

1989

# Gary Hunt v. Domtar Industries, Inc. : Brief of Appellee

Utah Court of Appeals

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~~IN THE~~ UTAH COURT OF APPEALS

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Category 14(b)

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT  
OF TOOELE COUNTY, STATE OF UTAH  
THE HONORABLE PAT B. BRIAN PRESIDING

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**FILED**

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Mary T Noonan

IN THE UTAH COURT OF APPEALS

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GARY HUNT,	:	
	:	
Plaintiff/Appellant,	:	Case No. 890719-CA
	:	
vs.	:	
	:	Category 14(b)
DOMTAR INDUSTRIES, INC., a	:	
corporation, LAKE POINT SALT	:	
CO., INC., a corporation, ESI	:	
ENGINEERING, INC., a	:	
corporation, and JOHN DOES	:	
I-X,	:	
	:	
Defendants/Appellees.	:	

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BRIEF OF THE APPELLEE

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT  
OF TOOELE COUNTY, STATE OF UTAH  
THE HONORABLE PAT B. BRIAN PRESIDING

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The Defendant/Appellee ESI Engineering, Inc. ("ESI"), pursuant to Rule 24(b) of the Rules of the Utah Court of Appeals (1990), submits the following Brief.

#### JURISDICTION

This Court has jurisdiction to decide this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (1953, as amended, 1988). This case was poured over to the Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4) (1953, as amended, 1988). This is an appeal from a final Order and Judgment of the Third Judicial District Court in and for Tooele County, State of Utah, the Honorable Pat B. Brian presiding. The Order and Judgment entered by the trial court granted Defendant ESI's Motion for Summary Judgment, and dismissed with prejudice Plaintiff Gary Hunt's ("Hunt") Second Amended Complaint against ESI.

#### STATEMENT OF ISSUE

The following issue is presented to this Court for review:

Did the trial court properly conclude that insufficient evidence existed to create a jury issue as to whether the condition precedent to design professional liability - that the designer's plans were followed - was met?

### STANDARD OF REVIEW

This Court may not set aside the trial court's findings of fact unless such findings are found to be clearly erroneous. Utah Rule of Civil Procedure 52(a) (1990); Western Kane County Special Service District No. 1 v. Jackson Cattle Company, 744 P.2d 1376, 1377 (Utah 1987). The trial court's conclusions of law are reviewed for correctness. Bailey v. Call, 767 P.2d 138, 139 (Utah App. 1989) cert. denied 773 P.2d 45 (Utah 1989).

### STATEMENT OF THE CASE

#### A. Nature of the Case.

This case began as a strict products liability and negligence action brought by Hunt against defendants Domtar Industries, Inc., Lakepoint Salt Company, Inc., and ESI, alleging that the defendants were negligent in the design, construction and/or maintenance of the transfer conveyor on which Hunt was injured and that they were strictly liable in tort. Hunt voluntarily dismissed his strict liability claims. He later settled his claims against Domtar Industries, Inc. and Lakepoint Salt Company, Inc. ESI is the only defendant remaining in the action.



B. Course of Proceedings / Disposition of Trial Court.

Hunt's claims of negligence against ESI at the trial level were as follows:

- (1) The transfer conveyor was designed and constructed without a guard at the tail pulley;
- (2) The transfer conveyor was designed and constructed without a pull-rope electrical kill switch along the length of the conveyor;
- (3) The transfer conveyor was designed and constructed without a self-cleaning tail pulley, a plow scrapper, training idlers, or a vulcanized spliced belt.

ESI filed a Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment seeking judgment on the following four issues:

- (1) Summary Judgment on all of Hunt's claims of negligence on the grounds that the transfer conveyor which injured Hunt was not the transfer conveyor ESI designed and which Lakepoint constructed in 1982 and 1983;
- (2) Partial Summary Judgment on Hunt's second claim of negligence regarding an electrical kill switch on the grounds that ESI was not retained to

design and did not design the electrical controls of the transfer conveyor;

- (3) Partial Summary Judgment on Hunt's third claim with regard to a self-cleaning tail pulley, a plow scrapper, training idlers, and a vulcanized splice belt on the grounds that: a failure to design the transfer conveyor initially without a self-cleaning tail pulley, a plow scrapper, training idlers, and a vulcanized splice belt did not fall below the standard of care ordinarily exercised by professional engineers; it would only fall below the standard of care for an engineer not to use all or some of these devices to correct excessive tracking of the conveyor once that problem exhibited itself; ESI last performed work on the salt wash plant in June 1983 and was not advised of tracking problems with the transfer conveyor; and the transfer conveyor did not track excessively until the summer of 1985.

- (4) Partial Summary Judgment on Hunt's first claim of negligence with regard to the absence of a tail pulley guard on the grounds that a guard

complying with the standard of care would still have resulted in some injury to Hunt and the jury should not be permitted to speculate on the injuries which would have been prevented by a guard.

The trial court granted Summary Judgment in favor of ESI on issue (1); granted partial Summary Judgment on issues (2) and (3); and denied partial Summary Judgment on issue (4).

Hunt appeals only the court's ruling on issue (1), in which the court concluded that ESI is not liable to Hunt because the transfer conveyor which injured Hunt was not the transfer conveyor ESI designed in 1982.

C. Statement of Facts

1. Salient Facts.

Hunt's accident occurred on August 30, 1985, when he was attempting to correct the excessive "tracking" of the conveyor belt on which he was working. (R. 776, 769). "Tracking" means the conveyor belt moves from side to side and does not stay centered on the pulleys. (R. 772, 771).

Three years prior to Hunt's accident, ESI had been retained to provide the engineering design of salt wash facilities for Lake Point Salt Company. (R. 774). The transfer conveyor, at issue herein, was a part of the salt wash

facilities. (R. 776, 775). ESI's design of the transfer conveyor called for an open web steel joist frame. (R. 774). ESI did not design the operating components of the conveyor, such as the type of tail pulley to be used, the type of idlers, or the type of conveyor belt or belt splice to be used. Nor did ESI specify whether the tail pulley would be self-cleaning or not. (R. 774).

Lake Point, which had considerable experience in the construction of conveyors, constructed the transfer conveyor. In constructing it, Lake Point used its discretion in determining which parts to order for the operating components not shown on the ESI drawings. (R. 774).

The transfer conveyor, constructed by Lake Point with the open web steel joist frame designed by ESI, operated without unusual tracking difficulties between 1983 and 1985. (R. 772, 771). Hunt testified to this in his deposition:

Q.: Were you having any problems operating the transfer belt before they made--

A.: The prior belt?

Q.: Yes.

A.: No, that's why I couldn't understand why they changed it.

Q.: What differences were there in the one that was there when you first started operating it?

A.: Style of framework of the conveyor belt.

Q.: Just the style?

A.: Framework on the belt prior was a thin framed belt and this belt was a thicker framed belt, spread out, more open.

(Deposition of Gary Hunt dated 10/27/87 ("Hunt Depo. I") at 61:22-62:10) (R. 850).

In 1985, without the participation of ESI, the open web steel joist frame designed by ESI was removed and a channel iron frame was substituted. (R. 771, 767). While the new frame was being installed, it was accidentally bent. (R. 770). Hunt testified that the bend occurred when a front end loader bounced the new frame while it was suspended by a chain from the front end loader during installation. (Hunt Depo. I. at 59:23-60:13) (R. 850). After the bent frame was installed, the transfer conveyor began experiencing excessive tracking problems caused by the bend. (R. 770). Hunt testified that the bend resulted in the misalignment of the pulleys, which in turn, caused the tracking problems. (Deposition of Gary Hunt dated 3/6/89 ("Hunt Depo. II") at 115:14 - 116:6 (R. 861). Hunt testified as follows:

Q.: . . .Did you ever make any kind of determination of why the transfer belt required more frequent adjustments than the long belt?

A.: The frame was bent.

Q.: The frame was bent?

A.: Yes.

Q.: Where was that bent?

A.: In the center of the belt.

\* \* \* \*

Q.: How?

A.: When it was brought down and installed with the front-end loader, he drove too fast and he bounced it, put pressure on the chains, bent the frame.

(Hunt Depo. I at 59:23-60:13) (R. 850).

Hunt testified to the significance of the bend in the channel iron frame as follows:

Q.: So is it your testimony that the channel iron was never fully corrected or straightened?

A.: Yes.

Q.: And that failure to fully straighten it, in your opinion, caused the belt to track from side to side at the time of the accident?

\* \* \* \*

A.: I said that the pulleys were not lined up straight after that point, they had to be on an angle in order to get the belt to run straight, therefore, it wasn't corrected.

Q.: And in your opinion, the fact that it wasn't totally aligned was causing part of the tracking problems?

A.: Right. That's my opinion.

(Hunt Depo. II at 115:14-116:6) (R. 861).

Although the deposition testimony varies as to exactly what Hunt was doing when he got caught in the conveyor, it is clear that whatever he was doing, it was for the purpose of attempting to correct the excessive tracking caused by the bend in the new frame that replaced the frame designed by ESI. (R. 769, 768, 767). Hunt himself testified that his left hand was caught by the transfer conveyor as he was attempting to adjust a scraping device inserted into the framework of the transfer conveyor a week or two before the accident in an effort to prevent the transfer conveyor from tracking excessively. (Hunt Depo. I at 113-129) (R. 850).

The facts are undisputed that (1) ESI designed the framework for the transfer conveyor, but not the operating

components (R. 774); (2) the transfer conveyor constructed with the open web steel joist frame designed by ESI operated without unusual tracking difficulties between 1983 and 1985 (R. 772, 771); (3) only after the frame of the transfer conveyor was modified without the participation or knowledge of ESI in 1985, did the transfer conveyor track excessively (R. 772, 771, 774); (4) excessive tracking of the transfer conveyor commencing in 1985 was due to a bend in the new channel iron frame (R. 770); and (5) Hunt was taking action in an effort to remedy the excessive tracking of the transfer conveyor at the time of the accident (R. 769). Under this set of facts, reasonably minded jurors could not conclude that the conveyor that injured Hunt was the conveyor designed by ESI.

Indeed, all of the facts in the record indicate that the transfer conveyor was operated safely up until the change of frames caused excessive tracking. It was only then that the employees of Lake Point Salt Company were exposed to the hazards experienced by Hunt.

At the conclusion of argument on ESI's Motion for Summary Judgment, the trial court requested that ESI prepare proposed Findings of Fact and Conclusions of Law. ESI did so, and provided them to Hunt for comment pursuant to Rule 4-504, Utah Code of Judicial Administration (1988). Hunt filed



Objections and Additions to Proposed Findings of Fact and Conclusions of Law, which objected to four of ESI's nineteen Findings of Fact. Of the four Hunt objected to, only three related to Findings relevant to the issue on appeal.<sup>1/</sup> Of these three, ESI agreed to modification or deletion of two of the Findings in accordance with Hunt's objections. The only objection ESI did not agree to was Hunt's objection to ESI's proposed Finding that Gary Hunt was injured by the transfer conveyor "while taking action in an attempt to correct excessive tracking of the conveyor." ESI refused to modify this Finding, and consequently brought the matter before the trial court for resolution. At a hearing on July 14, 1989, Judge Brian allowed this Finding to remain. All of Hunt's eleven Proposed Additional Findings of Fact were incorporated into the final Findings of Fact and Conclusions of Law.

Hunt now claims that factual issues exist that must be determined by the trial court. (See Point I of ESI's Argument, at page 31 herein.) Considering the limited objections Hunt

<sup>1/</sup> The other relates to expert testimony concerning the standard of care with respect to designing self-cleaning pulleys, training idlers, and other aspects of conveyors. Hunt did not appeal the summary judgment ground to which his Conclusion of Fact related.

made to the proposed Findings of Fact and Conclusions of Law, and the extent to which his objections were accommodated, he should not now be allowed to raise them.

Set forth below are the Findings of Fact entered by the trial court,<sup>2/</sup> followed by citations to portions of the record that fully support each of the court's Findings of Fact.

## 2. The Trial Court's Findings of Fact.

Court's Finding of Fact No. 1: On or about August 30, 1985, Plaintiff Gary Hunt was injured at the Sol-Aire Salt and Chemical Company Salt Wash Plant while he was employed by Sol-Aire Salt and Chemical Company as the Salt Wash Plant Operator.

Record:

ESI's Memorandum in Support of Motion for Summary Judgment (R. 343).<sup>3/</sup>

<sup>2/</sup> Findings not relevant to this appeal are not included.

<sup>3/</sup> Throughout these citations to the record supporting the trial court's Findings of Fact, in every instance that reference is made to ESI's Memorandum in Support of Motion for Summary Judgment, it is with reference to undisputed facts not challenged by Hunt in his Opposition to Motion for Summary Judgment. Because Hunt did not dispute any of these facts, they are deemed admitted under Rule 4-501.5), Utah Code of Judicial Administration (1988).

- Hunt's Second Amended Complaint (R. 76, 75).

Court's Finding of Fact No. 2: At the time of the accident, salt was mined from settling ponds and taken to the Salt Wash Plant for cleansing. The Salt Wash Plant was comprised of ramps supported by retaining walls which permitted large trucks to drive over a grizzly (screen) upon which the salt was dumped by the trucks. The salt fell through the grizzly into one of two wet salt bins. The salt flowed from the wet salt bins by gravity into one of two immersion washers. The salt was then carried by screw conveyors from each immersion washer onto one of two wire mesh conveyors. The wire mesh conveyors partially dewatered the salt as it moved the salt east and discharged the salt onto the transfer conveyor, which was perpendicular to the two wire mesh conveyors. The transfer conveyor was a nylon-corded rubber belt conveyor which carried the partially dewatered salt to the long belt, which was perpendicular to the transfer conveyor. The long belt carried the salt east to the stacking conveyor, a movable incline conveyor which deposited the salt in storage piles. A diagram of the Salt Wash Plant was attached as Exhibit "1" to the Affidavit of Frank B. Bonell [sic] ("Bonell

Affidavit") and was identified as Exhibit "1" during argument of the Motion.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 342, 343).
- Deposition of Jim Palmer dated 4/8/88 ("Palmer Depo. I") at 7:15-17; 21:15-18 (R. 853).
- Hunt Depo. I at 37:10-39:13; 72:6-73:2; 40:21-23; 40:10-15; 41:13-20; 126:15-16; 42:1-5; 42:19-23 (R. 850).
- Affidavit of J. Frank Bonnell dated 3/11/89 ("Bonnell Affidavit I") (R. 234, 229).

Court's Finding of Fact No. 3: Gary Hunt was injured when his left hand and left arm were pulled into the tail pulley of the transfer conveyor. The upper belt of the transfer conveyor moved salt from north to south. When the salt reached the far southern end of the transfer conveyor, it was deposited onto the long belt as the transfer conveyor belt moved around the head pulley. The head pulley is the drive pulley to which a motor is attached. The lower portion of the transfer conveyor belt moved from south to north where it

wrapped around the tail pulley of the transfer conveyor in a counter-clockwise rotation.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 342).
- Hunt Depo. I at 129:1-8; 134:10-23; 41:1-6; 41:13-16; 49:8-12 (R. 850).

Court's Finding of Fact No. 4: The Salt Wash Plant was designed and constructed in 1982 and 1983. It was first operated during the summer of 1983. At that time, the salt plant was owned by Lake Point Salt Company ("Lake Point").

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 341).
- Palmer Depo. I at 23:24 (R. 853).
- Deposition of Michael Bolinder dated 2/23/89 ("Bolinder Depo.") at 11:3-6 (R. 851).

Court's Finding of Fact No. 5: Engineering Associates, Inc., an engineering firm now known by the name of ESI Engineering, Inc., was retained in May of 1982 to provide

engineering design of the salt washing facilities at the Salt Wash Plant, including conveyors.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 341).
- Deposition of James R. Palmer dated 3/7/89 ("Palmer Depo. II") at 7:6-23 (R. 857).

Court's Finding of Fact No. 6: ESI Engineering prepared two drawings that depicted the transfer conveyor. These drawings did not include details for the transfer conveyor describing the type of tail pulley, the type of idlers, whether the tail pulley was self-cleaning or non self-cleaning, or the type of conveyor belt or conveyor belt splice to be used. ESI's drawings of the transfer conveyor also did not include a tail pulley guard. ESI designed the frame of the transfer conveyor using an open web steel joist frame.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 340).
- Deposition of Frank Bonell dated 3/4/88 ("Bonell Depo.") at 18:19-23 (R. 852).

- Bonell Affidavit I (R. 234).
- Palmer Depo. II at 11:11-12:2; 20:3-21:17; 24:18-20 (R. 857).
- Deposition of Dean Cox Matthews ("Matthews Depo.") at 33:8-35:8; 38:11-16 (R. 855).
- Palmer Depo. I at 28:17-18 (R. 853)
- Plaintiff's Objections and Additions to Proposed Findings of Fact and Conclusions of Law (R. 667).

Court's Finding of Fact No. 7: Lake Point had considerable experience in the construction of conveyors. Lake Point's construction crew constructed the transfer conveyor. Its construction crew used its discretion in determining which parts to order for the operating components of the transfer conveyor not shown on ESI's drawings, such as the tail pulley, the idlers, the conveyor belts and conveyor belt splice.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 340).
- Palmer Depo. I at 26:8-17; 26:21; 28:2-21 (R. 853).
- Palmer Depo. II at 24:4-10; 13:19-14:9; 24:11-17 (R. 857).

- Bonnell Affidavit I (R. 234).

Court's Finding of Fact No. 8: Lake Point's

construction crew constructed the transfer conveyor with a drum pulley (non self-cleaning), without training idlers, without a plow scraper for the lower belt and with a mechanically spliced nylon-corded rubber belt.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 340).

Court's Finding of Fact No. 11: ESI's drawings of the

transfer conveyor depict an open web steel joist frame. Sheet 2 of Exhibit 1 to the Deposition of Verl Young reflecting ESI's design of an open web steel joist transfer conveyor (the drawing refers to the transfer conveyor as the "collection conveyor") was identified as Exhibit "3" during argument of the Motion. The construction crew of Lake Point initially constructed the transfer conveyor with an open web steel joist frame. A photograph of the transfer conveyor taken by J. Frank Bonell in late June 1983 or early July, 1983, during the final stages of construction of the Salt Wash Plant, was attached as



Exhibit "A" to ESI's Reply Memorandum and was identified as Exhibit "4" during the argument of the Motion. This photograph shows that an open web steel joist frame was constructed by Lake Point in 1983.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 339).
- Reply Memo, Exhibit A, (R. 287).
- Bonnell Affidavit dated 4/5/89 (R. 299).
- Palmer Depo. I at 28:17-18 (R. 853).
- Palmer Depo. II at 11:11-12:2 (R. 857).
- Hunt Depo. I at 62:3-17 (R. 850).
- Deposition of Verl Young dated 2/23/89 ("Young Depo.") Exhibit 1 (R. 854).
- Hunt Depo. II at 49:2-50:6 (R. 861).
- Matthews Depo. at 31:2-8 (R. 855).

Court's Finding of Fact No. 12: The Salt Wash Plant was operated seasonally from approximately April to October, depending upon the weather. The Salt Wash Plant was operated with the open web steel joist frame transfer conveyor during the 1983, 1984 and part of the 1985 season.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 338).
- Hunt Depo. I at 35:11-19; 61:1-62:17; 65:7-8 (R. 850).
- Deposition of Michael Dean Bolinder dated 2/23/89 ("Bolinder Depo.") at 18:10-19 (R. 851).

Court's Finding of Fact No. 13: During its use, the open web steel frame transfer conveyor operated without unusual tracking difficulties. A conveyor is said to "track" when the conveyor belt moves from side to side and does not stay centered on the pulleys.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 338).
- Hunt Depo. I at 63:1-3; 66:14-67:17 (R. 850).

Court's Finding of Fact No. 14: Build-up of material on the tail pulley of a conveyor can cause a conveyor belt to track. To prevent the transfer conveyor from tracking while the open web steel joist frame was used in the seasons of 1983, 1984 and a part of 1985, a fresh water hose was attached to the

frame of the transfer conveyor with baling wire and allowed to spray on the top side of the lower belt cleaning the top side of the lower belt before it returned upon the tail pulley.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 338).
- Bolinder Depo. at 20:1-4; 20:17-21:2 (R. 851).
- Hunt Depo. I at 144:14-24; 145:7-18 (R. 850).

Court's Finding of Fact No. 15: Sometime during the 1985 season, the frame of the transfer conveyor was changed from the open web steel joist frame shown in Exhibit "3" and Exhibit "4" to a channel iron frame shown in the Utah Occupational Safety and Health (UOSH) photographs of the transfer conveyor taken after the accident. Exhibit 4B-4 to the Donald Anderson Deposition, a UOSH photograph of the transfer conveyor taken on the day of the accident, was identified as Exhibit 2 during the argument of the Motion. It reflects that a channel iron frame transfer conveyor, not the open web steel joist frame transfer conveyor reflected in Exhibits "3" and "4" to the Motion, was in place on the day of the accident.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 338-337).
- Deposition of Donald Anderson dated 12/1/88 ("Anderson Depo.") Exhibits 4B-1, 4B-2, 4B-3 and 4B-4 (R. 860).
- Hunt Depo. I at 62:3-14 (R. 850).
- Bolinder Depo. at 18:8-19 (R. 851).
- Matthews Depo. at 39:21-42:25 (R. 855).

Court's Finding of Fact No. 16: Sometime during the 1984 or 1985 season, a second modification was made to the transfer conveyor. The fresh water hose which had been used to clean the top side of the lower belt of the transfer conveyor was moved from the transfer conveyor to a location below the wire mesh conveyor to operate in conjunction with a sucking fan.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 337).
- Hunt Depo. I at 144:14-145:6; 147:7-15 (R. 850).
- Hunt Depo. II at 50:7-51:22 (R. 861).

Court's Finding of Fact No. 17: Gary Hunt operated the Salt Wash Plant during the 1984 and 1985 seasons. During

the 1985 season after the frame was changed, considerable difficulties were experienced by Mr. Hunt in the operation of the transfer conveyor. The transfer conveyor tracked excessively because the frame was bent during its installation.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 336, 337).
- Hunt Depo. I at 65:7-14; 64:6-12; 59:23-60:13 (R. 850).
- Hunt Depo. II at 48:10-15; 115:14-116:6 (R. 861).

Court's Finding of Fact No. 18: In an effort to clean the top side of the lower belt as it returned to the tail pulley to reduce the amount of tracking of the transfer conveyor, the week of or the week prior to the accident an employee of the Salt Wash Plant constructed a belt scraping device. The belt scraping device was constructed of a 2 to 3 foot piece 2x4 which had nailed to its face a piece of nylon conveyor belt which hung down 8" to 10" from the 2x4. The 2x4 scraping device was placed in the frame of the transfer conveyor, secured by the "upright" shown by the arrow on Exhibit 4C of the Donald Anderson Deposition, such that the

belt flap scraped the top side of the lower belt before it reached the tail pulley.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 336).
- Hunt Depo. I at 80:17-25; 81:18-25; 82:1-7; 83:5-19; 84:6-17; 120:10-13; 126:11-21 (R. 850).
- Hunt Depo. II at 27:13-16; 54:8-23 (R. 861).
- Bolinder Depo. at 27:2-25 (R. 851).
- Anderson Depo. Exhibit 4C (R. 860).

Court's Finding of Fact No. 19: Gary Hunt was injured by the transfer conveyor while taking action in an attempt to correct excessive tracking of the conveyor. Gary Hunt's testimony as to his actions prior to the accident are as follows:

(a) Several days prior to the accident, Gary Hunt had noticed that the two ends of the transfer conveyor belt which were mechanically fastened to make one continuous belt had chunks missing from each end of the belt on one edge. The missing chunks exposed the mechanical fastener on the one edge as shown in Exhibit "1" to Gary Hunt's Deposition. The mechanical

fastener was an alligator clamp fastener, which is comprised of two clamps, one of which is attached to each end of the belt. The fasteners are then interlocked like a door hinge and a rod is inserted to hold the two ends of the belt together.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 335, 336).
- Hunt Depo. I at 130:4-10; 130:19-24 (R. 850).
- Hunt Depo. II at 19:5-20:8; 21:13-16; 16:16-17:13; Exhibit 1 (R. 861).

Court's Finding of Fact No. 19(b): Just prior to the accident, Gary Hunt noticed that the flap of the 2x4 scraper had flipped under and instead of scraping salt from the belt was smoothing the salt without removing it.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 335).
- Hunt Depo. I at 118:4-9 (R. 850).

Court's Finding of Fact No. 19(c): Immediately prior to the accident, Gary Hunt was standing 3 to 4 feet from the tail pulley and facing southwest. He used a stick held in his left hand, which he found on the ground to poke at the flap to move it into proper position. He poked the stick to the south, away from the tail pulley, at the back side of the scraper. While doing so, Gary Hunt's left hand was caught by the rod of the mechanical fastening device on the belt and pulled toward the tail pulley.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 335).
- Hunt Depo. I at 84:14-17; 129:15-19; 128:23-129:8 (R. 850).
- Hunt Depo. II at 23:12-20; 6:11-14; 7:12-23; 9:9-20 (R. 861).

Court's Finding of Fact No. 19(d): Gary Hunt was spun around so that his back side was against the frame of the transfer conveyor with his left hand moving with the belt toward the tail pulley. He grabbed the frame with his right hand and with all the



strength of both arms and his body attempted to pull free of the belt. He was unable to do so and was pulled off his feet up onto the frame while his left hand and arm went into the nip (pinch) point of the tail pulley and were pulled around the pulley.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 334).
- Hunt Depo. I at 129:1-8; 134:14-16 (R. 850).
- Hunt Depo. II at 41:21-42:14 (R. 861).

Court's Finding of Fact No. 19(e): A total of 3 to 4 seconds elapsed between the time Gary Hunt was first caught by the belt and the time his hand went into the nip point of the tail pulley.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 334).
- Hunt Depo. II at 43:6-16 (R. 861).

Court's Finding of Fact No. 19 (continued): Other witnesses testified Gary Hunt was taking other action to

prevent excessive tracking of the transfer conveyor at the time of the accident. These actions are as follows:

(a) Gary Hunt was throwing salt into the tail pulley at the time of the accident and got too close to the nip point;

Record:

- Deposition of LaVar Gunderson dated 2/24/89 at 60:19-61:21 (R. 856).

(b) Gary Hunt was sticking a 2x4 against the tail pulley and was inadvertently pulled in.

Record:

Bolinder Depo. at 38:3-40:2 (R. 851).

Court's Finding of Fact No. 20: ESI last performed engineering services on the Salt Wash Plant on June 29, 1983. ESI was not advised or consulted about tracking problems of the transfer conveyor prior to the accident.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 333).
- Bonnell Affidavit I at ¶ 7, ¶ 8 (R. 233).
- Palmer Depo. I at 49:4-50:22 (R. 853).

Court's Finding of Fact No. 22: On the day following the accident, Lake Point maintenance crews fabricated a guard on the tail pulley of the transfer conveyor and installed a self-cleaning pulley. A photograph of the tail pulley guard installed after the accident is marked as Exhibit "4C" of the Donald Anderson Deposition.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 334).
- Young Depo. at 56:7-10; 55:8-11 (R. 854).
- Anderson Depo. at 49:14-19; Exhibit 4C (R. 860).
- Deposition of Gary Padley dated 1/9/89 ("Padley Depo.") at 63:3-6 (R. 859).

Court's Finding of Fact No. 23: The tail pulley guard installed after the accident shown in Anderson Deposition Exhibit 4C was accepted by Utah Occupational Safety and Health ("UOSH") as complying with Section 182.1.2 of the UOSH Rules and Regulations, General Standards, for the guarding of tail pulleys of belt conveyors.

Record:

- ESI's Memorandum in Support of Motion for Summary Judgment (R. 333, 334).
- Padley Depo. at 63:3-16 (R. 859).
- Anderson Depo. at 36:20-25; Exhibit 4C (R. 860).

SUMMARY OF ARGUMENT

In his Appeal Brief, Hunt raises several issues of fact that he argues must be decided by a jury. Hunt did not, however, raise these issues below in either his opposition to ESI's Motion for Summary Judgment or in his objections to ESI's Proposed Findings of Fact and Conclusions of Law. Utah case law is firm in disallowing a party from raising such issues on appeal.

The objective of Hunt's Brief is to convince this Court to apply a strict products liability analysis to this negligence case. He argues that no reason exists for this Court not to apply the "substantial alteration" doctrine applicable in strict products liability law. This idea is so unique that he is unable to point to a single case in which a court has done so, nor a single commentator who has advocated it. The real issue, and the one decided in ESI's favor by the trial court, is whether Hunt was able to present to the trial court sufficient evidence to create a jury issue as to the well-established condition precedent applicable in negligent

design cases: that the designer's plans and specifications were followed.

In this case, Hunt was unable to muster sufficient evidence to create a jury question on this issue because the undisputed facts demonstrate that Hunt's accident occurred while he was attempting to correct excessive tracking problems on the conveyor--tracking problems that arose only after his employer removed the conveyor frame designed by ESI and substituted a different frame that was bent during installation and which bend caused the tracking problem. It is undisputed that no unusual tracking problems occurred when the frame designed by ESI was in use. Thus, Hunt was unable to satisfy his burden to demonstrate that a genuine issue of material fact exists for the jury. Because only one reasonable conclusion can be drawn from these undisputed facts, the issue of a condition precedent was correctly decided by the trial court as a matter of law.

#### ARGUMENT

I. HUNT CANNOT NOW BRING BEFORE THIS COURT  
FACTUAL ISSUES THAT HE DID NOT RAISE AT  
THE TRIAL LEVEL.

In Hunt's Brief, he asserts that the following factual issues must be determined by a jury: (1) whether an original

design defect existed in the transfer conveyor; (2) whether there was a subsequent alteration in that design; and (3) whether the original design defect alone, or in conjunction with the subsequent alteration, was a proximate cause of Hunt's injury. Brief of Appellant at 26 - 27. Hunt, however, in his Opposition to ESI's Motion for Summary Judgment, disputed only issue (3) above relating to causation. (R. 269-272). He did not raise the issues of design defect or substantial alteration. (R. 269-272). Nor did he raise them in his Oppositions and Additions to Proposed Findings of Fact and Conclusions of Law. (R. 664-670). Having not raised them at the trial court level, Hunt cannot now bring them before this Court. Park City Utah Corp. v. Ensign Company, 586 P.2d 446, 447 (Utah 1978) ("Where a party neither raises an issue in its pleadings nor presents it to the trial court, the issue cannot be considered for the first time on appeal.")

II. HUNT DID NOT PRESENT TO THE TRIAL COURT SUFFICIENT EVIDENCE TO CREATE A JURY ISSUE AS TO THE CONDITION PRECEDENT TO ESI'S LIABILITY: THAT THE CONVEYOR THAT INJURED HUNT WAS DESIGNED BY ESI AND CONSTRUCTED IN ACCORDANCE WITH ESI'S DESIGN.

In this negligence case, Hunt has based his entire argument on appeal on the law of strict products liability.

Not a single case he cites in support of the "substantial alteration" basis for his appeal is a negligence case. The law he discusses is as inapplicable on close examination as it is on first glance. Hunt's argument is, for lack of a better term, a red herring.

Negligence is a relatively simple concept that has been in place since the early nineteenth century. Strict products liability in tort is a comparatively new concept that developed in the 1960's.<sup>4/</sup> Strict products liability and negligence have some aspects in common, but one cannot make the assumption that a concept of strict liability law applies in a negligence case, absent compelling authority. Hunt offers no authority at all for his proposition that the substantial alteration concept in strict products liability analysis should also apply in negligence cases. This concept has no application. Hunt has no strict liability claim against ESI, having voluntarily dismissed it in recognition of the fact that ESI is not a manufacturer or seller of products. To drop his

<sup>4/</sup> According to Prosser, the first case to apply a theory of strict liability in tort was Greenman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 377 P.2d 897 (1963). Prosser and Keeton on Torts (5th Ed. 1984) at 694.

strict liability claim, then attempt to have this Court apply a strict liability analysis to his remaining negligence claim is simply asking too much.

The legal concept at issue in this case is the overlying principle that a design professional cannot be liable for defects in plans or specifications unless it is shown that those plans and specifications were followed--in other words, a condition precedent to design professional liability for negligence is compliance with the designer's plans and specifications. If the judge determines insufficient evidence exists in support of this condition precedent to create an issue for the jury, summary judgment is proper. See cases discussed at pages 38 through 39 infra.

This is exactly what occurred before the trial court in this case. The trial court entered conclusions of law establishing that insufficient evidence has been presented by Hunt to raise a triable issue. Those conclusions were:

1. It is a condition precedent to liability of ESI for negligent design of the transfer conveyor, that ESI have actually designed the transfer conveyor which caused Plaintiff's injuries and that the conveyor have been constructed in substantial conformance with ESI's design. Balcom Industries, Inc. v. Nelson, 454 P.2d 599 (Colo. 1969); Weston v. New Bethal



Missionary Baptist Church, 598 P.2d 411  
(Wash. App. 1979).

2. Where it is uncontroverted that ESI's drawing prepared in 1982-1983 of the transfer conveyor (Exhibit "3" to the Motion) provided the frame design, with Lake Point designing the operating components of the conveyor, Lake Point originally constructed the transfer conveyor with the frame designed by ESI, the frame was changed when the transfer conveyor was reconstructed in 1985 with a channel iron frame, and the change in the frame changed the operating characteristics of the transfer conveyor, causing excessive tracking, the Court concludes that Plaintiff was not injured by the transfer conveyor designed by ESI.

3. Where it is uncontroverted that Plaintiff's injuries were sustained while he was taking action in an attempt to remedy the excessive tracking of the channel iron frame transfer conveyor constructed in 1985 without ESI's involvement, caused in part by a bend in the frame, the Court concludes that Plaintiff's injuries were not proximately caused by any negligence of ESI in the design or construction of the open web steel joist transfer conveyor without a tail pulley guard, an electrical kill switch, a self-cleaning pulley, a plow scraper, training idlers or a vulcanized spliced belt.

4. There is no genuine issue of material fact and ESI is entitled to Summary Judgment as a matter of law dismissing with prejudice and on the merits Plaintiff's Second Amended Complaint against ESI.

(R. 765, 766).

Ample case law--both substantive and procedural --supports the trial court's ruling. It is black letter law that an architect or engineer is not liable for negligent design if his or her plans and specification are not followed. This is recognized by sources as general as American Jurisprudence which states: "[A]n architect is not liable if the employer has failed to follow the plans in an important particular and damages result which may have been due to the departure." 5 Am. Jur. Architects § 23 (1962).

This principle has been present in negligence law since the late 1800's. In Lake v. McElfatrick et al., 139 N.Y. 349, 34 N.E. 922 (1893), the Court of Appeals of New York reversed the trial court's denial of a directed verdict because the plaintiff had failed to produce sufficient evidence that the architect's plans and specifications for the design of an opera house had been followed. The Court of Appeals stated:

[T]he plaintiff was . . . required to affirmatively establish two material facts: (1) that his assignor had followed the plans, specifications, and drawings in the construction of the building in all essential matters; and (2) that the plans were defective; and unless there was sufficient evidence to go to the jury upon both of these issues, the judgment which he has recovered cannot stand.

139 N.Y. at 923. The plaintiff in McElfatrick had not produced sufficient evidence to go to the jury as to whether the plans and specifications had been followed. Specifically, the plaintiff failed to submit sufficient proof that an eight foot arch, which collapsed, was built in accordance with the architect's plans, which specified stone supports. The arch was built with brick supports. The court elaborated:

[W]here the variance is not disputed, and involved the integrity of the mode of construction of the affected part, and is so far material that it may have been the direct cause of the injury for which the owner seeks to hold the architect responsible, it must be held, we think, that the plaintiff has failed to establish the cause upon which he relies.

139 N.Y. at 925.

A trial court's denial of a directed verdict was also reversed in Bayne v. Everham, 197 Mich. 181, 163 N.W. 1002 (1917), in which the plaintiff sought to recover from a reinforced concrete company for the death of his decedent in the collapse of a concrete garage. The concrete company had prepared plans and specifications for the reinforcement of the garage. The concrete company produced evidence that numerous

strands of reinforcing steel called for in the design were omitted by the contractor, which weakened the structure. The concrete company moved for a directed verdict at the close of the plaintiff's evidence. The court denied it and submitted to the jury the question "whether the plans had been substantially followed . . .". The Supreme Court of Michigan reversed, holding that the concrete company defendant had been entitled to a directed verdict.

In a more recent Washington state case, the Washington Court of Appeals affirmed the trial court's award of summary judgment to an engineer whose plans were not followed. In Weston v. New Bethel Missionary Baptist Church et al., 23 Wash. App. 747, 598 P.2d 411 (1979) (cited in the trial court's Conclusions of Law), property owners recovered a judgment against defendant church for damages suffered when a "rockery" (retaining wall/rock garden) collapsed. The church then sought indemnity from an engineer whom it had hired to design the rockery. The engineer demonstrated that the church deviated from the plans by constructing a 22' wall when the plans called for a 16' wall. The court held: "Since [the engineer's] plans were not followed or relied upon, [he] could not be guilty of negligence that caused damages to plaintiff's property." 598 P.2d at 414.

Finally, in Caranna and Caranna v. Eades et al., 466 So. 2d 259 (Fla. App. 1985), the Florida Court of Appeals affirmed the trial court's granting of summary judgment to defendant architect because the plaintiff, a child who fell through slats on a balcony, could not show that the architect's design, calling for a 6" space between slats, had been followed. As constructed, the space between the slats ranged from 5-3/8" to 8-5/8".

In numerous negligence cases, appellate courts have affirmed the trial court's denial of recovery when the plaintiff fails to prove the condition precedent of compliance with plans and specifications. These include Balcom Industries, Inc. v. Nelson, 169 Colo. 128, 454 P.2d 599 (1969) (cited in the trial court's Conclusions of Law) (plaintiff could not recover against engineer for negligent design of bean storage bin where design was not followed); Ressler v. Nielsen, 76 N.W. 2d 157 (N.D. 1956) (architect not liable where he specified one type of glass, and the owner, during construction, had it changed to another type that was more sensitive to temperature changes); and Dorsey v. Frishman, 291 F. Supp. 794, 796 (D. D.C. 1968) (engineer of an air conditioning system could not be liable for negligence where

there was "no evidence that the defects were not due to the departure from the plans.")

The burden is upon Hunt to set forth specific facts showing that there is a genuine issue for trial. Thornock v. Cook, 604 P.2d 934, 936 (Utah 1979). A genuine issue of material fact exists only when on the basis of the facts in the record, reasonable minds could differ. Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982). If, however, the facts are undisputed and but one reasonable conclusion can be drawn from them, the issue should be decided as a matter of law. FMA Acceptance Co. v. Leatherby Insurance Co., 594 P.2d 1332, 1335 (Utah 1979). This is precisely what the trial court did in this case. Its ruling should consequently be left standing.

#### CONCLUSION

Utah law precludes Hunt from raising before this Court factual issues he failed to raise below.

Hunt was unable to satisfy his burden to bring before the trial court sufficient evidence to create a jury question on the issue of a condition precedent. Consequently it was proper for the trial court to enter summary judgment in favor of ESI.

DATED this 29th day of June, 1990.

JONES, WALDO, HOLBROOK & McDONOUGH

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CERTIFICATE OF SERVICE

I, Michael J. Kelley, certify that on July 2, 1990, I served a copy of the attached Brief of the Appellee upon Gordon K. Jensen, the counsel for the appellant in this matter by causing it to be personally served upon him at the following address:

Gordon K. Jensen, Esq.  
Robert J. DeBry & Associates  
4252 South 700 East,  
Salt Lake City, Utah 84107

JONES, WALDO, HOLBROOK & McDONOUGH

By   
\_\_\_\_\_  
Michael J. Kelley  
Attorneys for ESI

sv 452/mm



## ADDENDUM

CLERK OF THE COURT  
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3RD DISTRICT COURT

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IN THE THIRD JUDICIAL DISTRICT COURT OF TOOELE COUNTY  
STATE OF UTAH

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GARY HUNT,	:	
	:	
Plaintiff,	:	MEMORANDUM OF DECISION
	:	AND FINDINGS OF FACT AND
vs.	:	CONCLUSIONS OF LAW
	:	
DOMTAR INDUSTRIES, INC.,	:	
a corporation, LAKE POINT	:	
SALT CO., a corporation,	:	
ESI ENGINEERING, INC., a	:	Civil No. 87061
corporation, and JOHN	:	
DOES I through X,	:	Judge Pat B. Brian
	:	
Defendants.	:	

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MEMORANDUM OF DECISION

This litigation arises out of serious injuries suffered by Plaintiff, Gary Hunt, on or about August 30, 1985, when his left hand and arm were pulled into the tail pulley of the transfer conveyor at the Sol-Aire Salt and Chemical Company, Salt Wash Plant. The Salt Wash Plant was constructed in 1982 and 1983. The Salt Wash Plant was owned at that time

000730

by defendant Lake Point Salt Company. Lake Point Salt Company engaged ESI Engineering, Inc. to design the Salt Wash Plant.

Plaintiff has dismissed his claims of strict liability in tort and is proceeding to trial solely on negligence claims against defendants Lake Point Salt Company ("Lake Point"), Domtar Industries, Inc. (a related corporation to Lake Point) and ESI Engineering, Inc. ("ESI"). Plaintiff's claims of negligence against ESI are as follows:

(1) The transfer conveyor was designed and constructed without a guard at the tail pulley;

(2) The transfer conveyor was designed and constructed without a pull-rope electrical kill switch along the length of the conveyor;

(3) The transfer conveyor was designed and constructed without a self-cleaning tail pulley, a plow scraper, training idlers or a vulcanized spliced belt.

ESI filed a Motion for Summary Judgment, or in the Alternative, for Partial Summary Judgment seeking judgment on four issues as follows:

(1) Summary Judgment as to all of Plaintiff's claims of negligence on the grounds that the transfer conveyor which injured Plaintiff was not the transfer

conveyor ESI designed and which Lake Point constructed in 1982 and 1983;

(2) Partial Summary Judgment on Plaintiff's second claim of negligence regarding an electrical kill switch on the grounds that ESI was not retained to design and did not design the electrical controls of the transfer conveyor;

(3) Partial Summary Judgment on Plaintiff's third claim with regard to a self-cleaning tail pulley, a plow scraper, training idlers and a vulcanized splice belt on the grounds that: a failure to design the transfer conveyor initially without a self-cleaning tail pulley, a plow scraper, training idlers and a vulcanized spliced belt did not fall below the standard of care ordinarily exercised by professional engineers; it would only fall below the standard of care for an engineer not to use all or some of these devices to correct excessive tracking of the conveyor, once that problem exhibited itself; ESI last performed work on the Salt Wash Plant in June, 1983 and was not advised of tracking problems with the transfer conveyor; and the transfer conveyor did not track excessively until the summer of 1985.

(4) Partial Summary Judgment on Plaintiff's first claim of negligence with regard to the absence of a tail pulley guard on the grounds that a guard complying with the standard of care would still have resulted in some injury to Plaintiff, and that the jury should not be permitted to speculate on the injuries which would have been prevented by a guard.

ESI's Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment came on for hearing before the Court on April 26, 1989, at approximately 11:30 a.m. Plaintiff was represented by its counsel, Daniel F. Bertch, Esq., ESI was represented by its counsel, Craig R. Mariger, Esq. and Sue Vogel, Esq., and Domtar Industries, Inc. and Lake Point were represented by their counsel, Stuart L. Poelman, Esq. The Court heard argument from Daniel F. Bertch, Esq. and Craig R. Mariger, Esq. At the conclusion of argument, the Court granted ESI's Motions for Partial Summary Judgment on issues (2) and (3) stated above. The Court took under advisement issues (1) and (4) of ESI's Motion. On April 27, 1989, the Court granted ESI's Motion for Summary Judgment on issue (1) and denied ESI's Motion for Partial Summary Judgment on issue (4).

In accordance with Rule 52(a), Utah Rules of Civil Procedure, the Court, having reviewed the memoranda and affidavits submitted by counsel, having heard the arguments of counsel, having considered the deposition testimony of Plaintiff, James Palmer, Verl Young, Michael Bolinder, J. Frank Bonell, Dean Cox Matthews, Ernest LaVar Gunderson, Donald Anderson, Gary Padley, William D. Peterson, Vincent Gallagher and Michael Cutler referred to in the memoranda of counsel, and being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about August 30, 1985, Plaintiff Gary Hunt was injured at the Sol-Aire Salt and Chemical Company Salt Wash Plant while he was employed by Sol-Aire Salt and Chemical Company as the Salt Wash Plant Operator.

2. At the time of the accident, salt was mined from settling ponds and taken to the Salt Wash Plant for cleansing. The Salt Wash Plant was comprised of ramps supported by retaining walls which permitted large trucks to drive over a grizzly (screen) upon which the salt was dumped by the trucks. The salt fell through the grizzly into one of two wet salt bins. The salt flowed from the wet salt bins by gravity into one of two immersion washers. The salt was then carried by

screw conveyors from each immersion washer onto one of two wire mesh conveyors. The wire mesh conveyors partially dewatered the salt as it moved the salt east and discharged the salt onto the transfer conveyor, which was perpendicular to the two wire mesh conveyors. The transfer conveyor was a nylon-corded rubber belt conveyor which carried the partially dewatered salt to the long belt, which was perpendicular to the transfer conveyor. The long belt carried the salt east to the stacking conveyor, a movable incline conveyor which deposited the salt in storage piles. A diagram of the Salt Wash Plant was attached as Exhibit "1" to the Affidavit of Frank B. Bonell ("Bonell Affidavit") and was identified as Exhibit "1" during argument of the Motion.

3. Gary Hunt was injured when his left hand and left arm were pulled into the tail pulley of the transfer conveyor. The upper belt of the transfer conveyor moved salt from north to south. When the salt reached the far southern end of the transfer conveyor, it was deposited onto the long belt as the transfer conveyor belt moved around the head pulley. The head pulley is the drive pulley to which a motor is attached. The lower portion of the transfer conveyor belt moved from south to north where it wrapped around the tail pulley of the transfer conveyor in a counter-clockwise rotation.

4. The Salt Wash Plant was designed and constructed in 1982 and 1983. It was first operated during the summer of 1983. At that time, the salt plant was owned by Lake Point Salt Company ("Lake Point").

5. Engineering Associates, Inc., an engineering firm now known by the name of ESI Engineering, Inc., was retained in May of 1982 to provide engineering design of the salt washing facilities at the Salt Wash Plant, including conveyors.

6. ESI Engineering prepared two drawings that depicted the transfer conveyor. These drawings did not include details for the transfer conveyor describing the type of tail pulley, the type of idlers, whether the tail pulley was self-cleaning or non self-cleaning, or the type of conveyor belt or conveyor belt splice to be used. ESI's drawings of the transfer conveyor also did not include a tail pulley guard. ESI designed the frame of the transfer conveyor using an open web steel joint frame.

7. Lake Point had considerable experience in the construction of conveyors. Lake Point's construction crew constructed the transfer conveyor. Its construction crew used its discretion in determining which parts to order for the operating components of the transfer conveyor not shown on ESI's drawings, such as the tail pulley, the idlers, the conveyor belts and conveyor belt splice.



8. Lake Point's construction crew constructed the transfer conveyor with a drum pulley (non self-cleaning), without training idlers, without a plow scraper for the lower belt and with a mechanically spliced nylon-corded rubber belt.

9. ESI was not retained by Lake Point to provide any engineering design of the electrical circuitry or electrical controls for the transfer conveyor or for any other portion of the Salt Wash Plant.

10. The electrical circuitry and electrical controls for the Salt Wash Plant were provided to Lake Point by its in-house electrician, Ernest LaVar Gunderson. In designing the electrical controls and circuitry for the Salt Wash Plant, LaVar Gunderson did not design a safety kill switch for the transfer conveyor. A safety kill switch is comprised of two switches at the ends of the conveyor which are attached by a pull rope. When the pull rope is tugged, power is cut off to the entire Salt Wash Plant. LaVar Gunderson did design safety kill switches for other conveyors at the Salt Wash Plant. The decision not to include an electrical kill switch on the transfer conveyor was made by LaVar Gunderson. Mr. Gunderson knew that OSHA required kill switches on conveyors, and he intended that all conveyors, including the transfer conveyor, have kill switches. Mr. Gunderson decided to delay the

installation of a kill switch on the transfer conveyor due to economic considerations.

11. ESI's drawings of the transfer conveyor depict an open web steel joist frame. Sheet 2 of Exhibit 1 to the Deposition of Verl Young reflecting ESI's design of an open web steel joist transfer conveyor (the drawing refers to the transfer conveyor as the "collection conveyor") was identified as Exhibit "3" during argument of the Motion. The construction crew of Lake Point initially constructed the transfer conveyor with an open web steel joist frame. A photograph of the transfer conveyor taken by J. Frank Bonell in late June 1983 or early July, 1983, during the final stages of construction of the Salt Wash Plant, was attached as Exhibit "A" to ESI's Reply Memorandum and was identified as Exhibit "4" during the argument of the Motion. This photograph shows that an open web steel joist frame was constructed by Lake Point in 1983.

12. The Salt Wash Plant was operated seasonally from approximately April to October, depending upon the weather. The Salt Wash Plant was operated with the open web steel joist frame transfer conveyor during the 1983, 1984 and part of the 1985 season.

13. During its use, the open web steel frame transfer conveyor operated without unusual tracking difficulties. A

conveyor is said to "track" when the conveyor belt moves from side to side and does not stay centered on the pulleys.

14. Build-up of material on the tail pulley of a conveyor can cause a conveyor belt to track. To prevent the transfer conveyor from tracking while the open web steel joist frame was used in the seasons of 1983, 1984 and a part of 1985, a fresh water hose was attached to the frame of the transfer conveyor with baling wire and allowed to spray on the top side of the lower belt cleaning the top side of the lower belt before it returned upon the tail pulley.

15. Some time during the 1985 season, the frame of the transfer conveyor was changed from the open web steel joist frame shown in Exhibit "3" and Exhibit "4" to a channel iron frame shown in the Utah Occupational Safety and Health (UOSH) photographs of the transfer conveyor taken after the accident. Exhibit 4B-4 to the Donald Anderson deposition, a UOSH photograph of the transfer conveyor taken on the day of the accident, was identified as Exhibit 2 during the argument of the Motion. It reflects that a channel iron frame transfer conveyor, not the open web steel joist frame transfer conveyor reflected in Exhibits "3" and "4" to the Motion, was in place on the day of the accident.

16. Some time during the 1984 or 1985 season, a second modification was made to the transfer conveyor. The fresh water hose which had been used to clean the top side of the lower belt of the transfer conveyor was moved from the transfer conveyor to a location below the wire mesh conveyor to operate in conjunction with a sucking fan.

17. Gary Hunt operated the Salt Wash Plant during the 1984 and 1985 seasons. During the 1985 season after the frame was changed, considerable difficulties were experienced by Mr. Hunt in the operation of the transfer conveyor. The transfer conveyor tracked excessively because the frame was bent during its installation.

18. In an effort to clean the top side of the lower belt as it returned to the tail pulley to reduce the amount of tracking of the transfer conveyor, the week of or the week prior to the accident an employee of the Salt Wash Plant constructed a belt scraping device. The belt scraping device was constructed of a 2 to 3 foot piece 2x4 which had nailed to its face a piece of nylon conveyor belt which hung down 8" to 10" from the 2x4. The 2x4 scraping device was placed in the frame of the transfer conveyor, secured by the "upright" shown by the arrow on Exhibit 4C of the Donald Anderson deposition, such that the belt flap scraped the top side of the lower belt before it reached the tail pulley.

19. Gary Hunt was injured by the transfer conveyor while taking action in an attempt to correct excessive tracking of the conveyor. Gary Hunt's testimony as to his actions prior to the accident are as follows:

(a) Several days prior to the accident, Gary Hunt had noticed that the two ends of the transfer conveyor belt which were mechanically fastened to make one continuous belt had chunks missing from each end of the belt on one edge. The missing chunks exposed the mechanical fastener on the one edge as shown in Exhibit "1" to Gary Hunt's deposition. The mechanical fastener was an alligator clamp fastener, which is comprised of two clamps, one of which is attached to each end of the belt. The fasteners are then interlocked like a door hinge and a rod is inserted to hold the two ends of the belt together.

(b) Just prior to the accident, Gary Hunt noticed that the flap of the 2x4 scraper had flipped under and instead of scraping salt from the belt was smoothing the salt without removing it.

(c) Immediately prior to the accident, Gary Hunt was standing 3 to 4 feet from the tail pulley and facing southwest. He used a stick held in his left

hand, which he found on the ground to poke at the flap to move it into proper position. He poked the stick to the south, away from the tail pulley, at the back side of the scraper. While doing so, Gary Hunt's left hand was caught by the rod of the mechanical fastening device on the belt and pulled toward the tail pulley.

(d) Gary Hunt was spun around so that his back side was against the frame of the transfer conveyor with his left hand moving with the belt toward the tail pulley. He grabbed the frame with his right hand and with all the strength of both arms and his body attempted to pull free of the belt. He was unable to do so and was pulled off his feet up onto the frame while his left hand and arm went into the nip (pinch) point of the tail pulley and were pulled around the pulley.

(e) A total of 3 to 4 seconds elapsed between the time Gary Hunt was first caught by the belt and the time his hand went into the nip point of the tail pulley.

Other witnesses testified Gary Hunt was taking other action to prevent excessive tracking of the transfer conveyor at the time of the accident. These actions are as follows:

(a) Gary Hunt was throwing salt into the tail pulley at the time of the accident and got too close to the nip point;

(b) Gary Hunt was sticking a 2x4 against the tail pulley and was inadvertently pulled in.

20. ESI last performed engineering services on the Salt Wash Plant on June 29, 1983. ESI was not advised or consulted about tracking problems of the transfer conveyor prior to the accident.

21. It did not fall below the standard of care ordinarily exercised by professional engineers in the state of Utah in 1982-1983 to design the transfer conveyor initially without a self-cleaning pulley, training idlers, a plow scrapper or a vulcanized spliced belt.

22. On the day following the accident, Lake Point maintenance crews fabricated a guard on the tail pulley of the transfer conveyor and installed a self-cleaning pulley. A photograph of the tail pulley guard installed after the accident is marked as Exhibit "4C" of the Donald Anderson Deposition.

23. The tail pulley guard installed after the accident shown in Anderson Deposition Exhibit 4C was accepted by Utah Occupational Safety and Health ("UOSH") as complying

with Section 182.1.2 of the UOSH Rules and Regulations, General Standards, for the guarding of tail pulleys of belt conveyors.

### CONCLUSIONS OF LAW

#### ISSUE I

1. It is a condition precedent to liability of ESI for negligent design of the transfer conveyor, that ESI have actually designed the transfer conveyor which caused Plaintiff's injuries and that the conveyor have been constructed in substantial conformance with ESI's design. Balcom Industries, Inc. v. Nelson, 454 P.2d 599 (Colo. 1969); Weston v. New Bethal Missionary Baptist Church, 598 P.2d 411 (Wash. App. 1979).

2. Where it is uncontroverted that ESI's drawing prepared in 1982-1983 of the transfer conveyor (Exhibit "3" to the Motion) provided the frame design, with Lake Point designing the operating components of the conveyor, Lake Point originally constructed the transfer conveyor with the frame designed by ESI, the frame was changed when the transfer conveyor was reconstructed in 1985 with a channel iron frame, and the change in the frame changed the operating characteristics of the transfer conveyor, causing excessive tracking, the Court concludes that Plaintiff was not injured by the transfer conveyor designed by ESI.



3. Where it is uncontroverted that Plaintiff's injuries were sustained while he was taking action in an attempt to remedy the excessive tracking of the channel iron frame transfer conveyor constructed in 1985 without ESI's involvement, caused in part by a bend in the frame, the Court concludes that Plaintiff's injuries were not proximately caused by any negligence of ESI in the design or construction of the open web steel joist transfer conveyor without a tail pulley guard, an electrical kill switch, a self-cleaning pulley, a plow scraper, training idlers or a vulcanized spliced belt.

4. There is no genuine issue of material fact and ESI is entitled to Summary Judgment as a matter of law dismissing with prejudice and on the merits Plaintiff's Second Amended Complaint against ESI.

#### ISSUE II

5. ESI had no contractual or other duty to design electrical controls or electrical circuitry for the transfer conveyor.

6. Where it is uncontroverted that Lake Point\* assumed the duty of designing and installing the electrical controls and electrical circuitry for the Salt Wash Plant and actually installed electrical kill switches on conveyors other than the transfer conveyor at this Salt Wash Plant, the Court

concludes that expert testimony of a professional engineer as to the practice in the industry of installing electrical kill switches on material handling conveyors is insufficient to cast upon ESI responsibility for the failure of Lake Point to design and install such electrical controls. Linder v. Combustion Engineering, Inc., 315 So. 2d 199, 200 (Fla App. 1975).

7. Where it is uncontroverted that Lake Point's electrician, LaVar Gunderson, was aware that the installation of an electrical kill switch on the transfer conveyor was an OSHA safety requirement and LaVar Gunderson intended to install an electrical kill switch on the transfer conveyor but had delayed doing so due to budgetary constraints, the Court concludes ESI had no duty to warn Lake Point of the dangers of the absence of the installation of an electrical kill switch on the transfer conveyor. Larner v. Torgerson Corporation, 613 P.2d 780 (Wash. 1980). The Court further concludes that ESI's failure to warn of such dangers was not a proximate cause of Plaintiff's injuries. Beach v. University of Utah, 726 P.2d 413 (Utah 1986).

8. There is no genuine issue of material fact and ESI is entitled to Partial Summary Judgment as a matter of law dismissing with prejudice and on the merits Plaintiff's claim of negligence against ESI for failing to design the transfer

conveyor with an electrical kill switch and for failing to warn Lake Point of the dangers of the absence of an electrical kill switch on the transfer conveyor.

### ISSUE III

9. ESI was not negligent in failing to initially design the transfer conveyor with a self-cleaning pulley, training idlers, a plow scraper or a vulcanized spliced belt.

10. Where it is uncontroverted that ESI last performed engineering services on the Salt Wash Plant in June, 1983, the transfer conveyor did not begin to track excessively until the summer of 1985 and ESI was not informed of the excessive tracking of the transfer conveyor, the Court concludes that ESI was not negligent in failing to recommend the use of a self-cleaning pulley, training idlers, a plow scraper or a vulcanized spliced belt to remedy the excessive tracking of the transfer conveyor.

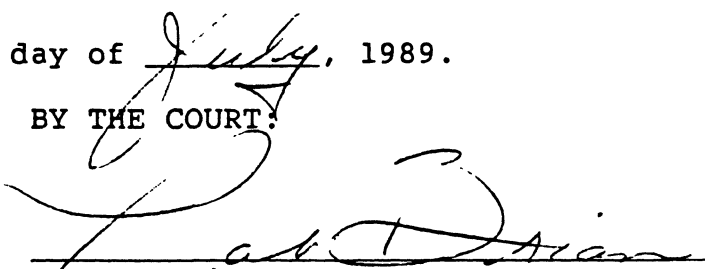
11. There is no genuine issue of material fact and ESI is entitled to Partial Summary Judgment as a matter of law dismissing with prejudice and on the merits Plaintiff's claim of negligence against ESI for failing to design the transfer conveyor with a self-cleaning pulley, training idlers, a plow scraper and/or a vulcanized spliced belt.

ISSUE IV

12. Genuine issues of material fact exist whether any tail pulley guard would have prevented injuries suffered by Plaintiff.

DATED this 25 day of July, 1989.

BY THE COURT:

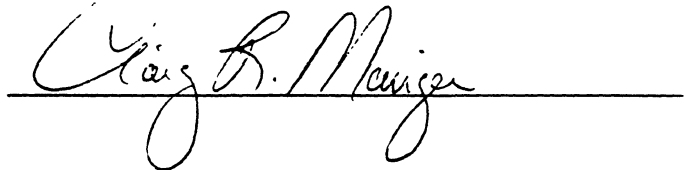
  
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Pat B. Brian  
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this the 18 day of July, 1989, I caused to be hand-delivered true and accurate copies of the foregoing proposed Memorandum of Decision and Findings of Fact and Conclusions of Law in accordance with Rule 4-504 of the Utah Code of Judicial Administration to:

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A handwritten signature in cursive script, reading "Craig R. Meizer", is written over a horizontal line.

crm 124/db