actual employer of Mays is irrelevant to the determination of Mays's employment status when this accident happened.

The 1975 amendments to Section 62 make it clear that the expansive statutory employer definition of Section 42 is not to be used in determining those parties immune from tort liability under Section 60. Riddle and Mays, therefore, are not co-employees of Owens-Corning for tort claim purposes and Riddle's claim is not barred by Section 60.

POINT II

(REPLYING TO RESPONDENTS' POINT II)

THE POLICY OF THE WORKERS' COMPENSATION ACT ALLOWS RIDDLE TO PURSUE THIS TORT CLAIM

The respondents assert that the policy of the Workers' Compensation Act should prevent an employee of the general contractor from suing a subcontractor or that subcontractor's employee and cite Smith as support for that position. They fail, however, to cite the full discussion of policy explained in Smith. After stating the purpose of the Workers' Compensation Act, as quoted by the respondents, the Court continues:

> The other side of the coin is the correlated important purpose of assuring employers that if they provide this protection for their employees, the employers will themselves be protected against the possibility of exorbitant claims for injuries. The reasonable and fair concomitant of the foregoing is that inasmuch as the injured employee has the protection just mentioned with respect to his employer, he must forego the privilege of suing the employer.

Id. at 157.

In other words, to the extent an employer, including a statutory employer, becomes responsible for compensation benefits to an injured worker, that employer should be immune from tort liability. The appellant contends that according to

the policy explained in Smith and the current language of the Workers' Compensation Act, an injured worker may pursue tort claims against anyone, even one qualifying as the injured worker's statutory employer, who does not actually provide workers' compensation benefits to the injured worker.

MSI exercised no supervision or control over Kenneth Riddle. MSI cannot, therefore, qualify as Riddle's statutory employer under Section 42 and could never be obligated to Riddle for compensation benefits. Under those circumstances, there is no policy for granting MSI tort immunity.

The respondents argue that the "upstream/downstream" contractor distinction ignores "the whole concept of fairness as outlined in Smith." (Respondents' Brief, p. 9.) To the contrary, that distinction helps define the fairness contemplated by the Workers' Compensation Act by allowing tort claims against parties who cannot, by statutory definition, be responsible for an injured worker's compensation benefits. Like MSI cannot be responsible to Riddle for compensation benefits in this case.

Regarding Shupe v. Wasatch Electric Co., 546 P.2d 896 (Utah 1976), the respondents claim that the 1975 amendments to Section 62 "had no bearing on the Shupe decision." (Respondents' Brief, p. 10.) That is true only to the extent

that the Court held that the amendments did not apply in Shupe because the accident happened before the amendments took effect and that the amendments did not apply retroactively. The respondents cannot, however, ignore that the majority opinion in Shupe states that "the amendment if applicable would leave the plaintiffs in court." Id. at 898.

The respondents place much emphasis on Hinds v. Herm Hughes & Sons, Inc., 577 P.2d 561 (Utah 1978). The plaintiff reiterates that to rule in his favor on this appeal does not require this Court to overrule Hinds. Hinds does not control this appeal.

The respondents further claim that because Section 62 states that only those not occupying an "employee-employer relationship" may maintain a civil action, the "statutory employer" definition of Section 42 "must be applied to determine an employer-employee relationship." (Respondents' Brief, p. 12.) Why? Such an interpretation is directly contrary to Section 62, which states that tort claim liability is to be determined "notwithstanding the provisions of Section 35-1-42." The appellant asserts that the "employer-employee relationship" language of Section 62 means actual employer and that the "statutory employer" definition of Section 42 should not be considered in defining that relationship. That was the

purpose and intent of the 1975 Legislative amendments to Section 62.

Accepting the appellant's position would not, as the respondents suggest, require MSI to pay worker's compensation premiums for the employees of every subcontractor on a given work site. If MSI exercises no supervision or control over those subcontractors, MSI could not qualify as a statutory employer of those workers and would never be responsible for their workers' compensation benefits. MSI would, however, be subject to tort liability for injuries to those workers caused by MSI's negligence. Such is the balancing of interests discussed in Smith. MSI wants it both ways. It wants immunity from tort liability while having no obligation to provide workers' compensation benefits to the injured worker. That kind of protection is not contemplated by the Workers' Compensation Act.

Finally, the respondents claim that:

> It makes no sense to afford limited liability to entities qualifying as statutory employers under the Workmen's Compensation Act, while denying such limited liability to subcontractors and others working on a site with an injured employee who have much less control over, and even less contact with, the injured employee than the protected statutory employer has.

(Respondents' Brief, p. 13.)

That is precisely the point and it makes good sense. Those subcontractors with no control over and contact with an injured worker will never be called upon to provide that worker with compensation benefits and should, therefore, be subject to tort liability if negligent. The statutory employer, on the other hand, is subject to pay those benefits and, if called upon to do so, should be immune from tort liability. It makes sense to treat them differently under the statute.

POINT III

(REPLYING TO RESPONDENTS' POINT III)

THE "LOANED SERVANT DOCTRINE" DOES NOT APPLY TO THIS CASE BECAUSE MSI EXERCISED NO CONTROL OVER RIDDLE

The "loaned servant doctrine" does not apply to every situation where workers labor closely together on a project. The "lender" employer must surrender and the "borrower" employer must assume the power of supervision and control over the loaned employee. Bambrough v. Bethers, 552 P.2d 1286, 1292 (Utah 1976)(citing Fisher v. Seattle, 62 Wash.2d 800, 384 P.2d 852 (1963)).

While this Court in Bambrough held that it is not necessary for the original employer to surrender all control over the loaned employee, the borrower employer must exercise some degree of control over the alleged loaned employee for the doctrine to apply. In Bambrough, this Court found that transfer of control to have occurred when Bambrough's original employer, in response to Bambrough asking whether he should help transfer the load, said, "If that's their procedure, you do it." Id. at 1292.

MSI exercised no such control over Riddle at any time. The critical inquiry in determining whether the "loaned servant doctrine" should apply is the location of the power to control the servant. Petrick v. State, 22 Wash.App. 163, 589 P.2d 250 (1977).

The respondents claim that, "Because of this close working relationship with MSI and Mays, Riddle's ability to recover against respondents should be limited to benefits under the Act." (Respondents' Brief, p. 15.) The control, or right to control, in the case of a loaned servant must, however, create a relationship of subordination rather than a relationship of cooperation. Pichler v. Pacific Mechanical Constr., 1 Wash.App. 447, 462 P.2d 960 (1969).

Because MSI exercised no supervision or control over Riddle, the "loaned servant doctrine" does not apply to this case. Riddle is allowed to pursue his tort claim against Mays and MSI.

POINT IV

(REPLYING TO RESPONDENTS' POINT IV)

GENUINE ISSUES OF FACT EXIST REGARDING OWENS-CORNING'S CONTROL OVER MSI WHICH, IF RELEVANT, MUST BE DECIDED BY A JURY

Riddle's deposition testimony, taken as a whole, creates issues of fact regarding control which, if relevant, must be decided by a jury. To simply say, as the respondents do, that Riddle said he supervised work done by MSI does not dispose of the issue. As detailed in the Appellant's Brief, pages 21 to 23, Riddle also testified that he did not supervise the work of Alan Mays; that Maynard Crossland, a part-owner of MSI, supervised and instructed Mays; that Riddle had no authority to fire Mays without the approval of Crossland; and that MSI, not Owens-Corning, paid Mays from MSI's payroll.

The question of control is a question of fact for the jury. Moloso v. State, 644 P.2d 205 (Alaska 1982). The respondents attempt to establish control by taking one or two statements made by Riddle during his deposition, while

ignoring other sworn testimony creating issues of fact for the jury.

The appellant restates his position that, for the reasons set forth in his main brief, the issue of Owens-Corning's control over Mays and/or MSI is irrelevant to the determination of the issues presented by this appeal.

DATED this 1st day of March, 1989.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF (Riddle v. Mays, et al.) was hand delivered, this 1st day of March, 1989, to the following:

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