

1989

Gary Hunt v. Domtar Industries, Inc. : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

890719-CA

IN THE UTAH COURT OF APPEALS

GARY HUNT,

Plaintiff/Appellant,

vs.

ESI ENGINEERING, INC., a
corporation, DOMTAR INDUS-
TRIES, INC., a corporation,
LAKE POINT SALT CO., INC.,
a corporation, and JOHN DOES
I-X,

Defendant/Respondent.

Case No. 890719-CA

APPELLANT'S PETITION FOR REHEARING

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

MAY 1 1991

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

GARY HUNT,)
)
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Plaintiff/Appellant,

vs.)
ESI ENGINEERING, INC., a)

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TRIES, INC., a corporation,)
LAKE POINT SALT CO., INC.,)
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INTRODUCTION

In Hunt v. ESI Engineering, Inc., 158 Utah Adv. Rep. 26 (Utah App. 1991) (see Appendix), this Court affirmed a summary judgment granted to ESI Engineering, Inc. ("ESI"). The trial court had concluded that ESI did not design the system which injured Hunt. 158 Utah Adv. Rep. at 27 (hereinafter "Hunt at p. ____"). This Court determined the crucial issue on appeal to be whether ESI "had any design responsibility as to the operating components and safety devices of the transfer conveyor which injured Hunt." Id. This Court stated "after reviewing the record we affirm the trial court's conclusion that ESI did not." Id.

There are two reasons why this Court should grant a rehearing. They are:

1. Based upon the court's definition of the duty of a design engineer (Id.) ESI had a duty to design safety devices into the transfer conveyor which injured Hunt; and
2. The evidence in the record clearly shows a duty to design safety devices into the transfer conveyor which injured Hunt.

The factual nature of the argument requires that Hunt show the court that the record contains facts which show ESI had a duty to design safety devices into the transfer conveyor. It will

be necessary to set forth herein a number of quotes from depositions. While such quotes are usually set forth in footnotes, the importance of the quoted material to the argument herein necessitates their inclusion in the text. Counsel apologizes for the increase of text occasioned by inclusion of the deposition materials.

ARGUMENT

POINT I

THE COURT'S OPINION IS BASED ON EVIDENCE NOT PRESENTED TO THE TRIAL COURT AND NOT FOUND IN THE RECORD

This Court concluded that ESI had no design responsibilities as to the safety devices of the transfer conveyor which injured Hunt. Hunt at p. 27. The court stated that the following "uncontroverted" testimony from J. Frank Bonell, president of ESI and James R. Palmer, vice-president of Lake Point supported a finding that "ESI served solely as structural engineers for the plant and did not have any design responsibility as to the operating components of the transfer conveyor":

QUESTION: [F]or Lake Point Salt, you designed a salt conveyor system; is that correct?

BONELL: I designed a preliminary salt washing plant for Lake Point Salt, in which I did the basic structural design of the components.

And later:

QUESTION: Anything else that you recall about the scope of your assignment for --

BONELL: The scope of my assignment was to provide structural details. . . . [W]e did not have a contract to design all phases or all components of the system.

* * *

PALMER: [T]he general outline from [ESI] was followed; however, our people have expertise and knowhow in fabricating these various pieces of equipment so it isn't necessary for the engineer to draw a detailed outline, only a general plan, like [Bonell] did on this plan. . . .

PALMER: In our relationship with ESI Engineering, because -- due to the ability of our -- our people and in order -- because we did not have to put this out on bid, there were many items that we had on hand that would be used in various parts of the construction, including take-ups and other components of the [transfer] conveyor.

QUESTION: But your employees would make the decision what take-up to use and what pulley to use?

PALMER: That is right.

QUESTION: And that decision wouldn't be made by ESI Engineering, would it?

PALMER: No.

Hunt at p. 28.

This testimony shows ESI designed the basic system. The system contained a transfer conveyor. Lake Point employees took the ESI design and used it to build the system including the actual transfer conveyor. This Court concluded, based upon the above

testimony, that "ESI did not design the transfer conveyor which was in place at the time of the accident, and the trial court was correct in granting summary judgment." Id.

The reason a rehearing is necessary is that the Court's opinion completely ignores the evidence and legal theories which support Hunt's liability claim.

Hunt's claim, in a nutshell, is that ESI had a duty to design safety devices into the original transfer conveyor. ESI did not do so. This failure was the cause of Hunt's injury.

Nowhere in any deposition testimony, or anywhere in the record, does anyone testify that ESI did not have the responsibility for designing the safety features, including a tail pulley guard, of the transfer conveyor. There is no evidence in the record to support the Court's statement (Hunt at p. 27) that the type of safety guard to include on the tail pulley was "left up to the discretion of Lake Point." Nowhere in the record, either in the trial court or on appeal, did ESI argue that it did not have a duty to design the safety features of the transfer conveyor. In fact, Bonell's testimony shows that the design of such safety features was within ESI's responsibility:

QUESTION: Now, did you design the conveyor systems for these other five projects? Did I ask you that before?

BONELL: Yes.

QUESTION: And these other conveyor systems on these other salt projects - did they involve pulleys and - belt driver pulleys, I guess?

BONELL: Yes.

QUESTION: Were they designed with guards on the pulleys, these other five projects?

BONELL: Some were. Some were - some of them are not exposed to - some of them are not. You're not able to put a guard around the pulley because of the sheer location of the positioning of the conveyor.

QUESTION: Did the ones outside the United States have guards or pull cords?

BONELL: I don't recall. I know they had - in places where there were exposure, they had guards.

QUESTION: Take a moment and just briefly describe for me the situation then where you would put a - or have put a guard on the pulley and - and the situation in which you have not. In other words, tell me when you do and when you don't in your practice.

BONELL: If the pulley is in the position where it can come in direct contact with an individual, where he is working on or around it, it should be - have a guard on it.

(Bonell Deposition, p. 43, lines 23-25; p. 44, lines 1-10, 19-21; p. 58, lines 8-15).

There is some evidence that ESI may not have had a contract to design "all phases or all components of the system." Hunt at pp. 27-28. There is some evidence in the record that Lake Point would "fabricate" the conveyors with parts on hand. Even so, ESI is still be liable for Hunt's serious injuries under a

negligence theory. To relieve ESI of all liability in this case on a summary judgment, it must be undisputed that ESI had no duty or responsibility to design safety features of the transfer conveyor which injured Hunt.

Instead of undisputed evidence that ESI had no duty to design safety features, the evidence showed that the standard of care requires ESI to design safety features into the transfer conveyor. Hunt's experts, Peterson and Gallagher, testified about ESI's duty and the breach of that duty:

QUESTION: Have you formulated any opinions or conclusion whether any of the parties in this case were negligent using that definition?

PETERSON: The conveyor was not complete in that it didn't have a return-pulley guard. . . .

(Peterson Deposition, p. 38, lines 2-6.)

QUESTION: What in your opinion should have been in the design that wasn't in the design?

PETERSON: The standard design practice requires the pinch points of the head pulley and the tail pulley to be guarded from. It also requires design of the drive system being guarded. In this case . . . the tail pulley was not guarded.

(Peterson Deposition, p. 39, lines 6-11, 12, 15.)

QUESTION: By stating "standard design practice," are you referencing the practice in your profession, are you referencing OSHA standards, what are you referencing?

PETERSON: Practice in the profession . . . the practice in the profession has got to have some knowledge of OSHA standards. OSHA is a minimum,

but usually it's more than -- you do more than what OSHA would require.

QUESTION: At Pemco when you were designing conveyor systems, did you guard the pinch points of the head and the tail pulleys?

PETERSON: Yes.

(Peterson Deposition, p. 40, lines 23-25, p. 41, lines 1, 3-10.)

Gallagher testified as follows:

QUESTION: Would you tell me what opinions or conclusions you have rendered with regard to his case.

GALLAGHER: It's my opinion that the conveyor system where Mr. Hunt was injured was unreasonably dangerous for a number of reasons.

QUESTION: Would you tell me those reasons.

GALLAGHER: The ingoing nip point at the tail pulley was completely exposed. It should have been guarded. And there's abundant references in the safety literature that give direction to engineers on how to avoid that hazardous area.

(Gallagher Deposition, p. 72, lines 2-12.)

QUESTION: Anything else?

GALLAGHER: I think it was a very unsafe design, it was an invitation to injury.

(Gallagher Deposition, p. 73, lines 3-5.)

This deposition testimony, combined with Bonell's own testimony and this Court's definition of a design engineer's duty, is sufficient to carry Hunt's burden to show that there are issues of fact regarding ESI's responsibility for the design of the

transfer conveyor. Thornock v. Cook, 604 P.2d 934 (Utah 1979). All facts and inferences on appeal are viewed in the light most favorable to Hunt. D & L Supply v. Saurini, 775 P.2d 420 (Utah 1989). These fact issues require remand to the trial court. ESI has never taken a position either way on whether it had a duty to design safety features. ESI simply argued that a 1985 frame change in the conveyor was "substantial" and relieved ESI from liability, regardless of ESI's design duty. Viewing all facts and inferences on appeal in the light most favorable to Hunt, D & L Supply v. Saurini, supra, summary judgment on the safety design issue was improper.

This Court's opinion is correct only if ESI had no duty or responsibility to design safety features on the transfer conveyor. Deposition testimony that ESI did not "design all phases or all components of the system" is not enough to support this Court's Opinion. Deposition testimony that Lake Point "fabricated" the conveyor using some of its own parts is not enough. At most, such testimony merely contradicts the testimony of Hunt's expert. Before summary judgment is appropriate on the safety design issue, there must be specific, undisputed evidence that ESI never had a duty or responsibility to design safety features, including tail pulley guards. There simply is no such evidence in the record.

Hunt respectfully submits that ESI has never raised or contested the issue of its duty to design safety devices into the system. ESI's summary judgment motion was based on the proposition that an alteration of the transfer conveyor system in 1985 relieved it of any liability for failure to design safety features into the system. (R. 766). ESI has never argued that it had no duty to design safety features on the conveyor system. The issue of whether ESI had a duty to design safety features into the system was first raised by this court in its opinion.

Where an appellate court raises a new issue sua sponte, counsel for all parties should be afforded a fair opportunity to brief the new issue and to present their positions to the appellate court before the issue is finally determined. Johnson v. State, 240 Kan. 123, 727 P.2d 912, 916 (1986).

This Court's opinion that ESI had no responsibility for the design of safety features on the transfer conveyor cannot stand because it has no basis in the evidence found in the record and was never presented to the trial court. Hunt requests an opportunity to brief this issue on rehearing before the final determination of this appeal.

POINT II

THE COURT'S OPINION DISREGARDS ITS OWN DEFINITION OF A DESIGN ENGINEER'S DUTY

This Court's conclusion that ESI had no "design responsibility as to the . . . safety devices of the transfer conveyor" cannot be reconciled with this Court's description of the duties of a design engineer contained in its opinion. This Court states:

It is clear that in negligence cases, a designer has a "duty to design its product so as to eliminate any unreasonable risk of foreseeable injury." Prentis v. Yale Mfg. Co., 421 Mich. 670, 365 N.W.2d 176, 186 (1984). See also Anderson v. Dreis & Krump Mfg. Corp., 48 Wash. App. 432, 739 P.2d 1177, 1182-83 (1987) (a designer is required under negligence principles to design a reasonably safe product); Mather v. Caterpillar Tractor Corp., 23 Ariz. App. 409, 533 P.2d 717, 719 (1975) (a design defect arises when the designer has failed to use reasonable care in designing its product, rendering such product unsafe for intended uses); Restatement (Second) of Torts § 398 (1965). Hunt at p. 27.

Every authority cited by this Court to explain a design engineer's duty discusses that duty in terms of safety features.

This Court sets out the above duties, and then in spite of testimony from Hunt's experts¹ that ESI had a duty to design

¹Hunt's experts testified in deposition that to design a transfer conveyor without a guard around the tail pulley is a breach of the standard of care and also a breach of ESI's duty. See testimony of Peterson and Gallagher set forth at pp. 6-7 herein.

safety features into the transfer conveyor, concludes ESI has no such duty. Id.

Even if ESI was not retained to design "all phases or all components of the system", its duty, as defined by this Court, would still include the design of the safety features of the conveyor it was admittedly retained to design. This Court's definition of a design engineer's duty includes the responsibility to design safety devices which will render the product safe for intended uses and avoid the unreasonable risk of foreseeable injury. Id. The testimony of Hunt's experts raised material fact issues on the duty question which preclude summary judgment.

POINT III

THE COURT'S OPINION DISREGARDS FACTUAL ISSUES WHICH REQUIRE REMAND TO A JURY

The Court's Opinion is improper if there is any dispute of material fact as to whether ESI had a duty to design safety factors into the transfer conveyor which injured Hunt on August 30, 1985. As Hunt contended on appeal, and for the reasons stated in this petition, the trial court's Findings of Fact Nos. 5 and 6 and Conclusion of Law No. 12 (see Appendix) are sufficient to remand this case to the jury. Those findings and that conclusion establish that ESI was retained to provide engineering design of the salt wash plant, including conveyors; that ESI's two drawings

depicting the transfer conveyor did not include a tail pulley guard; and that it's a fact question whether a tail pulley guard would have prevented Hunt's injuries.

Toward the end of its opinion, this Court briefly addresses the substance of ESI's argument that the "substantial" alteration in the frame of the transfer conveyor in 1985 relieves ESI of liability. ESI argued that the alteration of the frame of the conveyor made the conveyor different from the one ESI acknowledged designing. This Court, addressing that issue, stated:

[T]he [open web steel joist frame designed by ESI] was not even in place on the date of the accident, having been replaced by Lake Point with a different frame prior to the accident.

Hunt at p. 28.

To relieve ESI of liability for failure to properly design safety devices into the system, an alteration must be substantial. An alteration is deemed substantial for liability purposes only if it relates to the safety of the product. McDermott v. Tedun Constructors, 211 N.J. Super. 196, 511 A.2d 690 (1986); Whitehead v. St. Joe Lead Co., Inc., 729 F.2d 238 (3d Cir. 1984). Whether an alteration is substantial for liability purposes is to be determined by a jury under all circumstances presented. Soler v. Castmaster Division of HPM Corp., 484 A.2d 1225 (N.J. 1984).

ESI's position has always been that the transfer conveyor they designed was substantially altered in 1985. ESI claims that that alteration relieves ESI of liability. Hunt has argued that the defect of having no tail pulley guard on the conveyor was the result of ESI's breach of its duty to design safety features into the system. Hunt claims that this original defect existed before and after any alteration of the system by Lake Point. The alteration had no effect on the existing defect. Hunt claimed that this specific design defect was a proximate cause of his injury. These factual issues must all be decided by a jury. Soler v. Castmaster Division of HPM Corp., supra. This Court disregarded these factual issues when it affirmed the trial court's grant of summary judgment in favor of ESI.

CONCLUSION

This Court's Opinion was based on the conclusion that ESI had no duty to design the operating components and safety devices of the transfer conveyor which injured Hunt. There is no evidence in the record to support that conclusion as it relates to safety devices. ESI's duty and failure to design safety devices into the transfer conveyor is the subject of this appeal. ESI never raised the argument of lack of duty in the trial court or on appeal. This Court's sua sponte conclusion that ESI had no duty to design safety devices into the transfer conveyor is directly contrary to the

Court's definition of a design engineer's duty, set out in its opinion in this case. In affirming summary judgment, this Court disregarded factual disputes which require remand to the trial court. For these reasons, Hunt requests that this Court reverse its opinion and remand this case to the trial court. In the alternative, Hunt requests the opportunity to brief the issue of ESI's duty to design safety devices on the transfer conveyor. This issue was raised for the first time by this Court in its Opinion.

CERTIFICATION

Counsel for the petitioner certifies that this Petition is presented in good faith and not for delay.

DATED this 1st day of May, 1991.

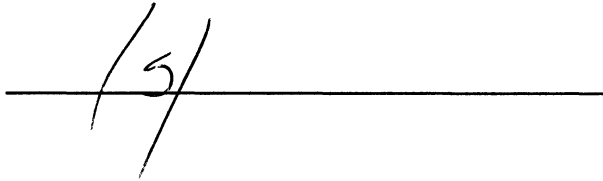
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff/Appellant

By: Edward T. Wells
EDWARD T. WELLS

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing APPELLANT'S PETITION FOR REHEARING (Hunt v. ESI Engineering, Inc., et al.) were mailed this ____ day of May, 1991, to the following:

Craig R. Mariger
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main, #1500
Salt Lake City, UT 84101



2397-062\jn

A P P E N D I X

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Exhibit A - Hunt v. ESI Engineering, 158 Utah Adv. Rep 26(1991)

Exhibit B - Findings of Fact and Conclusions of Law

EXHIBIT A

Each of the limited partner-defendants authorized the general partner to negotiate the terms of the purchase, including financing terms and the waivers of certain defenses, and, prior to execution of their guaranty agreements, [which was prior to the execution of the amended and revised limited partnership agreement of 1981], each of the limited partner defendants had sufficient time to learn all of the terms of the purchase contract."

The managing general partner "knew all of the terms of the purchase transaction, including the total purchase price of \$6.9 million prior to the time of the closing of the purchase transaction." The limited partners are therefore bound by the actions of the general partner which they authorized in the limited partnership agreement.

The trial court held that guaranties provided by the Bank and signed by some class B limited partners did not bind the limited partners under Illinois law. We find it unnecessary to reach that issue since under the partnership agreement the Bank is entitled to recovery under section 7.5 on both the provisions for an additional capital contribution and on the guaranty.

The judgment below is affirmed in part and reversed in part, and the case is remanded for entry of judgment in accordance with this opinion.

WE CONCUR:

Gordon R. Hall, Chief Justice
I. Daniel Stewart, Justice
Christine M. Durham, Justice
Michael D. Zimmerman, Justice

1. Section 71 provides: "(1) To constitute consideration, a performance or a return promise must be bargained for.... (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person." Illustration 18 states: "A promises to pay \$1,000 to B, a bank, in exchange for the delivery of a car by C to A's son D. The delivery of the car is consideration for A's promise."

Cite as
158 Utah Adv. Rep. 26

IN THE UTAH COURT OF APPEALS

Gary HUNT,
Plaintiff and Appellant,

v.

ESI ENGINEERING, INC., a corporation,
Domtar Industries, Inc., a corporation, Lake
Point Salt Co., a corporation, and John Does
I through X,
Defendants and Appellee.

No. 890719-CA
FILED: April 3, 1991

Third District, Salt Lake County
Honorable Pat B. Brian

ATTORNEYS:

Glen A. Cook and Gordon K. Jensen, Salt
Lake City, for Appellant
Craig R. Mariger, Salt Lake City, for Appellee
Before Judges Bench, Jackson, and Russon.

OPINION

RUSSON, Judge:

Gary Hunt (Hunt) appeals from a summary judgment entered in favor of ESI Engineering, Inc. (ESI). We affirm.

On August 30, 1985, Gary Hunt was injured at the Sol-Aire Salt and Chemical Company Salt Wash Plant (the plant) in Tooele County, Utah, where he was employed as salt wash plant operator. He was injured when his left hand was pulled through the nip (pinch) point of the tail pulley of a conveyor belt.

The salt cleansing 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 and then into the corresponding immersion washer. The salt was then carried by screw conveyors from both immersion washers onto corresponding wire mesh conveyors, which ran parallel to each other. The wire mesh conveyors partially dewatered the salt and then discharged the salt onto the transfer conveyor. The transfer conveyor was a nylon-corded rubber belt conveyor, which ran perpendicular to the wire mesh conveyors. The upper belt of the transfer conveyor moved salt from north to south. The lower portion of the transfer conveyor belt moved south to north where it wrapped around the tail pulley of the transfer conveyor in a counter-clockwise rotation. When the salt reached the southern end of the transfer conveyor, it was deposited onto the long belt

as the transfer conveyor belt moved around the head pulley. The long belt carried the salt to the stacking conveyor, a movable incline conveyor, which deposited the salt in storage piles. Hunt was injured when his left hand and arm were pulled into the tail pulley of the transfer conveyor.

The plant was designed and constructed in 1982 and 1983; it was first operated during the summer of 1983. At that time, the plant was owned by Lake Point Salt Company (Lake Point). Engineering Associates, Inc., an engineering firm which later became known as ESI, was retained in May of 1982 to provide the structural engineering design of the salt washing facilities at the plant. ESI prepared two drawings for Lake Point which depicted the transfer conveyor, an open web steel joist frame to support the conveyor, and the footing detail for support of the transfer conveyor. These drawings did not include details for the transfer conveyor, such as the type of tail pulley, or its safety guards, 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, which were left up to the discretion of Lake Point. ESI last performed engineering services on the plant in 1983.

Lake Point, which had considerable experience in the construction of conveyors, constructed the transfer conveyor which injured Hunt. It determined which parts to utilize for the operating components of the conveyor, which were not shown on ESI's drawings, including the tail pulley, idlers, conveyor belt splice and conveyor belts. In fabricating the transfer conveyor, it did construct an open web steel joist frame, as depicted in ESI's drawings.

The plant operated with the open web steel joist frame supporting the transfer conveyor during the 1983 and 1984 seasons, and part of the 1985 season. However, sometime prior to the accident in the 1985 season, Lake Point removed the open web steel joist frame and replaced it with a channel iron frame. The latter was in place on the day of the accident.

Following the accident, Hunt brought this negligence action against ESI and several other defendants. This appeal concerns only ESI. Hunt claims that ESI designed the transfer conveyor and was negligent in failing to depict a tail pulley guard in regards thereto, the construction of which may have prevented Hunt's injury. ESI moved for summary judgment on the ground that the transfer conveyor which injured Hunt was not designed by ESI.¹ The trial court granted ESI's motion, and Hunt appealed, raising the following issue: did the trial court err in concluding that ESI did not design the transfer conveyor which injured Hunt on August 30, 1985?

Summary judgment is appropriate only when no genuine issue of material fact exists

and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Transamerica v. Dixie Power*, 789 P.2d 24, 25 (Utah 1990). The facts and inferences to be drawn therefrom are viewed in the light most favorable to the losing party and are affirmed only where it appears that there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law. *D & L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989) (citing *Themy v. Seagull Entertainment Inc.*, 595 P.2d 526, 528-29 (Utah 1979)). See also *Parents Against Drunk Driving v. Graystone*, 789 P.2d 52, 54 (Utah Ct. App. 1990). However, it is Hunt's burden to show that there are specific material facts which preclude a grant of summary judgment. *Thornock v. Cook*, 604 P.2d 934, 936 (Utah 1979); *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982). Since summary judgment is granted as a matter of law rather than fact, the trial court's legal conclusions are reviewed for correctness. *Bergen v. Travelers Ins. Co.*, 776 P.2d 659, 662 (Utah Ct. App. 1989).

In granting ESI's motion for summary judgment, the trial court concluded that ESI did not design the transfer conveyor which injured Hunt. The initial issue, therefore, is whether ESI actually had any design responsibility as to the operating components and safety devices of the transfer conveyor which injured Hunt. After reviewing the record, we affirm the trial court's conclusion that ESI did not.

It is clear that in negligence cases, a designer has a "duty to design its product so as to eliminate any unreasonable risk of foreseeable injury." *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 365 N.W.2d 176, 186 (1984). See also *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wash. App. 432, 739 P.2d 1177, 1182-83 (1987) (a designer is required under negligence principles to design a reasonably safe product); *Mather v. Caterpillar Tractor Corp.*, 23 Ariz. App. 409, 533 P.2d 717, 719 (1975) (a design defect arises when the designer has failed to use reasonable care in designing its product, rendering such product unsafe for intended uses); Restatement (Second) of Torts §398 (1965). However, it is equally clear that one cannot be held liable for a defective design if one did not, in fact, create such design.

In the case at bar, the uncontroverted deposition testimony of J. Frank Bonell, ESI's current president, and James R. Palmer, vice-president and general manager of Sol-Aire Salt Company, substantiates the trial court's grant of summary judgment. This testimony clearly indicates that ESI served solely as structural engineers for the plant and did not have any design responsibility as to the operating components of the transfer conveyor.

Bonell testified as follows:

Q: [F]or Lake Point Salt, you designed a salt conveyor system; is that correct?

A: I designed a preliminary salt washing plant for Lake Point Salt, in which I did the basic structural design of the components.

And later:

Q: Anything else that you recall about the scope of your assignment for --

A: The scope of my assignment was to provide structural details.... [W]e did not have a contract to design all phases or all components of the system.

Palmer's uncontroverted testimony stated that:

A: [T]he general outline from [ESI] was followed; however, our people have expertise and knowhow in fabricating these various pieces of equipment so it isn't necessary for the engineer to draw a detailed outline, only a general plan, like [Bonell] did on this plan....

And also:

A: In our relationship with ESI Engineering, because -- due to the ability of our -- our people and in order -- because we did not have to put this out on bid, there were many items that we had on hand that would be used in various parts of the construction, including take-ups and other components of the [transfer] conveyor.

Q: But your employees would make the decision what take-up to use and what pulley to use?

A: That is right.

Q: And that decision wouldn't be made by ESI Engineering, would it?

A: No.

The exhibits (drawings and photographs) also substantiate that ESI did not design the transfer conveyor which was involved in the accident. In fact, the only specific ESI drawing pertained to the footing detail and the support for this conveyor, that is, the open web steel joist frame. And, the latter was not even in place on the date of the accident, having been replaced by Lake Point with a different frame prior to the accident.

The evidence is uncontroverted that ESI did not design the transfer conveyor which was in place at the time of the accident, and the trial court was correct in granting summary judgment. Accordingly, we affirm.

Leonard H. Russon, Judge

WE CONCUR:

Russell W. Bench, Judge

Norman H. Jackson, Judge

1. ESI also moved for summary judgment on several other grounds, which are not presently before this court.

Cite as

158 Utah Adv. Rep. 28

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Appellee,

v.

Ellis R. BLACKWELL,
Defendant and Appellant.

No. 900262-CA

FILED: April 5, 1991

Second District, Weber County
Honorable Ronald O. Hyde

ATTORNEYS:

Stephen A. Laker and Bernard Allen, Ogden,
for Appellant

R. Paul Van Dam and Marian Decker, Salt
Lake City, for Appellee

Before Judges Billings, Garff, and Russon.

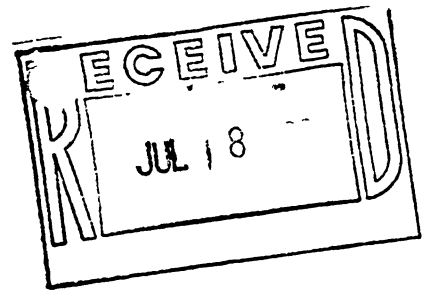
OPINION

BILLINGS, Judge:

Defendant Ellis R. Blackwell appeals his conviction of possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. §58-37-8(2) (1990). Initially, defendant was also charged with possession of drug paraphernalia, a class B misdemeanor; theft of a motor vehicle, a class A misdemeanor; and improper registration, a class B misdemeanor. As part of a plea bargain agreement, he entered a plea of no contest, preserving his right to appeal the denial of his motion to suppress evidence. In his motion to suppress, defendant challenged the admission in this prosecution of results of a urinalysis he was required to submit to as a condition of parole. We affirm defendant's conviction.

In June 1989, defendant was paroled by the Utah State Board of Pardons. Defendant signed a parole agreement which included among other conditions, a requirement that he submit to random urinalysis. On December 7, 1989, defendant's parole officer apprehended defendant in a moving vehicle, after giving

EXHIBIT B



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

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.	:	

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

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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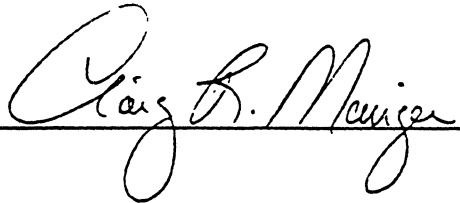
Pat B. Brian
District Judge

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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