

2010

# Jose M. Gonzalez v. Orchard Vista, LLC, Pacificorp : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

Brief of Appellant, *Jose M. Gonzalez v. Orchard Vista, LLC, Pacificorp*, No. 20100671 (Utah Court of Appeals, 2010).  
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IN THE UTAH COURT OF APPEALS

JOSE M. GONZALEZ,

Plaintiff/Appellee

vs.

ORCHARD VISTA, LLC, PACIFICORP,  
an Oregon Corporation d/b/a ROCKY  
MOUNTAIN POWER, R.M. REES  
CONSTRUCTION, a Utah corporation  
d/b/a/ DESIGN STONE CREATIONS,  
RUSSELL SORENSEN  
CONSTRUCTION, a sole proprietorship;  
JOHN DOE ENTITIES 1-5 and JOHN  
DOES 1-5.

Defendants.

No. 20100671-CA

BRIEF OF APPELLANT

APPEAL FROM INTERLOCUTORY ORDER ENTERED ON JULY 30, 2010, BY  
THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE JOSEPH C. FRATTO

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FILED  
UTAH APPELLATE COURTS  
MAR 25 2011

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**Defendant/Cross Claim Defendant/Appellant:** Russell Sorensen Construction

**Plaintiff/Appellant:** Jose M. Gonzalez

**Defendant/Cross Claim Defendant (Not participating in appeal):** Orchard Vista L.L.C

**Defendant/Cross Claim Plaintiff (Not participating in appeal):** PacifiCorp, d/b/a, Rocky Mountain Power

**Defendant/Cross Claim Defendant (Not participating in appeal):** R.M. Rees Construction d/b/a/ Design Stone Creations

**Defendant/Counterclaim Plaintiff (Not participating in appeal):** John Clayton Construction

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## JURISDICTION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals has jurisdiction of this appeal, pursuant to Utah Code Ann. § 78A-4-103-(2)(j) (2008).

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue 1: Whether the trial court erred in failing to grant summary judgment when it applied the Restatement (Second) of Torts § 384, which has not been adopted in Utah, and ruled that Russell Sorensen Construction, as a general contractor, “is subject to the same liability, and enjoys the same immunity from liability, as though he were the possessor of the land, for bodily harm caused to others within and without the land, while the work is in his charge, by the dangerous character of the structure or other condition.” *See*, Restatement (Second) of Torts § 384.

Preservation: This issue was preserved in Russell Sorensen Construction’s Motion for Summary Judgment, its Memorandum of Points and Authorities Supporting Russell Sorensen Construction’s Motion for Summary Judgment and Russell Sorensen Construction’s Reply Memorandum in Support of Motion for Summary Judgment and at oral argument.

Standard of Review: The Court reviews the denial of summary judgment for correctness. *See, Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731, 733 (Utah 1995) (“A trial court’s decision to grant or deny a motion for summary judgment is a legal one and will be reviewed for correctness. Therefore, all issues in this case will be

reviewed *de novo*, giving no deference to the trial court's conclusions.") (internal citations omitted). Additionally the trial court's interpretation "of prior precedent, statutes, and the common law are questions of law that we review for correctness." *See, In re Estate of Ostler*, 2009 UT 82 ¶ 7.

Issue 2: Whether the trial court erred in failing to grant summary judgment by determining that the Plaintiff's Amended Complaint sufficiently alleged a premises liability claim against RSC when the Plaintiff's Amended Complaint did not allege that RSC either owned or possessed the property where the Plaintiff was injured.

Preservation: This issue was preserved in Russell Sorensen Construction's Motion for Summary Judgment, its Memorandum of Points and Authorities Supporting Russell Sorensen Construction's Motion for Summary Judgment and Russell Sorensen Construction's Reply Memorandum in Support of Motion for Summary Judgment and at oral argument.

Standard of Review: The Court reviews the denial of summary judgment for correctness. *See, Silver Fork Pipeline Corp.*, 913 P.2d at 733.

## STATEMENT OF THE CASE

### **I. Nature, Proceedings and Disposition Below.**

This case involves a personal injury claim asserted by Jose M. Gonzalez ("Gonzalez") against several Defendants, including Russell Sorenson Construction ("RSC"), Orchard Vista LLC. ("Orchard Vista"), Pacificorp, d/b/a/ Rocky Mountain

Power (“RMP”), and R.M. Rees Construction, d/b/a/ Design Stone Creations (“Rees”). On September 26, 2008, Gonzalez filed his complaint against RSC, Orchard Vista, RMP, and Rees in the Third District Court, alleging negligence and strict liability against all of the Defendants. (Record 1). On December 23, 2008, Gonzalez filed a Stipulated Motion for Leave to File Amended Complaint. (Record 95). Gonzalez filed his Amended Complaint and Jury Demand on January 22, 2009. (Record 126). RSC answered Gonzalez’ Amended Complaint on February 11, 2009. (Record 161). RSC’s Fourteenth Affirmative Defense stated: “Plaintiff’s claims are barred because Sorensen did not retain control over the injury causing aspect of the Plaintiff’s work or the work of Plaintiff’s employer.” (Record 168). RSC’s Answer further provided notice to all parties of RSC’s intent to apportion fault to Gonzalez’ employer, John Clayton Construction (hereinafter “JCC”) and specified the grounds for apportionment. (Record 169).

Following the conclusion of fact discovery and on April 9, 2010, RSC filed Russell Sorensen Construction’s Motion and Memorandum in Support for Summary Judgment as well as its supporting exhibits (hereinafter collectively, “RSC’s Motion for Summary Judgment”). (Record 759 & 618 – 768). RSC’s Motion for Summary Judgment sought a dismissal of Gonzalez’ negligence claim based upon Utah’s retained control doctrine. (Record 627 – 637). RSC’s Motion for Summary Judgment also sought a dismissal of Gonzalez’ strict liability claim as the activity at issue, *i.e.* installing soffit

and fascia, was not an “abnormally dangerous” or “ultrahazardous” activity. (Record 637 – 639).

Gonzalez filed his Memorandum in Opposition with his supporting exhibits on May 5, 2010. (Record 825 – 1004). Gonzalez’ opposition acknowledged that RSC did not retain control over the injury causing aspect of the Gonzalez’ work or the work of Gonzalez’ employer. (Record 839 – 840). Instead, Gonzalez’ Opposition attempted to re-characterize his claims against RSC as “direct negligence” claims, arising out of a “premises liability” analysis. (Record 841 – 851). Gonzalez’ direct negligence claims are, “based upon the Utah Supreme Court’s seminal opinion in *Hale v. Beckstead*, which applied premises liability negligence principles to claims by subcontractors.” (Record 826 – 827). Notwithstanding the fact that RSC did not own or possess the property at issue, Gonzalez argued that The Restatement (Second) of Torts § 384 imposed premises liability upon RSC due to RSC’s status as a general contractor. (Record 826 – 851). In his Opposition, Gonzalez acknowledged that his direct negligence claims against RSC are based upon a “premises liability” theory. (Record 826 – 827). Gonzalez did not oppose RSC’s second basis for Summary Judgment on the strict liability claim. (Record 825 – 851).

RSC filed its Reply Memorandum on May 24, 2010. (Record 1029). In its Reply RSC argued, *inter alia*:

- i. The Plaintiff failed to properly plead a “premises liability” claim against RSC as Plaintiff failed to allege that RSC owned or possessed the property.
- ii. The Plaintiff’s “premises liability” theory was raised for the first time in its opposition to a motion for summary judgment; consequently the trial court should not consider the same.
- iii. The adoption of Restatement (Second) of Torts § 384, is inconsistent with the general rule in Utah that “the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.” *Thompson v. Jess*, 979 P.2d 322 (Utah 1999), and would eviscerate the retained control doctrine.

(Record 1056 – 1067).

The trial court heard argument on RSC’s Motion for Summary Judgment on July 21, 2010. (Record 1564). During oral argument, counsel for Gonzalez again acknowledged that Gonzalez’ claims for direct negligence are solely tied to a premises liability analysis. (Record 2219 at Pg. 23 L. 9 – 20). The trial court entered a Memorandum Decision on July 30, 2010.<sup>1</sup> (Record 1585 – 1589). The trial court denied RSC’s Motion for Summary Judgment stating “In sum, the Court agrees with Plaintiff and concludes that § 384 reflects sound policy and should be applied in the instant.” (Record 1588). The trial court’s memorandum decision did not address RSC’s summary judgment argument on Gonzalez’ strict liability claim notwithstanding the fact that Gonzalez did not oppose the same in either his Opposition or during oral argument. (Record 1585 – 1589; 2219).

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<sup>1</sup> A true and correct copy of the district court’s Memorandum Decision is attached as Addendum A.

## **II. Statement of Facts.**

1. RSC was the general contractor for a Planned Unit Development (PUD) known as the Orchard Vista P.U.D., (the "Project"). (Record 833)
2. Orchard Vista was the owner of the real property on which the Project was built and was the developer of the Project. Orchard Vista, through its engineers and surveyors, decided where to locate the buildings on the Project and was responsible for the development of the property, the building plans and "staking out" the buildings on the Project. (Record 1048 – 1051, 1070 – 1077, 1101 – 1102, 1104 – 1111)
3. RSC entered into a subcontract with R.M. Rees Construction, ("Rees") to perform certain stucco work for the Project. (Record 833-834)
4. RSC entered into a subcontract with John Clayton Construction, wherein JCC was to perform certain siding, soffit and fascia work on the Project. (Record 834)
5. Gonzalez was an employee of JCC. (Record 834)
6. RSC contracted with its subcontractors to perform specific construction related duties and services on the Project. Each subcontractor was responsible for the oversight and supervision of their workers. Additionally, each subcontractor controlled the overall method and manner concerning how the subcontractor performed its work. (Record 834)
7. On June 22, 2007, JCC sent Gonzalez and other workers to install soffit and fascia on the north wall of the fourth and final building on the Project. (Record 836)

8. JCC and its employees were the only subcontractors present and working on building four on the date of the accident. RSC was not present at the jobsite and was unaware of JCC's employees presence on the Project, on June 22, 2007. (Record 836)

9. In performing his soffit and fascia work on the north wall of building four, Gonzalez utilized scaffolding that was owned by Rees. (Record 836)

10. Prior to the accident Gonzalez did not have any discussions with Rees or RSC about whether or not it would be okay or safe to use the scaffolding. (Record 837)

11. Gonzalez climbed Rees' scaffolding with his tools and four sections of aluminum J channel material. (Record 837 – 838)

12. While on Rees' scaffolding, the Plaintiff was evidently electrically shocked when a 12 foot piece of aluminum J channel came in contact with a 7200 volt power line. (Record 838)

13. It is undisputed that apart from scheduling and coordinating Rees' work on the Project, RSC did not exercise affirmative control over the method or manner in which Rees' performed the stucco work on the Project. Additionally, it is undisputed that RSC did not exercise affirmative control over the method or manner in which Rees' erected scaffolding on the Project. (Record 838 – 839).

14. Additionally, it is undisputed that RSC did not exercise affirmative control over the method and manner in which JCC supervised its employees (including Gonzalez) or over the safety equipment JCC employees utilized when JCC performed the siding,

soffit and fascia work on the Project. Furthermore, it is undisputed that apart from scheduling and coordinating JCC's work on the Project, RSC did not exercise affirmative control over the method or manner in which JCC or Gonzalez performed the siding, soffit and fascia work on the Project. (Record 839 – 840).

15. Nowhere in Gonzalez' original Complaint or his Amended Complaint does Gonzalez allege that RSC owned or possessed the property. However, both in the original Complaint and the Amended Complaint Gonzalez correctly alleges that Orchard Vista was at all relevant times the owner and developer of the property where the Project was located. (Record 1 – 10; 126 – 134)

16. RSC was not responsible for the placement of building four and its proximity to the power lines. (Record 1048 – 1051, 1070 – 1077, 1101 – 1102, 1104 – 1111)

17. On or about April 9, 2010, RSC filed a Motion for Summary Judgment against the Plaintiff. In support of its summary judgment motion RSC argued that Utah law clearly establishes that, as the general contractor on the Project, RSC cannot be held liable for the workplace injury of a subcontractor's employee unless RSC exercised affirmative control over the injury causing aspect of the work. (Record 627 – 637).

18. In its opposition to RSC's motion for summary judgment, Gonzalez claimed that RSC was "directly negligent" as Gonzalez' claims against RSC were, in fact, "premises liability" claims. Gonzalez' "premises liability" argument was not based on



RSC's ownership or possession of the property; rather, Plaintiff argued that pursuant to the Restatement (Second) of Torts § 384, RSC, as the general contractor, is subject to the same liability as an owner of land in a premises liability case. (Record 825 – 851)

19. A hearing on RSC's motion for summary judgment was held before the honorable Joseph C. Fratto on July 21, 2010. (Record 1564).

20. For the first time at oral argument Gonzalez referenced non-binding decisions made by other Utah District Courts and offered copies of the same to this Court and counsel for RSC. Neither the Trial Court nor counsel for RSC accepted the copies offered by Gonzalez's counsel. Notwithstanding the same, on July 21, 2010, Plaintiff's counsel mailed copies of the referenced decisions to this Court ex parte. (Record 1573 – 1584)

21. On July 30, 2010, RSC formally objected to Gonzalez's counsel's attempt to submit additional argument ex parte and without leave of Court in violation of Utah R. Civ. P. 7(c)(1) and requested the Court to strike the same. (Record 1573 – 1584)

22. Notwithstanding RSC's Objection and Motion to Strike Gonzalez's Supplemental Argument, on July 30, 2010, the trial court issued a Memorandum Decision, denying RSC's Motion for Summary Judgment. In its Memorandum Decision the trial court ruled:

After reviewing the record in this matter, including consideration of plaintiff's claim of "possessor liability," which in light of Utah's liberal pleading standards, is appropriate, the Court is not persuaded summary judgment can be granted in the instant. Indeed, while no

Utah Court has explicitly adopted this section of the Restatement (Second) of Torts, such a theory of liability has not been rejected by the Courts in Utah and indeed, it has been continuously adopted in other jurisdictions. Moreover, although not binding precedent, other district courts in Utah have also been persuaded of its applicability.<sup>2</sup>

Applied to the facts of this case, the Court finds it sensible to conclude that when an owner relinquishes control of property to a general contractor, that contractor must be responsible for any conditions it creates on the property, specifically in this matter, the constructing of a building and its resulting conditions. In sum, the Court agrees with Plaintiff and concludes that § 384 reflects sound policy and should be applied in the instant.

(Record 1587 – 1588).

23. Contrary to the District Court's Memorandum Decision, Orchard Vista, not RSC, was responsible for the location and placement of building four on the Project and its proximity to the power line. Gonzalez has expressly asserted premises liability claims against Orchard Vista in his Amended Complaint and his premises liability claims against Orchard Vista are still pending. (Record 1048 – 1051, 1070 – 1077, 1101 – 1102, 1104 – 1111)

### SUMMARY OF ARGUMENTS

This Court has accepted RSC petition for interlocutory appeal to review the trial court's denial of RSC's Motion for Summary Judgment. Notwithstanding the fact that it was undisputed that RSC did not participate in or control the manner in which Gonzalez's work was performed and was not present at the Project on the day Gonzalez was injured,

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<sup>2</sup> Copies of the District Court Opinions referenced by the trial court are provided as Addendum B.

the trial court denied RSC's Motion for Summary Judgment. In denying RSC's Motion for Summary Judgment the trial court erred in two respects.

First, the trial court erred when it applied landowner liability upon RSC based solely upon RSC's status as the general contractor for the Project. In Utah, "the general rule is that 'the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.' " *Begaye v Big D Construction*, 2008 UT 4 ¶ 8, 178 P.3d 343. (quoting, *Thompson v. Jess*, 1999 UT 22 ¶ 13). Utah law further recognizes "...that one who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety or the manner or method of performance implemented." *Thompson v. Jess*, 1999 UT 22 ¶ 13. An exception to this general rule only arises "when an employer 'participate[s] in or control[s] the manner in which the contractor's work is performed.' " *Begaye v Big D Construction*, 2008 UT 4 ¶ 8. This exception is known as the "retained control doctrine." *Id.*

However, the trial court ruled as a matter of law that the Restatement (Second) of Torts § 384, imposed landowner liabilities upon RSC, notwithstanding the fact that Restatement § 384 has never been adopted by a Utah appellate court and is inconsistent with established Utah precedent concerning a general contractors liability and the retained control doctrine. The trial court's adoption of Restatement § 384 and the expanded and onerous duties that accompany § 384 undermine and eviscerate established Utah law. As

will be demonstrated below, the trial court's adoption of Restatement § 384 is contrary to the holdings in virtually all of Utah's retained control cases that unequivocally state that a general contractor's basic responsibility to look for and correct dangerous working conditions is not enough to make it liable under circumstances where the general contractor does not exercise control over the injury causing aspect of the subcontractor's work. *See, Magana*, 2009 UT 49 ¶ 29; *Begaye*, 2008 UT 4 ¶ 5. Indeed, here Orchard Vista, the developer and landowner is a defendant in this case and Gonzalez has pursued his premises liability claims directly against Orchard Vista from the outset of this case. Because the trial court's adoption of § 384 is inconsistent with Utah law, and because the undisputed facts below demonstrate that RSC did not actively participate in the injury causing aspect of Gonzalez' work, RSC is entitled to a reversal of the trial court's decision and the granting of summary judgment in RSC's favor.

Second, the trial court erred when it ruled that Gonzalez properly plead a premises liability claim. Gonzalez' Amended Complaint is deficient in many respects and fails to give RSC notice that Gonzalez was asserting a premises liability argument against it. Indeed, Gonzalez' complaint fails to allege that RSC owned or possessed the property at issue. In Utah, a plaintiff's failure to allege ownership or possession of the location where a hazard is located is fatal to a plaintiff's premises liability claim. *See, Hevelone v. City Market, Inc.*, 2005 Ut. App. 215, (Utah Ct. App.)(emphasis added). Moreover, Gonzalez first raised his premises liability claim in his Opposition to RSC's Motion for

Summary Judgment. Because Gonzalez' novel premises liability claim is predicated upon the adoption of Restatement § 384, which has never been adopted by a Utah appellate court, Gonzalez failed to properly plead or otherwise give notice of his premises liability claim against RSC.

Gonzalez' opposition relies upon a legal argument that has never been adopted in Utah and conflicts with firmly established Utah precedent. Indeed, Orchard Vista, not RSC was responsible for the location and placement of building four and its proximity to the power lines. Moreover, In Utah, a court will not consider a novel theory of recovery when it is raised for the first time in an opposition to a motion for summary judgment. *Asael Farr & Sons Co. v. Truck Ins. Exchange*, 2008 UTApp. 315 ¶ 19, 193 P.3d 650. Consequently, the trial court's determination that Gonzalez adequately plead a premises liability claim is in error and should be reversed by this Court.

## ARGUMENT

- I. The trial court erred in applying the Restatement of Torts (Second) § 384 to the instant case as § 384 has not been adopted by Utah appellate courts, is inconsistent with prior Utah case law, and is incompatible with Utah's general rule of non-liability.**

Utah has long established a general rule that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." *Thompson v. Jess*, 1999 UT 22 ¶ 13, 979 P.2d 322 (emphasis added). As will be demonstrated below, RSC is entitled to summary judgment on Gonzalez' negligence claims because it is undisputed that RSC, in its coordination and

scheduling of the Project, did not retain control over the method or manner that Gonzalez or his employer JCC performed their work. Indeed, the Plaintiff conceded that JCC employees alone determined the methods, manner and materials they used and had complete autonomy over the injury causing aspect of the work. Gonzalez argued to the trial court that RSC owed duties to Gonzalez under a premises liability theory that is contrary to established Utah law and has never been adopted by a Utah appellate court. The trial court erred in considering Gonzalez' premises liability argument and unless the trial court's order is reversed now, in the future RSC and other general contractors, will be subject to expanded legal duties and liabilities not previously recognized under Utah law and which conflict with Utah's well established retained control doctrine.

In Utah, "the general rule is that 'the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.' " *Begaye v Big D Construction*, 2008 UT 4 ¶ 8, 178 P.3d 343. (quoting, *Thompson v. Jess*, 1999 UT 22 ¶ 13). For ease of reference, RSC will refer to the above stated principle as "the general rule of non-liability." As pointed out by the Utah Supreme Court in *Magana v. Dave Roth Construction*, 2009 UT 45, 215 P.3d 143, the general rule of non-liability "...recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety or the manner or method of performance implemented." *Id.* at ¶ 22 (citing *Thompson v. Jess*, 1999 UT 22, ¶

13)(emphasis added). An exception to this general rule only arises “when an employer ‘participate[s] in or control[s] the manner in which the contractor’s work is performed.’” *Begaye v Big D Construction*, 2008 UT 4 ¶ 8. This exception to the general rule of non-liability is known as the “retained control doctrine.” *Id.*

It is undisputed that Gonzalez was injured while installing soffit and fascia on the north side of building four. See, Record 836. It is further undisputed that Gonzalez’ employer, JCC, was responsible for supervising its employees, was responsible for the safety equipment its employees utilized, and had complete control over the method and manner in which it performed its work on the Project. See, Record 839 – 840. Also, it is undisputed that RSC was not responsible for the placement of the buildings because Orchard Vista, the owner and developer, determined the location of the buildings on the Project and their proximity to the power lines. See, Record 1048 – 1051. Finally, it is undisputed that Gonzalez and his co-workers were the only workers present at building four on the date of his accident; consequently, RSC could not have directly contributed to Gonzalez’ accident. See, Record 836. Because it is undisputed that RSC did not participate in or control the manner in which Gonzalez’ work was performed, the retained control exception does not apply and RSC’s Motion for Summary Judgment should have been granted as a matter of law.

Faced with the undisputed facts that RSC was not liable for Gonzalez’s injuries, Gonzalez attempted to re-characterize his claims against RSC as “direct negligence”

claims similar to those asserted by the Plaintiff in *Magana v. Dave Roth Construction*, 2009 UT 45 ¶ 38, 215 P.3d 143. However, unlike the defendant in *Magana*, the undisputed facts demonstrate that RSC was not present on the date of Plaintiff's accident and therefore could not have directly contributed to Gonzalez' accident in the manner described in *Magana*. Given undisputed facts that RSC did not participate in the injury causing aspect of the work, Gonzalez argued for the first time in his opposition to RSC's Motion for Summary Judgment that RSC was liable under a premises liability analysis. Specifically, Gonzalez claims that his direct negligence claims are, "based upon the Utah Supreme Court's seminal opinion in *Hale v. Beckstead*, which applied premises liability negligence principles to claims by subcontractors." *See*, Record at 826 – 827.

However, because the defendant general contractor in *Beckstead* was also the property owner and thus fit the definition of "possessor of land" under the Restatement (Second) of Torts §§ 343 and 343A, the *Beckstead* case is readily distinguishable. *See*, *Hale v. Beckstead*, 2005 UT 24 ¶¶ 7, 8, 9, 116 P.3d 263. Unlike the general contractor in *Beckstead*, RSC was not the owner or a "possessor of land"; consequently, §§ 343 and 343A did not apply and Gonzalez was required to base his premises liability theory on Restatement (Second) of Torts § 384, a provision that has never been adopted by a Utah appellate court. In sum, the only "direct negligence" claims articulated by the Gonzalez against RSC are based upon a premises liability theory that creatively splices selected elements of *Beckstead* with Restatement § 384, a section that has not been adopted in



Utah and is incompatible with Utah's general rule of non-liability and Utah's case law on the retained control doctrine.

The trial court's acceptance of Gonzalez' novel argument and its adoption of Restatement § 384 has significant ramifications not only for RSC in the instant case, but for the entire construction industry in Utah. The trial court's conclusion that "§ 384 reflects sound policy and should be applied in the instant" ignores the fact that Restatement § 384 is inconsistent with Utah's general rule of non-liability for general contractors. Simply put, the adoption of Restatement § 384 would destroy any future application of the general rule of non-liability and the retained control doctrine.

By its very nature, nearly all construction sites will, at various times, contain dangerous conditions. If Gonzalez' argument is adopted, the basis for Utah appellate decisions in retained control cases would be severely undermined as future Plaintiffs would only have to allege that general contractors or other subcontractors on a project owed workers on the site the same premises liability duties as a landowner. According to the trial court in the instant case this expansive and onerous duty would include a duty to warn subcontractors of all known or knowable dangers. This result would dramatically broaden the responsibilities and liabilities of not only general contractors, but would dramatically expand the liabilities of each and every trade on a construction project with the exception of one, the employer of the injured worker.

Indeed, Utah law has long recognized that the employer of the injured worker has the most knowledge of the work to be performed, the risks inherent in the same and is in the best position to assess and control the safety precautions for its employees. However, due to the exclusive remedy provision of Utah's Workers Compensation Act, the expanded responsibilities and liabilities advocated by Gonzalez would not increase the responsibilities and liabilities of the employer of the injured worker.

Both workers compensation carriers and the injured worker have an incentive to find a third party to whom fault may be shifted. There is no doubt that the workers compensation carriers actively seek the recovery of benefits they pay to employees through the use of subrogation. Further, there is no doubt that injured workers actively seek to obtain larger common law damages above and beyond the no-fault benefits provided by workers compensation. As a result the theory advanced by Gonzalez would be used to circumvent the retained control doctrine and would create a perverse incentive for workers compensation carriers as well as the injured worker and his employer to shift the burden of worksite safety to the general contractor who was not in control of the injury causing aspect of the work. While the theory advanced by Gonzalez would provide injured workers and workers compensation carriers an "end-around" the retained control doctrine and provide, it would serve to undermine rather than promote worksite safety.

The district court's blanket adoption of Restatement § 384 is contrary to the holdings in virtually all of Utah's retained control cases that unequivocally state that a general contractor's responsibility to look for and correct dangerous working conditions is not enough to make it liable. *See, Magana*, 2009 UT 49 ¶ 29; *Martinez v. Jacobsen Constr. Co., Inc.*, 2005 WL 615106 (Utah Ct. App.)(unpublished decision); *Begaye*, 2008 UT 4 ¶ 5. Indeed, to hold otherwise would mean that a general contractor could subcontract for the performance of work but not successfully delegate the safety responsibility that normally accompanies that work. Logic and public policy dictate that safety responsibility best rests on the subcontractor doing the work, for the subcontractor is the entity most knowledgeable and familiar with its work and its particular hazards.

Because RSC did not own or possess the property, the Plaintiff was required to base his premises liability argument upon the Restatement § 384 which states:

One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to the same liability, and enjoys the same immunity from liability, as though he were the possessor of the land, for bodily harm caused to others within and without the land, while the work is in his charge, by the dangerous character of the structure or other condition.

(emphasis added). A copy of the Restatement (Second) of Torts § 384 is attached as Addendum C.

In *Thompson v. Jess*, 1999 UT 22, the seminal case articulating the retained control doctrine, the Utah Supreme Court examined other similar Restatement provisions in the context of a general contractor's liability to an injured employee of a subcontractor. The

Utah Supreme Court in *Thompson* refused to apply three sections of the Restatement (Second) of Torts as exceptions to the retained control doctrine:

We agree with *Privette* and *Wagner* and decline to apply section 413, 416, or 427 of the Restatement in the manner Thompson proposes. Whether based on direct negligence under section 413 or vicarious liability under sections 416 and 427, these provisions have no application when the injured person is an employee of the independent contractor undertaking the allegedly dangerous work. The majority of jurisdictions that have examined this issue have decided likewise.

*Thompson v. Jess*, 1999 UT 22 ¶ 30. Just as the Utah Supreme Court declined an invitation to eviscerate the retained control doctrine with the adoption of §§ 413, 416 and 427, RSC requests this Court to make the same sound public policy determination and not extend §384 to claims made by injured employees of subcontractors against general contractors or other subcontractors.

Of particular note, pursuant to the holding in *Thompson* the phrase “to others”, which appears in §§ 413, 416 and 427 which the Utah Supreme Court declined to adopt as well as § 384 which was adopted by the trial court in the instant case, does not apply to the subcontractor’s employees tasked with carrying out the work. *Thompson*, 979 P.2d at 330 (Utah 1999)(“In addition, sections 413, 416, and 427 each speak of liability for injury “to others,” which implies third parties rather than employees of the independent contractor carrying out the contracted work.”)(emphasis added)). Consequently, the trial court’s application of § 384 to the Plaintiff, an employee of the independent contractor carrying out the contracted work, is in error.

While Gonzalez argued that *Hale v. Beckstead* 2005 UT 24, 116 P.2d 263, was dispositive, Gonzalez could not achieve his desired result without creatively relying on selected portions of *Beckstead* coupled with Restatement§ 384, a provision that has not been adopted by Utah appellate courts. Contrary to Gonzalez' representations otherwise, *Beckstead*, standing alone, does not support Plaintiff's premises liability theory because the defendant in *Beckstead* was a property owner acting as his own general contractor. *Beckstead*, 2005 UT 24 ¶¶ 7, 8, 9, 116 P.3d 263. Consequently, as "an invitee on Beckstead's land" the Plaintiff in *Beckstead* had enjoyed "a status wholly separate from any status he may have had as an independent contractor." *Beckstead*, UT App 240, ¶ 11 n.2. Gonzalez' theory of premises liability is best described as a hybrid of elements of *Beckstead* coupled with the Restatement (Second) of Torts § 384 which has not been adopted by Utah Appellate Courts.

Notwithstanding Gonzalez' attempts to normalize and accredit his theory, Gonzalez cannot escape the fact that no other Utah appellate decision has ever held that a general contractor that does not concurrently own the premises at issue stands in the same shoes as a landowner for premises liability purposes. While acknowledging that Utah has not adopted Restatement (Second) of Torts § 384, Gonzalez claims that "it is unaware of jurisdiction that has rejected section 384." *See*, Record 843. In support of this assertion, Gonzalez provides a string cite from an unreported decision that purports "at least twenty-one other states...have followed the common law rule contained in §384." *See*, Record at

843 – 844. (citing *Smithey v. Stueve Constr. Co.*, 2007 U.S. Dist. Lexis 3871, 14-16 (D.S.D. January 18, 2007)).

A review of the cases cited in Gonzalez' string cite from *Smithey*, demonstrate an important distinguishing feature. Specifically the overwhelming majority of cases contained in the string cite did not involve an employee of a subcontractor, as in this case. Rather the majority of the cases in the string cite involved third parties such as infants, children or other members of the public.<sup>3</sup> Indeed, the case that contained the misleading

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*DeVazier v. Whit Davis Lumber Co.* 257 Ark. 371, 516 S.W.2d 610 (Ark. 1974)(13-year-old girl suffered personal injuries when stack of sheetrock fell on her legs as she and her mother were inspecting a house for purchase); *Broadway v. Blythe Industries, Inc.*, 313 N.C. 150, 326 S.E.2d 266 (N.C. 1985)(Action for injuries to trespassing child injured on a construction site); *Duggan v. Esposito*, 178 Conn. 156, 422 A.2d 287 (Conn., 1979)(Action for injuries to a child that ran into pipes protruding from defendant subcontractors' truck parked in driveway on owner's premises); *Cockerham v. R. E. Vaughan, Inc.*, 82 So.2d 890 (Fla.1955)(Action for injuries to an infant who fell into a hole existing on the land of another and dug by the defendant contractor for the installation of a septic tank); *Chronopoulos v. Gil Wyner Co.*, 334 Mass. 593, 137 N.E.2d 667 (Mass.1956)(Action for injuries sustained by minor who fell from temporary bridge across trench excavated by subcontractor); *Barnett By and Through Barnett v. Equality Sav. & Loan Ass'n, Inc.*, 62 S.W.2d 924 (Mo.App. E.D. 1983)(Action for injuries sustained by minor for injuries sustained when he climbed stack of cement bumper blocks used in parking lots to delineate parking spaces); *Harris v. Menten-Williams Co.*, 23 N.J.Super. 9, 92 A.2d 498 (N.J.Super.A.D. 1952)(Action for injuries to a child who fell from high to low ground level before bulldozing operation had been completed); *Cook v. Demetrakas*, 108 R.I. 397, 275 A.2d 919 (R.I. 1971)(Action for injuries incurred by policeman against property owners, their corporate tenant and construction company which was doing excavation work on the premises when policeman fell over embankment on the property while pursuing a fugitive after responding to a request from a third party at another address); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (Colo. 1971)(superseded by statute)(Action by police officer against fence company for injuries sustained when he stepped into post hole on property abutting alley); *Savoie v. Littleton Const. Co.*, 95 N.H. 67, 57 A.2d 772 (N.H.1948)(Action for injuries sustained by driver of auto that collided with the defendant's equipment on a new highway in process of construction); *Elliott v. Rogers*

string cite, *Smithey v. Stueve Constr. Co.*, 2007 U.S. Dist. Lexis 3871, 14-16 (D.S.D. January 18, 2007), is an unreported decision that, similar to the many cases it cited in support, involved a third party member of the public rather than an employee of a subcontractor as in this case.

Contrary to Gonzalez' claims otherwise, other states have considered and rejected Gonzalez' premises liability argument. In *Branum v. Petro-Hunt Corp.*, 2010 WL 1977963, (Dist. N.D. 2010), a Federal Magistrate Judge issued a report and recommendation to the District Court, denying on futility grounds, defendant Petro-Hunt's motion to add plaintiff's employer as a third-party defendant. The *Branum* Court reviewed the allegations of the Plaintiff's complaint, including Count I, a premises

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*Const., Inc.*, 257 Or. 421, 479 P.2d 753 (Or. 1971)(Action for wrongful death resulting from a collision that involved a job site worker six to eight miles from job site and one half four before work was to start, had not entered upon his duties and was performing no act for benefit of his employer; consequently, employer was not liable for decedent's death under doctrine of respondeat superior); *Hollett v. Dundee, Inc.* 272 F.Supp. 1 (D.C.Del. 1967)(Action for injuries incurred by janitor against contractor and subcontractor when he fell into ditch); *Kragel v. Wal-Mart Stores, Inc.* 537 N.W.2d 699 (Iowa 1995)(Customer sued store owner after customer fell on snow and ice which had accumulated in store parking lot); *Von Dollen v. Stulgies*, 177 Neb. 5, 128 N.W.2d 115 (Neb.1964)(Landowner's sister who visited home under construction as owner's guest solely to accompany and assist owner and who had no contract with or authority over builder was 'licensee' as to builder and was not entitled to recover from builder for injury received when wallboard fell on her foot, in absence of showing that builder or any of his employees were on premises on day of accident or had knowledge of placement of wallboard); *Williamson v. Allied Group, Inc.*, 117 Wash.App. 451, 72 P.3d 230 (Wash.App. Div. 1 2003)(Action for injuries incurred by Tenant who was injured when she slipped and fell on unimproved grassy slope between parking lot and apartment building); *Yee Chuck v. Board of Trustees of Leland Stanford Jr. University*, 179 Cal.App.2d 405, 3 Cal.Rptr. 825 (Cal.App.1960)(Action against university by sublessee related to conditions created on the land by the contractor).



liability claim premised upon Restatement (Second) of Torts § 343A, a Restatement provision expressly relied upon by Plaintiff in the instant action. Citing prior North Dakota precedent, the *Branum* Court stated:

When a person having control of a premises employs an independent contractor to conduct work and a claim is brought against that person, the more specific provisions of Restatement of Torts 2d §§ 414, 416, and 427 govern with respect to a claim of a failure to provide a safe place to work-at least when the claim is brought by an employee of an independent contractor.

*Id.* at 3. (emphasis added).

The *Branum* Court cited and quoted at length from a North Dakota Supreme Court decision *Petchel v. Conoco, Inc.*, 567 N.W. 2d 455 (N.D. 1994). Because its analysis is instructive and directly correlates with established Utah law, the *Petchel* decision, as cited by the court in *Branum*, is quoted here at length:

Relying on *Ruehl v. Lidgerwood Rural Tel. Co.*, 23 N.D. 6, 135 N.W. 793 (1912), the Pechtles also contend Conoco had a non-delegable duty regarding conditions at the worksite. They argue Conoco retained exclusive possession and control of the worksite and could not shift its duty to provide a safe workplace to Steier.

To the extent the Pechtles' argument is premised upon Conoco's control of the worksite, it is governed by our resolution of the issue of retained control under Section 414. The Pechtles' reliance on *Ruehl* is also misplaced. In *Ruehl*, a young child died when he fell into a telephone post hole dug by a person employed by the defendant, a telephone company. In discussing the telephone company's duty, this court said: \*\*\*\*

[quotation omitted]

*Ruehl* involved the existence of a hazardous condition, an unguarded hole in the ground in which a child fell. Here, the employee of an



independent contractor is claiming an injury caused by a hazardous or dangerous jobsite. In *Fleck* we recently considered a similar claim under Restatement (Second) of Torts §§ 416 and 427. We distinguished between members of the general public injured by worksite negligence and injured employees of an independent contractor, and we held an employer of an independent contractor is not vicariously liable to the independent contractor's employees for inherent dangers or peculiar risks at a jobsite under Sections 416 and 427. To the extent the Pechtls' argument is based upon language in *Ruehl* about a dangerous condition like a deep pit or well, our decision in *Fleck*<sup>4</sup> is dispositive of a claim by an employee of the independent contractor.

*Id.* at 3-4. (quoting, *Pechtl v. Conoco, Inc.*, 567 N.W.2d 813, 818 – 819 (N.D.1997)

(emphasis added).

The result in *Pechtl* and its progeny directly correlates with established Utah law as articulated in *Thompson v. Jess*, 1999 UT 22. Rather than adopt Gonzalez' argument which misapplies and incorporates Restatement (Second) of Torts §§ 343, 343A, and (the un-adopted) § 384, the more practical and reasoned approach, as demonstrated in *Pechtl* and *Thompson*, would be to analyze this case pursuant to the more specific provisions §§ 413, 414, 416, and 427. Regarding the same, for reasons virtually identical to the North Dakota Supreme Court in *Pechtl*, the Utah Supreme Court in *Thompson* declined to adopt §§ 413, 416 and 427 when the person injured was an employee of a subcontractor who was covered by workers compensation:

The purpose of these sections is “to ensure that innocent third parties injured by the negligence of an independent contractor hired by a

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*Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 449-54 (N.D.1994), is cited with approval by the Utah Supreme Court in *Thompson v. Jess*, 1999 UT 22, ¶ 30 at fn.4.

landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for the injuries." *Privette*, 21 Cal.Rptr.2d 72, 854 P.2d at 725. *Privette* held that this purpose is not advanced when these exceptions are applied in favor of a contractor's employees who are covered by workers' compensation. See *id.* 21 Cal.Rptr.2d 72, 854 P.2d at 726-30; see also *Wagner*, 421 N.W.2d at 840-44 (detailing reasons for not adopting sections 413, 416, and 427 in favor of employees of independent contractors).

We agree with *Privette* and *Wagner* and decline to apply section 413, 416, or 427 of the Restatement in the manner Thompson proposes. Whether based on direct negligence under section 413 or vicarious liability under sections 416 and 427, these provisions have no application when the injured person is an employee of the independent contractor undertaking the allegedly dangerous work. The majority of jurisdictions that have examined this issue have decided likewise<sup>5</sup>.

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See, *Id.* ¶ 30 at fn. 4 citing: *Morris v. City of Soldotna*, 553 P.2d 474, 481-82 (Alaska 1976); *Welker v. Kennecott Copper Co.*, 1 Ariz.App. 395, 403 P.2d 330, 337-39 (1965); *Jackson v. Petit Jean Elec. Coop.*, 270 Ark. 506, 606 S.W.2d 66, 69 (1980); *Privette*, 21 Cal.Rptr.2d 72, 854 P.2d at 726-31; *Ray v. Schneider*, 16 Conn.App. 660, 548 A.2d 461, 466 (1988); *Peone v. Regulus Stud Mills*, 113 Idaho 374, 744 P.2d 102, 105-06 (1987); *Johns v. New York Blower Co.*, 442 N.E.2d 382, 386-88 (Ind.Ct.App.1982); *Dillard v. Strecker*, 255 Kan. 704, 877 P.2d 371, 385 (1994); *King v. Shelby Rural Elec. Coop. Corp.*, 502 S.W.2d 659, 661-63 (Ky.1973); *Parker v. Neighborhood Theatres*, 76 Md.App. 590, 547 A.2d 1080, 1082-83 (1988); *Vertentes v. Barletta Co.*, 392 Mass. 165, 466 N.E.2d 500, 502-03 (1984); *Zueck v. Oppenheimer Gateway Properties*, 809 S.W.2d 384, 390 (Mo.1991) (en banc); *Sierra Pacific Power Co. v. Rinehart*, 99 Nev. 557, 665 P.2d 270, 273-74 (1983); *Donch v. Delta Inspection Services, Inc.*, 165 N.J.Super. 567, 398 A.2d 925, 927-29 (1979); *New Mexico Electric Serv. Co. v. Montanez*, 89 N.M. 278, 551 P.2d 634, 637-38 (1976); *Whitaker v. Norman*, 75 N.Y.2d 779, 552 N.Y.S.2d 86, 551 N.E.2d 579, 580 (1989); *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 449-54 (N.D.1994); *Curless v. Lathrop Co.*, 65 Ohio App.3d 377, 583 N.E.2d 1367, 1376-78 (1989); *Cooper v. Metropolitan Government of Nashville, Davidson County*, 628 S.W.2d 30, 32-33 (Tenn.Ct.App.1981); *Humphreys v. Texas Power & Light Co.*, 427 S.W.2d 324, 330-31 (Tex.Civ.App.1968); *Tauscher v. Puget Sound Power & Light Co.*, 96 Wash.2d 274, 635 P.2d 426, 428-31 (1981) (en banc); *Wagner*, 421 N.W.2d at 839-44; *Stockwell v. Parker Drilling Co.*, 733 P.2d 1029, 1031-33 (Wyo.1987).

*Id.* at ¶¶ 29, 30.

It is important to note that the Utah Supreme Court in *Thompson* examined the defendant's liability both on "vicarious liability" claims as well as "direct liability" claims and along with 22 other states, rejected the Plaintiff's attempt to apply these provisions to an employee of an independent contractor who was covered by workers compensation.<sup>6</sup>

The *Thompson* Court further examined the policy implications and the "unfair and anomalous results" that would occur if Restatement of Torts 2d. §§ 413, 416 and 427 applied to injured employees of subcontractors after taking into consideration Utah's workers' compensation system. The *Thompson* Court concluded that the adoption of an argument similar to the Plaintiff's in this case would (1) "exempt a single class of employees, those who work for independent contractors, from the statutorily mandated limits of workers' compensation"; (2) would allow a recovery of tort damages that is greater than the damages incurred by the injured employee's employer which are limited to its workers compensation premiums; and (3) would result in a reallocation of damages as a contractor would be held exclusively liable for a subcontractor's employee's injuries because the workers compensation insurer is entitled to complete reimbursement from any damages obtained by the injured employee. *Id.* at ¶ 32. The "unfair and anomalous

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Gonzalez' workers compensation coverage is not in dispute as Gonzalez filed a Motion for Leave to File Second Amended Complaint wherein Plaintiff seeks to have Workers Compensation Fund added as a named co-plaintiff to this action. Record at 1600 – 1618.

results” articulated in *Thompson* are present in the instant case and further argue against the Plaintiff’s unwarranted attempt to expand Utah law.

Following *Thompson*, injured workers and workers compensation carriers have creatively sought several different theories to circumvent the same. However, as demonstrated above, when the Utah Supreme Court decided *Thompson*, ample consideration was given to the interplay between Utah’s Workers Compensation Act and the incentive inherent in the same for injured workers and the workers compensation carrier to shift liability to other parties. The Plaintiff’s argument, if adopted by this Court, would result in a dramatic and unprecedented expansion of a general contractor’s liability and would serve to undermine rather than promote worksite safety. The reasoning rejecting the expansive liability advocated by Gonzalez was articulated in *Thompson* is sound and is applicable to this case:

As expounded in *Zueck*, if employees of an independent contractor are allowed to avail themselves of the peculiar risk doctrine or inherently dangerous work exception, the principal employer is placed in an untenable position: *he or she must anticipate activities that are “inherently dangerous” to the contractor’s employees and, if the dangers inhere to the manner in which the work is done, protect against such dangers despite the fact that the employees are best able to identify and address whatever hazards are involved in their own method of performance. Oftentimes, both the risks involved and the protections necessary to avoid the risks are beyond the principal employer’s knowledge or capacity. Thus, to avoid the liability imposed by the peculiar risk doctrine or inherently dangerous work exception, the principal employer has an incentive to direct his or her own employees to do the work despite their lack of expertise. Such a choice would limit the principal employer’s exposure to that under the Workers’ Compensation Act but, at the same time, increase the risk of injury to the*

*principal's employees and innocent third parties.* Placing principal employers in such a position distorts the objectives of tort law, and for that reason, the peculiar risk doctrine or inherently dangerous work exception should not apply in favor of employees of the independent contractor performing the work. *See Zueck*, 809 S.W.2d at 387-88.

*Id.* at 31. (emphasis added).

Gonzalez' argument that a general contractor, standing in the shoes of a landowner, owes a non-delegable duty to its subcontractors to make the premises reasonably safe and to warn of all known or knowable dangers places an onerous duty upon the general contractor that has been rejected implicitly by Utah courts. Utah appellate courts have consistently held that a general contractor's responsibility to look for and correct dangerous working conditions is not enough to make it liable. *See, Magana v. Dave Roth Construction*, 2009 UT 49 ¶ 29; *Martinez v. Jacobsen Constr. Co., Inc.*, 2005 WL 615106 (Utah Ct. App.)(unpublished decision); *Begaye*, 2008 UT 4 ¶ 5. Undoubtedly, the results in the aforementioned cases would be nullified by the adoption of Gonzalez' argument.

Undoubtedly, this unprecedented expansion of liability would, for the reasons articulated by the Utah Supreme Court in *Thompson*, not serve the noble goal to increase workplace safety, but instead would place general contractors in the untenable position of having to anticipate all of the dangers for all of the different trades on a construction project, even if those potential dangers are beyond the general contractors knowledge and capacity. While a general contractor relies upon an independent subcontractor to perform

a task due to the independent contractor's expertise, training and specialized knowledge, the adoption of the Plaintiff's argument would place the general contractor in the position to "to direct his or her own employees to do the work despite their lack of expertise." *Thompson*, at ¶ 31. Such a result would result in more workplace accidents and would serve to undermine, rather than promote, workplace safety. Consequently, Gonzalez' premises liability argument, while beneficial to Gonzalez, would ultimately make Utah construction projects less safe and should be explicitly rejected by this Court.

**II. The trial court erred by allowing Gonzalez to argue for the first time in his opposition that Gonzalez' claims against RSC were based in premises liability.**

The trial court erred when it allowed Gonzalez to argue for the first time in his opposition that his claims against RSC were based in premises liability. Although Utah pleading requirements are liberally construed, in a recent Utah Supreme Court case, the Supreme Court refused to allow a Plaintiff to argue for the first time in her opposition to a summary judgment, a new theory of causation when the Plaintiff failed to give notice to the parties of the same, "[t]he issue before us is to what extent a causation theory articulated for the first time in the context of a summary judgment motion must have appeared in prior pleadings in order to command consideration from the district court." See, *Gudmundson v. Del Ozone*, 2010 UT 33 (Utah 2010).

In *Gudmundson*, the Plaintiff alleged in her complaint that she was injured from "ozone overexposure." *Id.* at ¶ 40. However, when faced with a motion for summary

judgment, the Plaintiff alleged in her opposition that her injuries were the result of “ozone combined with other chemicals.” *Id.* at ¶ 41. The Utah Supreme Court rejected the Plaintiff’s attempts to broaden her theory of recovery and held, “[Plaintiff’s] failure to give appellees notice that she intended to pursue both theories precludes her from arguing that chemical toxicity caused her injuries.” *Id.*

The *Gudmundson* case is the most recent articulation of a well established legal principle. It is clear law in Utah that a court will not consider a novel theory of recovery when it is raised for the first time in an opposition to a motion for summary judgment. In *Asael Farr & Sons Co. v. Truck Ins. Exchange*, 2008 UTApp. 315 ¶ 19, 193 P.3d 650, the court noted that “[a] plaintiff cannot amend the complaint by raising novel claims or theories for recovery in a memorandum in opposition to a motion to dismiss or for summary judgment because such amendment fails to satisfy Utah’s pleading requirements.” (quoting *Holmes Dev. LLC v. Cook*, 2002 UT 38 ¶ 31, 48 P.3d 895). The *Asael* Court affirmed the district court’s refusal to consider the theory of “oral binder” when the plaintiff had not raised it prior to its opposition to motion for summary judgment because the case had been litigated for 3 years and the plaintiff had never raised it. *Id.* Similarly, the court in *Holmes* restricted the plaintiff to the allegations set forth in the complaint. *See, Holmes*, 2002 UT 38 ¶ 3, 48 P.3d at 895.

Moreover, in a case strikingly similar to this one, in *Hevelone v. City Market, Inc.*, 2005 UT App. 215, (unpublished opinion), the Plaintiff failed to allege or raise any



inference that the Defendant, City Market, owned or possessed the property. The Utah Court of Appeals, held “Hevelone's failure to allege City Market's ownership or possession of the fire lane where the hazard was located is fatal to her premises liability claim.” *Id.*

In *Gundmundson*, *Asael*, *Holmes*, and *Helvelone*, the Plaintiff failed to give notice or properly allege the theory of recovery sought. The Plaintiff's failure to do so in each case resulted the district court's proper disregarding of the same and dismissal of the unplead claims as the defendants were not given proper notice of the same. This case is no different. As in *Gundmunson*, Gonzalez only attempted to establish his new claim in the context of an opposition to summary judgment. As in *Helvelone*, Gonzalez' Amended Complaint failed to allege that RSC owned or possessed the property. Instead. Gonzalez' Amended Complaint correctly alleges that defendant Orchard Vista owned the property. See, Record 128 at ¶¶ 12 – 13. Further, the Plaintiff's Amended Complaint cannot reasonably be construed to allege a premises liability claim against RSC.

Even after the most generous reading of the Plaintiff's complaint, one cannot reasonably claim that it pleads premises liability against RSC. Plaintiff's counsel claims that the following two sub-paragraphs sufficiently plead a premises liability claim against RSC:

27. Defendants breached their duty of care to Plaintiff by, among other things:



a. Failing to properly exercise and maintain a *place of employment*, which was free from *recognized hazards that were likely to cause death or serious physical harm to individuals working on the Property*;

\* \* \*

c. Failing to ensure that the development of the Property did not encroach upon the *electrical lines lining the Property*, or that proper safety measures regarding power lines were followed, including cutting off power to the electrical lines, insulating the electrical lines and protecting the 10 foot safety circle; . . . .

First, if Gonzalez was asserting a premises liability argument against RSC, then Gonzalez' Amended Complaint was deficient as a matter of law. A plain reading of Gonzalez' Amended Complaint demonstrates that Gonzalez did not properly assert a premises liability action. As pointed out above, Gonzalez failed to even allege in his Amended Complaint that RSC owned or possessed the property. Rather, Gonzalez correctly alleged that another defendant, Orchard Vista, owned the property. In Utah, a plaintiff's failure to allege ownership or possession of the location where a hazard is located is fatal to a plaintiff's premises liability claim. *See, Hevelone v. City Market, Inc.*, 2005 Ut. App. 215, (Utah Ct. App.) This deficiency alone should have, as a matter of law, precluded the trial court from considering Plaintiff's premises liability argument.

Second, Gonzalez argued that his claim against RSC was a premises liability claim based upon *Hale v. Beckstead*, 2005 UT 24. However, to establish premises liability duties upon RSC, Gonzalez could not and indeed did not, rely solely on *Beckstead*. Rather, Gonzalez had to first argue that Restatement § 384 placed RSC in the same shoes

as a landowner for premises liability purposes in order to apply *Beckstead*. The coupling of Restatement § 384 with *Beckstead* was necessary because *Beckstead* standing alone was readily distinguishable and inapplicable to this case. Unlike the instant case, the Plaintiff in *Beckstead* filed suit “alleging negligence based upon principles of premises liability.” *Id.* at ¶4 (emphasis added). Unlike the Plaintiff in *Hale*, Gonzalez’ complaint is devoid of any reference to RSC’s ownership or possession of the property. Furthermore, the general contractor in *Hale* was also the owner of the property acting as his own general contractor. *Id.* at ¶ 3. Accordingly, the Utah Supreme Court did not analyze or base its holding in *Beckstead* upon the Restatement § 384. Instead the Utah Supreme Court analyzed the case based upon the defendant’s own ownership and control of the property. *Id.* at ¶ 8.

In sum, in order for RSC to have had notice that Gonzalez’ claims against RSC were based in premises liability RSC would first have to overlook Gonzalez’ failure properly plead that RSC had ownership or possession of the property. Second, RSC would have had to assume that its role as general contractor placed it in the same position as a property owner even though Utah law has never recognized that a general contractor *ipso facto* assumed the same liabilities as a landowner. Consequently, for RSC to have had notice of the premises liability claim, it would have to assume that Utah would at some future time adopt Restatement § 384 which would then arguably place RSC in the same position as a landowner. While Utah’s pleading standards are liberal, they do not

require RSC to possess a crystal ball to determine prior to Gonzalez' opposition that he was asserting a premises liability claim. Clearly, this does not meet the minimum notice requirements for pleadings in Utah. Consequently, the trial court's determination that Gonzalez sufficiently plead a premises liability action against RSC should be overturned and RSC should be granted summary judgment as a matter of law.

### **CONCLUSION**

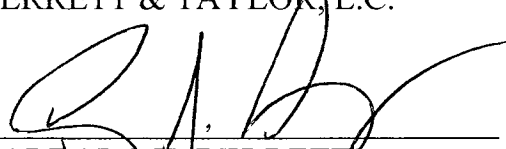
Utah law is clear that RSC, as the general contractor on the Project, cannot be liable for the workplace injury of Gonzalez unless RSC exercised affirmative control over the injury causing aspect of Gonzalez' work. Gonzalez' attempt to recast his claims against RSC as direct negligence and premises liability fail as a matter of law, as they are inconsistent and conflict with established Utah law. Utah has not adopted Restatement §384 and should not adopt it as it is in direct contravention of Utah's general rule of non-liability. Because it is undisputed that RSC did not directly participate in Gonzalez' performance in the injury causing aspect of the work, the trial court erred in denying RSC's Motion for Summary Judgment.

Further, Gonzalez' attempt to impose landowner premises liability duties upon RSC, fail as Gonzalez failed to properly plead or give notice of his premises liability claim until his opposing memorandum. Gonzalez failed to plead that RSC owned or possessed the property in question, which omission is fatal to Gonzalez' premises liability claim.

Based upon the foregoing, RSC respectfully requests this Court to reverse the district court's decision and direct the district court to grant RSC's Motion for Summary Judgment as a matter of law.

DATED this 25<sup>th</sup> day of March, 2011.

BERRETT & TAYLOR, L.C.



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BARBARA K. BERRETT  
TIMOTHY J. CURTIS  
*Attorneys for Defendant Russell  
Sorenson Construction*

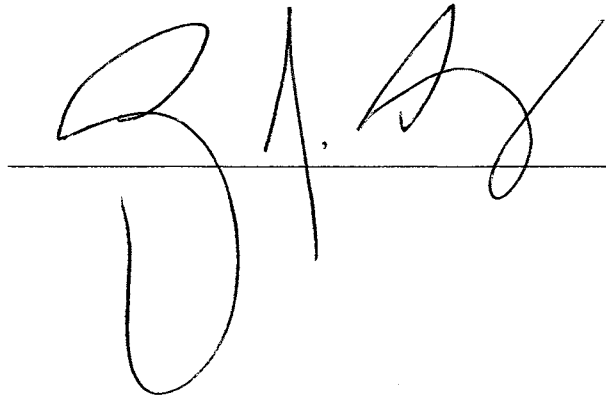
## CERTIFICATE OF SERVICE

I hereby certify that on the 25<sup>th</sup> day of March 2011, I mailed two true and correct copies of the foregoing Brief of Appellant, postage prepaid to:

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*Attorneys for R. M. Rees Construction*

A handwritten signature in black ink, appearing to read 'J.R. Black', is written over a horizontal line.

## **ADDENDUM**

## Tab A

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

JOSE M. GONZALEZ,

Plaintiff,

vs.

ORCHARD VISTA, LLC, PACIFICORP,  
an Oregon corporation d/b/a  
ROCKY MOUNTAIN POWER, R.M. REES  
CONSTRUCTION, a Utah  
corporation d/b/a/ DESIGN STONE  
CREATIONS, RUSSELL SORENSEN  
CONSTRUCTION, a sole  
proprietorship; JOHN DOE  
ENTITIES 1-5 and JOHN DOES 1-5,  
Defendants.

PACIFICORP,

Third-Party Plaintiff,

vs.

JOHN CLAYTON CONSTRUCTION,  
INC.,

Third-Party Defendant.

**FILED DISTRICT COURT**  
Third Judicial District

JUL 30 2010

SALT LAKE COUNTY

By                      Deputy Clerk

MEMORANDUM DECISION

Case No. 080921130

Hon. JOSEPH C. FRATTO, JR.

The above-entitled matter comes before the Court pursuant to Russell Sorensen Construction's Motion for Summary Judgment. The Court heard oral argument with respect to the Motion on July 21, 2010. Following the hearing, the motion was taken under advisement.

The Court having considered the motion, memoranda, exhibits attached thereto and for the good cause shown, hereby enters the



following ruling,

In support of its motion Russell Sorensen Construction ("RSC") argues Utah law is clear that as the general contractor on the project, RSC cannot be liable for the workplace injury of a John Clayton Construction ("JCC") employee unless RSC exercised affirmative control over the injury causing aspect of the work. Moreover, asserts RSC, plaintiff's attempts to recast its claims against RSC as direct negligence claims fail as it is undisputed that RSC did not directly participate in JCC's performance in the injury causing aspect of the work and plaintiff's attempts to impose landowner liability fails as plaintiff failed to plead or give notice of this claim until the opposing memoranda. Further, contends RSC, because Orchard Vista, LLC, another defendant in this case, owned and possessed the property-and there is no evidence RSC owned or possessed the property-plaintiff's claim of premises liability must fail. Finally, argues RSC, Utah has not adopted Restatement § 384 and would not adopt it in this case as it is in direct contravention of Utah's general rule of non-liability.

In opposition, plaintiff asserts he is bringing a claim of direct negligence, not vicarious liability, and based upon the Utah Supreme Court's decision in *Hale v. Beckstead* 2005 UT 24,

¶ 33, 116 P.3d. 263 (which applied premises liability negligence principles to claims by subcontractors), a general contractor who assumes control of a site is a possessor of land and a subcontractor's employee is a business invitee. According to plaintiff, under the Restatement, a possessor owes business invitees an affirmative duty not to create a dangerous condition on the premises and owes a further duty to take reasonable steps to make the premises safe.

In the present case, argues plaintiff, RSC created a dangerous and unsafe condition by constructing building No. 4, which contained Units 12 & 13, in violation of the National Electrical Safety Code, which requires minimum vertical and horizontal clearances to the high voltage power lines. The problem was further compounded, asserts plaintiff, by the fact that RSC failed to take reasonable steps to make the premises safe for subcontractors.

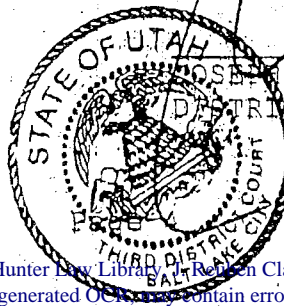
After reviewing the record in this matter, including consideration of plaintiff's claim of "possessor liability," which in light of Utah's liberal pleading standards, is appropriate, the Court is not persuaded summary judgment can be granted in the instant. Indeed, while no Utah Court has explicitly adopted this section of the Restatement (Second) of

Torts, such a theory of liability has not been rejected by the Courts in Utah and indeed, it has been continuously adopted in other jurisdictions. Moreover, although not binding precedent, district courts in Utah have also been persuaded of its applicability.

Applied to the facts of this case, the Court finds it sensible to conclude that when an owner relinquishes control of property to a general contractor, that contractor must be responsible for any conditions it creates on the property, specifically, in this matter, the constructing of a building and its resulting conditions. In sum, the Court agrees with Plaintiff and concludes that § 384 reflects sound policy and should be applied in the instant.

This said, disputed issues of material fact with respect to whether RSC created a dangerous condition on the premises and further, whether RSC took reasonable steps to protect invitees, precludes summary judgment. Russell Sorensen Construction's Motion for Summary Judgment is, respectfully, denied.

DATED this 30<sup>th</sup> day of July, 2010



JOSEPH C. PRATTO, JR.  
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 080921130 by the method and on the date specified.

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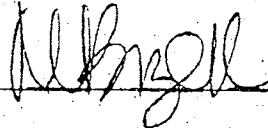
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Deputy Court Clerk

Tab B

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Rebecca L. Hill  
Geoffrey C. Haslam  
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Heidi G. Goebel ††  
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Heather L. Thuet  
Eric K. Jenkins  
Sarah E. Spencer †  
Gabriel K. White  
William M. Fontenot  
Tyler V. Snow

Of Counsel: Ray R. Christensen  
— Alain C. Balmanno

E.R. Christensen (1886-1979)  
Jay E. Jensen (1928-2003)

\*Also licensed in Washington State

\*\*Also licensed in Nevada

†† Also licensed in Colorado and Indiana

† Also licensed in Colorado

\*Also licensed in Idaho

July 21, 2010

The Honorable Judge Joseph C. Fratto  
THIRD JUDICIAL DISTRICT  
450 South State Street  
Salt Lake City, UT 84114-1860

Re: *Gonzalez v. Russell Sorensen Construction*

Dear Judge Fratto:

During the oral argument in the above-captioned case, I made reference to the ruling in the following cases:

1. *Aguirre/Rosales v. Newell K. Whitney*  
Judge Steven L. Hansen
2. *Christensen v. J.L. Hardy Construction*  
Judge Denise P. Lindberg

For your convenience, I have enclosed copies of the opinions in these cases. I have also provided counsel for defendant Sorensen with the Memorandum Decisions.

Sincerely yours,

CHRISTENSEN & JENSEN, P.C.

  
Karra J. Porter

WJH/KJP/sl  
Enclosures

FILED

MAR 03 2010

4TH JUDICIAL DISTRICT  
STATE OF UTAH  
UTAH COUNTY 42

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

GUADALUPE RUIZ ORDUNEZ, GUADALUPE ELEN LAZARO ROSALES, and BEATRIZ CHAVEZ SANDOVAL,  Plaintiffs,  v.  NEWELL K. WHITNEY, RISUN TECHNOLOGIES, and MUDDY BOYS, INC.,  Defendants.	<b>DECISION</b>  Date: March 3, 2010 Case No. 080400743 Judge Steven L. Hansen Division 2
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The matters before the court are the motions for summary judgment filed by all three defendants Newell K. Whitney ("Newell Whitney"), Risun Technologies, Inc. ("Risun") and Muddy Boys, Inc. ("Muddy Boys"). Oral arguments were heard on the motions on February 1, 2010, at which time the court took the motions under advisement. The court now issues this decision denying the motions for the reasons set forth below.

**BACKGROUND**

Defendant Newell K. Whitney ("Newell Whitney") was building a home in Alpine ("the Home") from 2005 to sometime in 2007. Newell Whitney was the owner of the Home as well as the general contractor on the construction of the Home. Defendant Risun Technologies, Inc. ("Risun") is owned by Bill Whitney, Newell Whitney's brother. Risun drew up the plans for the Home and obtained the necessary building permits for it. Apparently when Newell Whitney was

procuring subcontractors for the Home, he signed some of the contracts as "agent" of Risun.

There is a dispute regarding whether Newell Whitney had any actual or apparent authority to act as an agent on behalf of Risun. In his capacity as general contractor on the Home, Newell Whitney hired Muddy Boys, Inc. ("Muddy Boys") to do the drywall in the Home. Muddy Boys, in turn, hired Allstate Drywall ("Allstate") to hang the drywall. Other subcontractors were hired to do the taping and texturing on the drywall.

The Home was approximately 13,000 square feet and included a four-story elevator shaft. On the morning of the accident, Newell Whitney told two Allstate Drywall employees to wrap an exposed beam and some television cable at the very top of the elevator shaft. The two employees were Guadalupe Rosales and Ramon Aguirre. They apparently attempted to perform some work within the elevator shaft and were found a short time later at the bottom of the shaft in extremely critical condition and with injuries consistent with a long fall. Ramon Aguirre was pronounced dead at the scene, and Guadalupe Rosales suffered severe, permanent injuries. Ramon Aguirre's wife, plaintiff Guadalupe Ordunez, filed suit against Newell Whitney, Risun, and Muddy Boys (collectively "Defendants") in case number 080400076, which was assigned to this court. Plaintiffs Guadalupe Rosales and his wife plaintiff Beatriz Chavez Sandoval (all plaintiffs collectively "Plaintiffs") also filed suit against Defendants in a separate case, case number 080400743, which was assigned to Judge Taylor. Both cases asserted causes of action for negligence against Defendants. On July 15, 2008, this court signed an order of reinstatement and



consolidation ordering that case 080400076 be consolidated with case number 080400743. Rule 42(a)(2) of the URCP requires the consolidated case to be heard by the judge assigned to the first case, which is this court.

On September 11, 2009, Newell Whitney moved for summary judgment. Plaintiffs opposed the motion, and Newell Whitney filed his reply and a request to submit the motion for decision with oral arguments. On October 23, 2009, Muddy Boys moved for summary judgment, and on October 26, Risun moved for summary judgment. All three defendants argued that summary judgment is proper because none of the parties retained control over the method that caused Plaintiffs' injuries. Plaintiffs opposed the motions filed by Risun and Muddy Boys, and Risun filed a reply and a request to submit its motion for decision with oral arguments. Muddy Boys filed a reply on January 29, 2010. The court heard oral arguments on all three motions on February 1, 2010.

### DISCUSSION

The motions for summary judgment filed by the Defendants are denied. Rule 56 of the Utah Rules of Civil Procedure governs motions for summary judgment and states that the court shall grant summary judgment if the moving party shows "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c) (2009). In addition, "[t]he party moving for summary judgment has the burden of presenting evidence that no genuine issue of material fact exists." *Uintah Basin Med. Ctr. v.*

*Hardy*, 2008 UT 15, ¶ 16, 179 P.3d 786 (citing Rule 56(e)). The Utah appellate courts have made clear that “the nonmoving party is entitled to all inferences arising from the facts of record.” *Id.* at ¶ 18 (citing *Hermansen v. Tasulis*, 2002 UT 52, ¶ 10, 48 P.3d 235). Pursuant to this standard, the court concludes that there are genuine issues of material fact precluding the court from granting summary judgment to any of the Defendants. Specifically, the court concludes that there is a genuine issue of material fact regarding Newell Whitney’s duty of care as a possessor of land. There are also genuine issues of material fact regarding whether Risun and Muddy Boys were possessors of the land under a premises liability analysis. Therefore, summary judgment is not proper and the motions are denied.

Plaintiffs concede that none of the Defendants are liable for negligence under a retained control theory of negligence, but they assert that this theory of negligence is irrelevant to their case pursuant to *Magana v. Dave Roth Const.*, 2009 UT 45, 215 P.3d 143. In *Magana*, the Utah Supreme Court explained, “The retained control doctrine is separate and distinct from a direct negligence theory. Specifically, the retained control doctrine does not apply when a plaintiff alleges that an employer’s own actions were negligent.” *Id.* at ¶ 37.

Plaintiffs assert that they are pursuing each of the Defendants for direct negligence on the basis of premises liability as set forth in *Hale v. Beckstead*, 2005 UT 24, 116 P.3d 263, and §§ 343 and 343A of the Restatement (Second) of Torts. Under this theory of negligence, a possessor of land is liable for physical harm caused to invitees by dangers on his land only under

specified circumstances. Specifically, section 343, entitled “Dangerous Conditions Known to or Discoverable by Possessor,” provides,

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts, § 343. Similarly, the relevant portion of section 343A, “Known or Obvious Dangers,” provides, “(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.” *Id.* at § 343A.

The court in *Hale* explained that the open and obvious danger rule as set forth in sections 343 and 343A of the Restatement was the applicable law in a case where the plaintiff was a painter working for the defendant owner of the home who was also the general contractor. 2005 UT 24, at ¶ 14. The plaintiff in *Hale* was painting a portion of the defendant’s home on the second floor of the home. *Id.* at ¶ 3. A railing had not been installed on the second floor balcony, and the plaintiff stepped off the balcony when painting and was injured. *Id.* In further explaining the open and obvious danger rule, the court explained, “[I]t is a duty-defining rule that simply states that, under appropriate circumstances, a landowner’s duty of care might not include warning or otherwise protecting visitors from obvious dangers.” *Id.* at ¶ 23. The court stated,

~~“[T]he law simply requires owners to take reasonable steps to protect invitees. This duty does~~  
not require that landowners fully remedy potentially unsafe conditions, only that landowners  
adequately warn invitees about such dangers.” *Id.* at ¶ 30. The court then held that the grant of  
summary judgment was premature because “the Restatement rule requires an inquiry into  
whether factors existed to vest in the defendant a duty to warn or otherwise protect the plaintiff  
from an obvious harm[,]” and the facts regarding this inquiry were not developed below.

In support of their argument that all Defendants were possessors of land under the open  
and obvious danger rule, Plaintiffs cite to section 384 of the Restatement. Section 384 provides,  
“One who on behalf of a possessor of land erects a structure or creates any other condition on the  
land is subject to the same liability, and enjoys the same freedom from liability, as though he  
were the possessor of the land, for physical harm caused to others upon and outside the land by  
the dangerous character of the structure or other condition while the work is in his charge.”  
Restat. 2d Torts § 384. Comment *d* to this section clarifies the application of this rule to  
contractors and subcontractors and states, “In such a case, the rule stated in this Section applies  
to subject the particular contractor or subcontractor to liability for only such harm as is done by  
the particular work entrusted to him.” *Id.* at comment *d*.

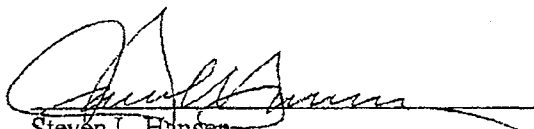
Neither the Utah Court of Appeals nor the Utah Supreme Court has explicitly adopted  
this section, but Plaintiffs argue that it applies to render each of the Defendants “possessors of  
land” within the meaning of the open and obvious danger rule. It appears that there are genuine

issues of material fact regarding which of the Defendants were in charge of the elevator shaft. It is the province of the finder of fact to determine which of the Defendants were "possessors" of the elevator shaft for purposes of premises liability and if they took reasonable steps to adequately protect the workers in that area. Therefore, Defendants' motions for summary judgment are denied.

#### CONCLUSION

Defendants' motions for summary judgment are denied. The court concludes that there are issues of material fact regarding which of the Defendants were possessors of the elevator shaft for purposes of premises liability and whether they took reasonable steps to protect workers in that area. Therefore, the motions are denied. Counsel for Plaintiff shall prepare an appropriate order consistent with this decision for signature by the court.

DATED this 3<sup>rd</sup> day of March, 2010.

  
Steven L. Hansen  
District Court Judge

Case No. 080400743

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 080400743 by the method and on the date specified.

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MAIL: JOHN E HANSEN 15 W SOUTH TEMPLE STE 600 SALT LAKE CITY UT 84101

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MAIL: STEPHEN F EDWARDS 136 S MAIN SUITE 800 SALT LAKE CITY UT 84101

Date: 3-5-10

Th 47

Deputy Court Clerk

MAY 26 2010

THIRD JUDICIAL DISTRICT COURT  
Third Judicial District

MAY 25 2010

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

SALT LAKE COUNTY

Deputy Clerk

MATT CHRISTENSEN, et al.,

Plaintiffs,

v.

J.L. HARDY CONSTRUCTION COMPANY aka  
J.L. HARDY CONSTRUCTION, INC.,

Defendant.

MEMORANDUM DECISION

Case No. 090906593

Judge Denise P. Lindberg

Date: May 25, 2010

This matter is before the Court on Defendant's Motion for Summary Judgment. Having fully considered the arguments, the Motion is GRANTED IN PART AND DENIED IN PART. Specifically, the Court agrees with Defendant that Plaintiffs' vicarious liability theory of "retained control" fails. However, Plaintiffs may proceed to trial on their two theories of direct liability.

This case involves an accident at a construction site. Plaintiff, Matt Christensen, was injured when he fell approximately 12 feet down an open stairwell. At the time of his fall, Christensen was working on the Prime Business Center construction project. Defendant, J.L. Hardy Construction, had been hired to be the general contract for the project. Defendant had hired Cobble Creek as a subcontractor to frame the building. Christensen worked for Cobble Creek as the project manager over this project.<sup>1</sup>

Plaintiffs argue that Defendant is liable for Christensen's injuries. Plaintiffs argue three theories negligence. The first two are direct negligence theories: (1) that Defendant is liable as a possessor of the

<sup>1</sup>At the hearing, Defendant presented copies of deposition testimony which had not been attached to any of the memoranda regarding this Motion. Defendant argued that this testimony was material to the determination of the Motion. Plaintiffs objected. The Court agrees with Plaintiffs that it was improper for Defendant to rely upon new evidence at the hearing. Although Defendant argues that Plaintiffs' counsel was already aware of the deposition testimony, Defendant did not give Plaintiffs an appropriate opportunity to prepare to meet the proffered testimony. Therefore, the Court does not consider the new evidence.

land and (2) Defendant is liable for interfering with Christensen's work and forcing him to work in unsafe conditions. Plaintiffs third theory is that Defendant is liable under the indirect negligence theory of "retained-control." In bringing this Motion Defendant asserts that Plaintiffs cannot prevail on any of the alternative theories of liability. Additionally, Defendant argues that Plaintiffs cannot prove the cause of Christensen's injuries because there were no witnesses to the accident and Christensen himself does not remember the accident.

***1. Direct Negligence***

***A. Possessor of Land***

Plaintiff and Defendant disagree over whether Defendant can be held liable for failing to protect Christensen against the open and obvious harm of the hole. The Court is persuaded that Plaintiff can proceed on this theory of negligence.

The Utah Case that governs this issue is *Hale v. Beckstead*, 2005 UT 24, 116 P.3d 263.<sup>2</sup> In *Hale*, the court adopted the Restatement Second of Torts §§ 343 and 343A. Section 343 provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Restat 2d of Torts, § 343. This section is read together with Section 343A, which provides:

- (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or

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<sup>2</sup>Plaintiffs also cite *Hale v. Beckstead*, 2003 UT App 240, 74 P.3d 628. However, the supreme court case overruled the court of appeals case in part and so this Court will rely on the supreme court case to establish the rule.



obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Restatement 2d of Torts, § 343A.

In discussing these sections, *Hale* said, “the Restatement sections 343 and 343A . . . defines the duty of care a possessor of land owes to invitees. It does not excuse negligence; it defines it. Where an invitee is injured by a condition on land from which the possessor did not owe a duty to protect the invitee, the possessor commits no negligence.” *Hale*, 2005 UT 24 at ¶23. “Where an invitee’s attention may be distracted, such that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it, a possessor of land may be liable for breaching his duty of care if he fails to warn . . . or to take other steps to protect [the invitee].” *Id.* at ¶26 (quotations and citations omitted) (alterations in original). Pursuant to Restatement 2d of Torts § 384, a contractor is treated as a possessor of land if it “erects a structure or creates an other condition on the land.” This rule has widespread acceptance, even though it has not expressly been adopted in Utah. See *Smithey v. Suave Construction Co.*, 2007 U.S. Dist. LEXIS 3871 (D.S.D. 2007) (“At least twenty-one other states, including several in this region, have followed the common law rule contained in § 384 and stated that a contractor working on behalf of a landowner stands in the landowner’s shoes for purposes of premise liability.”).

The Court is persuaded that it is appropriate to rely on Restatement 2d, Torts, § 384, and find that Plaintiffs can proceed to a jury trial on this theory of liability. As referenced above, this approach is widely accepted in other jurisdictions. Additionally, it reflects the sound policy that when the owner of property has relinquished control of his/her property to a general contractor, the

general contractor must then be responsible for the conditions it creates on the land.

In the present case, there are clearly questions of fact regarding whether Defendant had a duty to protect Christensen from the hole into which he fell. First, the parties dispute who created the hole. Defendant says that Cobble Creek had placed the floor joists and covered them with flooring, leaving an opening for the stairwell. Further, Defendant asserts that Cobble Creek had a contractual obligation to ensure the safety of the stairs. Section 2.8 of the contract between Cobble Creek and Defendant reads in part:

SUBCONTRACTOR, ITS AGENT, EMPLOYEES, MATERIALMEN AND LOWER TIER SUBCONTRACTORS SHALL PERFORM HIS WORK IN A SAFE MANNER; (1) TO COMPLY WITH PREVAILING SAFETY REGULATIONS, INCLUDING THE APPLICABLE OCCUPATIONAL SAFETY & HEALTH ACT AND THE CURRENT REGULATIONS ADOPTED THEREUNDER, (2) TO PROVIDE SAFE TOOLS AND EQUIPMENT, (3) TO HOLD WEEKLY SAFETY MEETINGS, (4) TO INSTALL BARRICADES, SIGNS, FLAGS, LIGHTS AND OTHER SAFE GUARDS TO PREVENT INJURY TO WORKERS AND OTHERS ON OR ABOUT THE CONSTRUCTION SITE, . . . .

Plaintiffs counter that Cobble Creek did not cover the stairwell because it was directed not to do so by the plans and specifications. Additionally, Plaintiffs assert that another subcontractor installed the steel beams/columns for the stairwell and Cobble Creek just built around those. Plaintiffs say that the open stairwell was in a common area, to which multiple subcontractors/workers were exposed. Even though Cobble Creek had to perform its own work safely, it was not responsible for erecting barriers around hazards that it did not create and which posed risks to all workers on the job equally. Plaintiffs, therefore, assert that it was Defendant's responsibility to keep the open stairway safe based on the provisions of the contract between Defendant and Prime Business Center LLC wherein Defendant accepted responsibility for "safety control" and "supervision" at the job site.

The Court disagrees with Defendant's assertion that the open and obvious doctrine does not

apply to general contractor/subcontractor relationships in Utah. Defendant says that *Dayton v. Free*, 148 P. 408 (Utah 1914) and *Thompson v. Jess*, 1999 UT 22, 979 P.2d 322, hold that the open and obvious doctrine doesn't apply to contractors. However, those cases are not directly on point. *Thompson* clearly says that sections 413, 416, and 427 of the Restatement Second of Torts "have no application when the injured person is an employee of the independent contractor undertaking the allegedly dangerous work." 1999 UT 22 at ¶30. *Thompson* does not discuss whether sections 343 and 343A apply to a general contractor or whether Utah will adopt section 384. In *Dayton*, the court held that the owner "having neither reserved nor exercised direction or control over the work, or the time or manner of doing it, . . . owed him no duty to provide a safe place to work, or to warn or notify him of missed holes, or to guard against dangers incident to or created by the prosecution of the work, and certainly not to guard or protect him against the negligence of those who had employed him or with whom he labored." 148 P. 408 at 412. *Dayton* did not discuss a general contractor's liability to a subcontractor, only an owner's liability to a general contractor. To the extent that *Dayton* is inconsistent with *Hale*, *Hale* supercedes *Dayton*.

At the hearing, Defendant asserted that *English v. Kienke*, 848 P.2d 153 (Utah 1993) controls. Although the Court has determined that it was improper for Defendant to present new arguments at the hearing that were not previously briefed, the Court disagrees that *English* dictates a different result. In *English*, the court held that Section 343 and 343A of the Restatement Second of Torts "does not extend to a hazard created by the invitee." *Id.* at 157. Here, there are questions of fact regarding who created the hazard.

**B. Interference with Job Duties**

Plaintiff alleges that the direct negligence alleged against Defendant relates to Defendant's

“affirmative actions that forced Matt to build the wall in question in a way that was less safe. But for J.L. Hardy’s actions, Matt would have build the wall in a manner that not only would have been safer, but would have obviated the need for exposure to the open stairwell.” Memo in Opp. at iv. The Court accepts that there are questions of fact regarding whether Defendant owed a duty to Plaintiff and whether Defendant breached that duty. Specifically, when the Court views the facts in the light most favorable to Plaintiffs and accepts all of the assertions in Plaintiffs’ expert reports, it is possible to conclude that Defendant owed a duty to Plaintiff, that Defendant was negligent in its management of the construction site, specifically, the safety aspects, and that Defendant’s negligence was a primary cause of Plaintiff’s accident. This is sufficient to survive summary judgment.

## 2. *Retained Control*

Defendant argues that it did not exercise control or “retain control” over the injury-causing work. The Court agrees with Defendant.

The “retained control” doctrine is discussed in the seminal case of *Thompson v. Jess*, 1999 UT 22, 979 P.2d 322. In *Thompson*, the defendant Jess contacted AmeriKan Sanitation and arranged for purchase and delivery of a large pipe. *Id.* at ¶2. When the AmeriKan employees, Dennis and Trevor Thompson, delivered the pipe, Jess asked them to install the pipe. *Id.* at ¶3. Despite responding that they were not equipped to erect the pipe, Jensen agreed to install the pipe and then Jess went back inside. *Id.* at ¶¶4-5. Jensen and Thompson attempted to install the pipe and Thompson was injured in the process. *Id.* at ¶5. The court then discussed whether Jess would be liable for Thompson’s injuries.

The *Thompson* court discussed the “retained control” theory by noting that “Utah adheres to

the general common law rule that the employer of an independent contractor is not liable for physical harm caused by another by an act or omission of the contractor or his servants.” *Id.* at ¶13. “This general rule recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor’s work is performed owes no duty of care concerning the safety of the manner or method of performance implemented.” *Id.* Nevertheless, the *Thompson* court noted that there are exceptions to the general common law rule, and that “retained control”

is a narrow theory of liability applicable in the unique circumstance where an employer of an independent contractor exercises enough control over the contracted work to give rise to a limited duty of care, but not enough to become an employer or master of those over whom the control is asserted. The duty in such situations is one of reasonable care under the circumstances and is confined in scope to the control asserted.

*Id.* at ¶15.

The *Thompson* court adopted the “active participation” standard to determine if an independent contractor exerted enough control to give rise to a duty of care. “Under the ‘active participation’ standard, a principal employer is subject to liability for injuries arising out of its independent contractor’s work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work.” *Id.* at ¶19. Examples of such control occur “when the principal employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished.” *Id.* (internal citations omitted). The court ultimately determined that Jess had not actively participated in the manner or method of performance and, consequently, was not liable to Thompson. The court reasoned that “[a]fter agreeing to erect the pipe, Jensen, not Jess, determined the method for bringing about the desired result. . . . The only control Jess exerted was in directing that the pipe be installed over the pipe stub. This amounted merely to control over the desired result.” *Id.* at ¶24.

The “retained control doctrine” has been clarified by subsequent cases. In *Magana v. Roth Construction*, 2009 UT 45, 215 P.3d 143, the court stated, “the question of whether an employer actively participated is not simply whether an employer participated in an injury-causing activity, but whether the employer controlled the means and methods by which the injury-causing activity was performed.” *Id.* at ¶31. The court went on to say, that, regardless of whether the contractor had controlled some aspects of the subcontractor’s work, the contractor had to “exert sufficient control over the independent contractor such that [the contractor cannot] carry out the *injury-causing aspect of the work* in its own way.” *Id.* at ¶27 (citations omitted) (alterations in original). Thus, the aspect that the contractor controls must be the proximate cause of the injury. *Id.* The court also rejected the plaintiff’s argument that Campbell’s general responsibility for safety at the site constituted “active participation.” The *Magana* court stated that “a general obligation to oversee safety on a project does not equate to exerting control over the method and manner of the injury-causing aspect of the [sub-contractor’s] work.” *Id.* at ¶29 (citations and quotations omitted) (alteration in original).

In *Begaye v. Big D Construction Corp.*, 2008 UT 4, 178 P.3d 343, the court determined that when the contractor “controlled the sequence of the task, as well as the workflow generally, but it had no discretion or control regarding the specifics of how [the wall] was built or which bracing method was used,” this was insufficient to prove retained control. *Id.* at ¶11. Additionally, although the contractor ordered the subcontractor to build the wall “when it could have sent the employees home for the day or sent them to work on another wall, such discretion is insufficient to bring it within the scope of the ‘active participation’ standard.” *Id.* at ¶12.

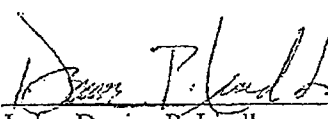
In the present case, even taking the facts in the light most favorable to the Plaintiff, Plaintiff simply cannot show that Defendant “retained control” over the injury-causing activity. It is

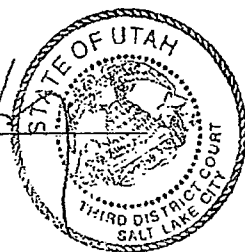
undisputed that Defendant never ordered Cobble Creek to build the wall in a certain manner. Instead, Plaintiff asserts that Defendant should be held *vicariously* liable for the injury suffered because the combined effect of all of Defendant's actions (leaving the trench open, placing dirt hills in inconvenient places, requiring Cobble Creek to keep working or be replaced) effectively controlled Plaintiffs actions to the extent that Plaintiffs were forced to perform their work in an unsafe manner. While these arguments may be presented under a direct negligence theory, as a matter of law they do not establish that Defendant actively participated in directing the injury-causing aspect of the work. The Court therefore concludes that Plaintiffs' claim under the "retained control" theory fails.

### 3. Causation

Defendant's final argument is that no one saw Christensen's accident and so Plaintiffs can't prove what caused it. This argument lacks merit. Though Plaintiffs may not have evidence of exactly how Christensen fell, it is undisputed that he fell down the hole accidentally while working on the wall. There is no allegation that Christensen (a) jumped into the hole purposely, (b) wasn't working when he fell, or (c) was pushed. The Court concludes that on the facts of this case, Plaintiffs have sufficient evidence to take the causation issue to the fact-finder.

DATED this 25 day of May 2010.

  
Judge Denise P. Lindberg  
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090906593 by the method and on the date specified.

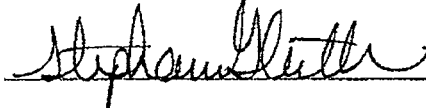
MAIL: WILLIAM J HANSEN CHRISTENSEN & JENSEN PC 15 W SO TEMPLE STE  
800 SALT LAKE CITY, UT 84101

MAIL: GEOFFREY C HASLAM CHRISTENSEN & JENSEN PC 15 W SOUTH TEMPLE  
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CITY UT 84111

MAIL: STEPHEN J TRAYNER 3 TRIAD CENTER STE 500 SALT LAKE CITY UT  
84180

Date: 5-25-10

  
Deputy Court Clerk



Tab C

**C**Restatement of the Law — Torts  
Restatement (First) of Torts  
Current through June 2009

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Division 2. Negligence  
Chapter 13. Liability For Condition And Use Of Land  
Topic 8. Liability Of Persons Other Than A Possessor, Vendor Or Lessor

§ 384. Persons Creating Artificial Conditions On Land On Behalf Of Possessor For Bodily Harm Caused Thereby While The Work Remains In Their Charge

**One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to the same liability, and enjoys the same immunity from liability, as though he were the possessor of the land, for bodily harm caused to others within and without the land, while the work is in his charge, by the dangerous character of the structure or other condition.**

*Comment:*

*a.* The words “on behalf of the possessor” are defined in § 383, Comment *a*. This Section applies to a person who on behalf of the possessor of land erects thereon a structure or creates any other artificial condition, whether in so doing he is acting as the possessor's servant or as an independent contractor and whether he does the work for reward or gratuitously.

*b.* It is not necessary that the charge of the erection of the building be entrusted directly by the possessor of land to the person whose liability is in question. It is enough that it is entrusted to such person by anyone whom the possessor has authorized to act on his behalf in such a matter, as where a contractor undertaking to erect a building for the possessor of the land is authorized to sublet the entire undertaking or to make a subcontract for a definite part thereof.

*c.* The rule stated in this Section applies to anyone who erects a structure upon land or alters the physical condition thereof on behalf of its possessor, irrespective of whether he does so as a servant of the possessor or as a paid or unpaid independent contractor.

*d. When work divided among several parties.* A possessor of land may put a number of persons severally in charge of the particular portions of the work of erecting a structure or creating any other condition upon the land. Again, a general contractor employed to do the whole of the work may, by the authority of his employer, sublet particular parts of the work to subcontractors. In such a case, the rule stated in this Section applies to subject the particular contractor or subcontractor to liability for only such harm as is done by the particular work entrusted to him. This is also true where a master divides among several servants or contractors the erection of a structure or retains in his own charge a part of the task of erection.

*e. When preparatory work known to be improperly done.* The situation to which the rule stated in this Section is usually applicable is that in which the contractor or servant has been negligent in performing the work entrusted to him. A servant or contractor may, however, be liable even though he has done the work entrusted to him in a careful and workmanlike manner. The particular work entrusted to the contractor, no matter how carefully done, may be safe only if certain preparatory work has been done by others. If so, a contractor who knows or should know that the preparatory work has been improperly done is subject to liability for any bodily harm caused by the fact that his own

perfect workmanship has been made dangerous by the improper preparatory work. So too, the work entrusted to the servant or contractor may be such that it necessarily creates a condition which is dangerous unless further steps are taken. In such a case the servant or contractor may be liable if he leaves the job in this dangerous condition, unless he has reason to expect that the necessary steps will be taken. The fact that his employer has retained charge of taking such steps or has entrusted them to another contractor is usually sufficient to warrant the servant or another contractor is assuming that they will be taken. On the other hand, the circumstances may be such as to lead him as a reasonable man to realize that this will not be done. In such a case the servant or contractor, after he realizes or should realize that such steps are not likely to be taken, is required to exercise reasonable care to take such steps as are then practicable to remove the danger created by his work.

*Illustration:*

1. A, the general contractor for the erection of an office building, lets out to B the construction of the foundations and to C the construction of the steel frame. The steel work, no matter how carefully done, will be insecure unless the foundations are properly laid. B's concrete work in the foundations is so badly done that a competent firm of steel constructors would immediately see that the foundation was unsafe. None the less C proceeds to erect the steel framework of the building. The work, as steel work, is perfectly done, but while the work is still going on the structure falls because of the insecurity of the concrete foundations. In its fall it causes harm to workmen of D who are doing other work upon the premises for A, and a part of its falls upon E, a traveller upon the adjacent highway. C is liable to the workmen and to E.

*Comment:*

*f. When actor follows possessor's plans.* The fact that the person erecting the structure or altering the physical condition of the land follows exactly the plans, specifications and directions of the possessor, does not necessarily prevent him from being liable under the rule stated in this Section. A servant or contractor entrusted with such work is usually entitled to assume that the plans, specifications and directions given him are such as will make the work safe. But they may be so imperfect or improper that the servant or contractor should, as a reasonable man, realize that the work done thereunder will make the structure or condition unsafe. If so, he will be liable even though he exactly follows the plans, specifications and directions.

*g. When possessor accepts work.* The rule stated in this Section applies to determine the liability of one who is entrusted by the possessor of land with the erection of a structure or the creation of any other physical condition thereon, for only such bodily harm as is caused while he remains in charge and control of the erection or creation of the structure or condition. It does not apply to determine his liability for harm caused after his charge and control of the work and his privilege to be upon the land for the purpose of accomplishing it is terminated in any manner. His charge and control is usually terminated by the possessor's acceptance of the completed work, but it may be terminated in a variety of other ways. For example, the possessor may, in pursuance or in violation of his contract, take the work out of the hands of the independent contractor before it is completed or may order a servant to stop the work entrusted to him. Again, the possessor himself may be ejected from the land by one who has a paramount title thereto or an injunction may prevent the continuance of the work.

*h.* As is stated in this Section, one who, as servant or contractor, erects a structure or changes the condition of land on behalf of the possessor thereof, is subject to the same but no greater liability for bodily harm done to others while he remains in charge of the work as though he were the possessor of the land.

As stated in § 333, a possessor of land is not required to maintain his land in a condition safe for the reception of trespassers except under the conditions stated in §§ 334 to 339. Therefore, a contractor or servant who so does the work entrusted to him that it is likely to injure persons who come into its vicinity, is not liable to trespassers even though he knows that they are, in fact, likely to be in the vicinity of the structure or condition created by him, unless the conditions stated in §§ 334 to 339 exist. So too, the servant or contractor, like the possessor of land, is not required to exercise care to prepare a safe place in which to receive gratuitous licensees. Like the possessor (see §§ 340 to 342), he is only required to warn them of dangerous conditions of which he knows and of which they are

unlikely to be aware. The servant or contractor shares these immunities of the possessor because he has been put in exclusive charge of a part of the land for the purposes of accomplishing the possessor's will as to its development and use. When the work is accomplished and accepted and he is no longer occupying the land on the possessor's behalf, he ceases to share the possessor's immunities (see § 385, Comment *b*).

*i.* The rule stated in this Section applies only to bodily harm caused by some structure erected or condition created by the servant or contractor. It does not apply to bodily harm caused by the failure of the servant or contractor to do any part of the work entrusted to him, except where such part is necessary to make safe a condition already created by him. This is so irrespective of whether the servant or contractor has or has not on previous occasions done similar work entrusted to him. As to the rules which determine the existence or nonexistence of liability under such circumstances, see § 383.

*Illustrations:*

2. A, who is erecting a building upon his corner lot immediately abutting upon two city streets, employs two contractors, B and C, the one to dig the cellar, the other to erect a fence between the excavation and the highway. C erects a flimsy fence on the one street but fails to erect any fence on the other. D, while walking along the one street is jostled by a fellow pedestrian and stumbles against the flimsy fence which gives way with him. C's liability to D is determined by the rule stated in this Section. E, while walking along the other street stumbles and falls into the unguarded cellar. The rule which determines whether C is or is not liable to E is stated in § 383.3. Under circumstances identical with those stated in Illustration 2, except that A employs B to dig the excavation and to erect the necessary fence around it, B's liability to both D and E is determined by the rule stated in this Section.