

2010

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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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 / Appellants.

No. 20100671-CA

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BRIEF OF APPELLEE

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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**

**MAY 27 2011**

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## **LIST OF PARTIES TO THE PROCEEDING**

The only parties to the appeal are:

Plaintiff Jose M. Gonzalez, and

Defendant Russell Sorensen Construction.

Other defendants and third-party defendants in the proceeding below who are not involved in the appeal are:

Orchard Vista, LLC,

R. M. Rees Construction, dba Design Stone Creations,

PacifiCorp, dba Rocky Mountain Power, and

John Clayton Construction.

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## JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j). Prior to transfer, the Utah Supreme Court had jurisdiction pursuant to Utah Code Ann. § 78A-3-102(3)(j).

## ISSUES PRESENTED ON APPEAL

**Issue 1:** Did the trial court correctly rule that issues of fact exist as to Gonzalez's negligence claims against Russell Sorensen under the principles summarized in *Restatement (Second) of Torts* § 384?

**Standard of review:** The denial of a motion for summary judgment is reviewed *de novo*. *Utah Dept. of Transp. v. Ivers*, 2005 UT App 519, ¶ 9, 128 P.3d 74.

**Preservation:** This issue was raised below in the parties' briefing on summary judgment (R. 842, R. 1029), and at oral argument (R. 2219 and Exh. 2 hereto (7/21/10 Tr.)).<sup>1</sup>

**Issue 2:** Did the trial court abuse its discretion in concluding that Russell Sorensen was sufficiently on notice of Gonzalez's negligence claim?

**Standard of review:** The Utah Supreme Court has not expressly identified the standard of review of a trial court's determination of fair notice under U.R.Civ.P. 8(a), particularly when such determination occurs mid-litigation. The court has applied an abuse of discretion standard regarding the pleading of affirmative defenses under U.R.Civ.P. 8(c), which must be pled in "short and plain terms." *See Cheney v. Rucker*,

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<sup>1</sup> Both parties have cited to the July 21, 2010, hearing transcript. *See, e.g.*, Brief of Appellant, p. 5 (citing R. 2219). However, it appears that the reporter may have inadvertently filed only the first page of the transcript. *See* R. 2219. For the Court's convenience, a full copy of the transcript is attached hereto as Exhibit 2.



14 Utah 2d 205, 381 P.2d 86, 91 (1963) (trial court did not abuse its discretion in allowing evidence at trial allegedly inconsistent with defendant's answer).

Appellee Gonzalez submits that the correct standard under Rule 8(a) is also abuse of discretion, the standard applied to the identical Federal Rule of Civil Procedure 8(a). 5 Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1217 (3d ed. 2002) (under Rule 8(a), "what is the proper length and level of clarity for a pleading cannot be defined with any great precision and is largely a matter that is left for the discretion of the trial court, which will be reversed by the court of appeals only if that discretion is abused"); *U.S. ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1167 (10th Cir. 2010), and cases cited; *see also Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 7 n.2, 53 P.3d 947 ("Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are 'substantially similar' to the federal rules.").

**Preservation:** Sorensen did not preserve this issue, as it was not raised below until its reply memorandum. *State v. Phathamavong*, 860 P.2d 1001, 1003-04 (Utah Ct. App. 1993).

## DETERMINATIVE STATUTES, RULES, AND REGULATIONS

### Utah Rule of Civil Procedure 8(a):

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

## STATEMENT OF THE CASE

### *Nature of Case, Course of Proceedings, and Disposition Below*

This is a claim for personal injuries arising when the plaintiff, Jose M. Gonzalez, came into contact with a live electrical wire while installing soffit. Gonzalez filed an initial complaint on September 26, 2008 (R. 1), and an amended complaint on January 22, 2009. (R. 126.)

After the close of discovery, including 14 liability depositions (R. 390, 393, 397, 405, 409, 414, 501, 513, 558, 561, 581, 614), defendant Russell Sorensen filed a motion for summary judgment as to Gonzalez's claims against it. (R. 759.) Gonzalez filed an opposing memorandum (R. 825), and Sorensen filed a reply memorandum (R. 1029).<sup>2</sup>

The trial court held oral argument on July 21, 2010 (R. 1564), and on July 30, 2010, issued a memorandum decision denying Sorensen's motion for summary judgment. (R. 1585, attached hereto as Exh. 1.) Sorensen timely petitioned for interlocutory review, which this Court granted.

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<sup>2</sup> Third-party defendant John Clayton also filed an opposition to Sorensen's motion for summary judgment. (R. 769.) Sorensen filed a motion to strike Clayton's opposition (R. 1009), and a motion for Rule 11 sanctions against Clayton for having filed the opposition, and also for opposing the motion to strike. (R. 1411.) Clayton filed a motion to intervene as an immune party (R. 1426), which Sorensen opposed as well. (R. 1522.) The trial court denied Sorensen's Rule 11 motion and granted the motion to intervene (R. 1832), mooting Sorensen's motion to strike Clayton's opposition. Gonzalez adopted the factual allegations in Clayton's opposition. (R. 2219 (Exh. 2), p. 23.)

### *Statement of Facts*

On June 22, 2007, plaintiff and appellee Jose M. Gonzalez was injured when he came into contact with high-voltage power lines at a construction site in Midvale, Utah. (R. 3-4.)

At the time of the incident, Gonzalez was an employee of John Clayton Construction (“Clayton”), a subcontractor hired to perform siding, soffit and fascia on Building No. 4. (R. 855-856; R. 956.) (Soffit is “the underside of a part or member of a building (as of an overhang or staircase), especially the intrados of an arch.” *Webster’s Ninth New Collegiate Dictionary* (1987).)

Appellant and defendant Russell Sorensen Construction (“Sorensen”) was the general contractor for the development of the Property and for the Project. (R. 3 ¶ 13; R. 128 ¶ 14; R. 163 ¶ 14; R. 654 ¶ 1; R. 669 ¶ 19; R. 919, 924.) Sorensen was on the job every day, “at least every day, if—and multiple times during the day.” (R. 296.) “As general contractor [Sorensen] was responsible for general oversight and general supervision of the overall construction of the Property.” (R. 665 ¶ 10.)<sup>3</sup>

More than a year before Gonzalez’s accident, PacifiCorp d/b/a Rocky Mountain Power installed live, 7,200-volt overhead power lines in the area where Gonzalez was later assigned to install soffit on Building No. 4. (R. 966-969 (lines at location by February 2006).)

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<sup>3</sup> Throughout the litigation, the parties have defined “the Property” as “the property located at 7590 Orchard Vista Court,” and “the Project” as “the construction project located at 7590 Orchard Vista Court.” (*E.g.*, R. 619, 1704.)

Several other subcontractors also worked on Building No. 4, including plumbers, framers, and roofers. (R. 927-931.) Defendant R.M. Rees Construction d/b/a Design Stone Creations (hereinafter “Rees”) was a subcontractor that did stucco work on the building. (R. 928-929; *see also* R. 110.)

The National Electric Safety Code (“NESC”) specifies minimum horizontal and vertical clearances for building walls and projections. Horizontal clearance must be at least 7.5 feet. Vertical clearance from roofs and projections on the building must be at least 12.5 feet. (R. 908; and citations therein.)

Gonzalez adduced evidence that Building No. 4, which contained units 12 & 13, was constructed by Sorensen in violation of both clearance requirements, in that it was constructed within 5.67 feet horizontally and within 8.5 feet vertically of the power line. (R. 908; R. 981; *see also* R. 913.)

On the north side of Building No. 4, another subcontractor (Rees) set up scaffolding to perform stucco work on the building. (R. 899; R. 998.) The scaffolding was approximately 37 inches from the power lines. (R. 885; R. 907; *see also* R. 913; R. 916; R. 997-998.)

Sorensen knew that, in order to do work on the north side of Building No. 4, workers would have to come within 10 feet or less of the live power lines. (R. 949.) Sorensen knew that OSHA regulations prohibited workers from working within 10 feet of high voltage electrical lines. (R. 923; *see also* R. 979-980; R. 986; R. 992.)

Sorensen knew that, if subcontractors would be working within 10 feet of the power line, Rocky Mountain Power should be contacted. (R. 951-952.) Sorensen knew

that Rocky Mountain Power could shut down the power lines, or that a contractor could put a blanket or sleeve on the lines. (R. 945.) Sorensen did not contact Rocky Mountain Power to let it know of any work on the north side of the building. (R. 951.)

Clayton had previously performed soffit and fascia work on the three other buildings in the development. (R. 957-958.) On Friday, June 22, 2007, Clayton's foreman assigned Gonzalez to perform soffit work on the north side of Building No. 4. (R. 862, 865.) Clayton had worked on building No. 4 for the previous two days. (R. 859-860.)

Clayton had used Rees' scaffolding on other occasions (R. 962), and Gonzalez used the scaffolding already set up by Rees on the north side of Building No. 4. (R. 860-861; 863-864.) Gonzalez climbed the scaffolding with his tools and four sections of aluminum "J channel" material. (R. 717; R. 866.) As he moved the mold, it either struck the energized line or came within sufficient proximity for electricity to arc from the line to the J channel. Gonzalez received an electrical shock and fell 18 feet onto a fence before hitting the ground. (R. 111-112; R. 882-884; R. 886; R. 898.)

Gonzalez's original complaint included, *inter alia*, the following allegations of negligence by Sorensen:

\* \* \*

23. Defendants did not give Plaintiff any warning of the dangerous power lines and their close proximity to the site where Plaintiff's work was to be performed and/or affirmatively or constructively notified him that it was safe to work on the scaffolding.

24. Defendants failed to have the power turned off or protective barriers installed around the power lines prior to allowing persons to work in close proximity to the power lines.

\* \* \*

### FIRST CAUSE OF ACTION

26. Plaintiff realleges and incorporates all prior paragraphs, as though restated and fully set forth herein.

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; . . . .

\* \* \*

g. Allowing people to work on improperly constructed scaffolding and/or scaffolding erected less than 10 feet away from operative, high-voltage electrical lines when they knew or should have known that it was dangerous and unsafe to do so.

h. Allowing individuals to work on the unsafe scaffolding and within 10 feet of the power lines when they knew or should have known it was unsafe to do so.

(Bold heading in original.) Similar allegations were contained in the January 2009

amended complaint. (R. 129-131, ¶¶ 24-25, 28(a, c, h, i).)

Neither the original nor the amended complaint asserts a cause of action for vicarious liability or retained control against Sorensen. (R. 1 and R. 126, *passim*.)

Sorensen has taken the position in the litigation that Clayton's workers were "trespassers" at the time of the accident, because they allegedly were not scheduled to do soffit work that day (R. 1364), although Sorensen admits that it never told Clayton's workers not to come to the site on Friday (June 22, 2007). (R. 859-860; *see also* R. 942; R. 960-961.) Sorensen maintains that it had "shut down" the site to "all subcontractors" on the day of the accident, and that Gonzalez did not have Sorensen's "consent" to be on the premises. (R. 941-943; R. 655 ¶ 4; R. 656 ¶ 7; R. 666-667 ¶ 12; R. 686-687, pp. 80-82:18-11; R. 688, pp. 86-88:20-14; and R. 1455-1457.) (It is undisputed, however, that other subcontractors were doing work on other buildings that day. (R. 862.) In a separate ruling, the trial court found that issues of fact exist as to whether Clayton had a right to be working on the property at the time of the accident. (R. 1832).)

After the accident, Rocky Mountain Power relocated the power lines and sent a bill to Sorensen for the cost of doing so. (R. 946-947; R. 1000.)

### SUMMARY OF ARGUMENT

The trial court properly denied Sorensen's motion for summary judgment. Sorensen's motion was based entirely upon a contention that Gonzalez cannot meet the elements of a "retained control" claim, but that concept applies only to claims of vicarious liability, which Gonzalez is not asserting against Sorensen. Under *Magana v. Dave Roth Construction*, 2009 UT 45, 215 P.3d 143, it would have been error for the trial court to apply retained control principles to a claim of direct negligence.

The court properly concluded that Gonzalez's negligence claim is cognizable because Utah would recognize the principles of liability summarized in the *Restatement*

(*Second*) of *Torts* § 384. Under that section, a party who exercises control over premises is subject to the same duties and defenses as an owner or possessor of the premises. Defendant Sorensen admits that it exercised control over the entire job site, including the specific area in which plaintiff Gonzalez was working at the time of the incident. Under Utah law, workers such as Gonzalez are business invitees, and thus Sorensen owed Gonzalez a duty not to create, or permit to remain, unreasonably dangerous conditions on the site.

Sorensen's arguments against application of Section 384 are unavailing. Courts and commentators widely recognize Section 384's adoption. Further, a number of courts (including the Utah Supreme Court) have applied premises liability principles to general contractors without expressly invoking Section 384.

Premises liability is not inconsistent with the general rule of non-liability for the negligence of independent contractors; in fact, Sorensen admits that landowners are subject to both the same general rule of non-liability and premises liability. Public policy is not served by subjecting potentially distant or ignorant landowners to liability for hazards created or tolerated by general contractors on site.

The duties applicable under Section 384 are only the basic reasonableness requirements set forth in *Restatement* §§ 343-343A and surrounding sections. Contrary to Sorensen's assertions, Gonzalez does not assert any duty by a general contractor to supervise the method or manner of subcontractors' work, or to remedy "all known or knowable" dangers, or with respect to risks inherent in the work itself. The Utah Supreme Court has properly concluded that no such duties should be imposed. But



encountering live power lines unreasonably close to a work area has nothing to do with the method or manner of installing soffit, and was not inherent in Gonzalez's work – indeed, all subcontractors working in the area were exposed to the same hazard.

Applying premises liability principles to Gonzalez's claim, the trial court correctly found issues of fact precluding summary judgment. Gonzalez adduced evidence that Sorensen created the dangerous condition (erecting Building No. 4 too close to live wires), and/or allowed the condition to remain unabated for more than a year, knowing that workers were being exposed to it.

Finally, the trial court did not abuse its discretion in concluding that Sorensen was sufficiently on notice of Gonzalez's claim. Although Sorensen accuses Gonzalez of "recharacterizing" his claim from retained control to premises liability, there is no retained control / vicarious liability claim in the complaint to begin with. The complaint plainly states that Gonzalez's negligence claims are based upon "hazards . . . on the Property," a classic premises liability claim. Although Sorensen argues that Gonzalez should have alleged that Sorensen was an owner or possessor of the land, that would have been erroneous: Under Section 384, the contractor is not transformed into an owner or possessor, but rather is subject to the same duties and defenses as those persons.

The factual predicate of Gonzalez's claim has never varied: Over the ensuing two years, 14 liability depositions have been taken (including that of Sorensen's principal), all of which focused on the creation, maintenance, and knowledge of the hazardous condition. In construing the complaint and surrounding circumstances liberally, as required by Utah Supreme Court precedent, the trial court did not abuse its discretion.

## ARGUMENT

### I. THE TRIAL COURT CORRECTLY FOUND ISSUES OF FACT ON GONZALEZ'S NEGLIGENCE CLAIM AGAINST SORENSEN.

#### A. Plaintiff's direct negligence claims are not subject to "retained control" principles, which apply only to claims of vicarious liability.

The sole argument raised in defendant Sorensen's motion for summary judgment was that plaintiff Gonzalez could not meet the elements of a claim under *Restatement (Second) of Torts* §§ 409 and 414 (1965), the "retained control" doctrine. See *Thompson v. Jess*, 1999 UT 22, 979 P.2d 322. Gonzalez had no dispute with that proposition – because he is not asserting a retained control claim.

The retained control doctrine only has application to claims of vicarious liability; it is irrelevant to claims that a defendant was itself negligent. The Utah Supreme Court reiterated this basic distinction in *Magana v. Dave Roth Construction*, 2009 UT 45, 215 P.3d 143. In *Magana*, the trial court and this Court both ruled that a worker's claims against a general contractor were barred because the plaintiff could not show retained control under *Thompson*, even though the plaintiff was also asserting a separate negligence claim against the defendant. The Supreme Court reversed.

In a section titled "THE RETAINED CONTROL DOCTRINE DOES NOT IMMUNIZE A CONTRACTOR FROM ITS OWN NEGLIGENT ACTS," the Supreme Court held that this Court's affirmance of summary judgment was error "because it only considered Magana's negligence claim under the retained control doctrine. The court

failed to separately consider Magana's claim under the direct negligence theory that Magana also advanced." *Id.* ¶ 36. The 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. Rather, the doctrine is limited to circumstances where the plaintiff alleges that the employer of a contractor is liable for the *contractor's negligence* because the employer retained sufficient control over the contractor's actions to owe the plaintiff a duty of care regarding the contractor's actions.

*Id.* ¶ 37 (emphasis in original).

Reinforcing this distinction, the *Magana* court quoted from *Thompson*, 1999 UT 22, ¶ 13 ("[T]he 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.") (emphasis by Supreme Court), and W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS 510 (1984) ("Quite apart from any question of vicarious responsibility, the employer may be liable for any negligence of his own in connection with the work to be done."). *Id.* ¶ 37 n. 30-31.

In this case, Gonzalez does not seek to hold Sorensen liable for the negligence of another contractor. To the contrary: Gonzalez seeks to hold Sorensen liable for the negligence of Sorensen. The retained control doctrine is thus immaterial to the claim.

**B. The trial court correctly found issues of fact regarding Sorensen's breach of duty under *Restatement* § 384.**

To prevail on a claim for negligence, a plaintiff must prove four elements: duty, breach, causation, and damages. *Braithwaite v. W. Valley City Corp.*, 921 P.2d 997, 999 (Utah 1996). The existence of a duty is generally a question of law, subject to subsidiary

issues of fact. *AMS Salt Indus., Inc. v. Magnesium Corp. of Am.*, 942 P.2d 315, 319-20 (Utah 1997).

In its motion for summary judgment, Sorensen essentially argued that it owed no duty to Gonzalez because Sorensen did not control the manner or method of Gonzalez's work, which would be one source of a duty recognized by the *Restatement*. In so arguing, however, Sorensen's argument overlooked other sources of duty.

Premises liability is a form of negligence (in other words, one potential source of duty). *Hale v. Beckstead*, 2005 UT 24, ¶ 4, 116 P.3d 263; *Carlile v. Wal-Mart*, 2002 UT App 412, ¶ 8, 61 P.3d 287. In Utah, workers who come to make alterations or repairs are business invitees, and are thus owed certain duties while on the premises. *Hale*, 2005 UT 24, ¶ 33. See pp. 27-28, *infra* (summarizing duties recognized in *Hale*).

Claims for breach of such duties are most often brought against the "owner" or "possessor" of the premises. In some instances, however, an owner or possessor permits (or hires) someone else to take charge of the premises. In this case, owner Orchard Vista hired general contractor Sorensen. Sorensen acknowledges – indeed, affirmatively declares – that it exercised full control over the entire site, including Building No. 4 where Gonzalez was working. See p. 8, *supra* (alleging that Clayton's workers were trespassers because they were on the premises without Sorensen's permission).

When a general contractor exercises control over premises, courts "overwhelming[ly]" hold that it has the same duties, and the same defenses, as an owner or possessor. See Richard L. Ferrell III, EMERGING TRENDS IN PREMISES LIABILITY LAW: OHIO'S LATEST MODIFICATION CONTINUES TO CHIP AWAY AT BEDROCK

PRINCIPLES, 21 OHIO N.U. L. REV. 1121, 1141 (1995) (“... [T]he overwhelming weight of authority across the country establish[es] that an independent contractor is subject to the same liabilities and clothed with the same rights as the landowner” [footnote omitted].) Those duties and defenses are, in general, summarized in the *Restatement (Second) of Torts* §§ 343-343A and surrounding sections. See, e.g., §§ 341A, 343 (duty owed to invitees), § 337 (duty owed to trespassers).

This principle is summarized in *Restatement* § 384, titled “Liability of Persons Creating Artificial Conditions on Land on Behalf of Possessor for Physical Harm Caused While Work Remains in Their Charge,” which states:

One who on behalf of the 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 of the land by the dangerous character of the structure or other condition while the work is in his charge.<sup>4</sup>

Comment g explains when these duties arise and terminate:

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 on the land, 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

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<sup>4</sup> A similar provision has been proposed in the Tentative Draft of *Restatement (Third) of Torts: Phys. & Emot. Harm*. Under the proposed draft, which has not yet been cited by any courts, application of premises liability duties to contractors is expressed by the latter's inclusion in the definition of “possessor.” See § 49 (T.D. No. 6, 2009), Possessor Of Land Defined, cmts a, e, and f.

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. . . .

As noted above, there is no dispute that Russell Sorensen exercised control over the entire premises, including the area in which Gonzalez was injured. The only issue, therefore, is whether Utah would join the majority of jurisdictions in adopting § 384. Sorensen correctly notes that the Utah Supreme Court has not yet done so. Notably, however, the court has applied premises liability duties to general contractors. *Kessler v. Mortenson*, 2000 UT 95, ¶¶ 3, 9-10, 17, 16 P.3d 1225 (reversing orders granting summary judgment and allowing attractive nuisance claims against both landowner and contractor under *Restatement* § 339).

Sorensen argues that, because a contractor generally is not liable for the negligence of an independent contractor, it would be inconsistent to allow a claim against it under § 384. Sorensen's argument fails in several respects. First, to what negligence by another contractor is Sorensen referring? It was Sorensen who allowed the building to be constructed too close to the power lines, and who knew that various individuals would have to work on the north side of Building No. 4. If Sorensen feels that the negligence of Gonzalez or Clayton, or one of its co-defendants, was exclusively the cause of the accident, it certainly has not shown so as a matter of law, as required to obtain summary judgment. *See also Hale, supra* (alleged comparative negligence by the worker is for the jury, not a bar to suit).<sup>5</sup>

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<sup>5</sup> Under § 384, a subcontractor may also owe duties if it exercises control over a site. *See* Cmt. d. How the Utah Supreme Court would deal with co- or joint liability under this

Sorensen's argument also overlooks the fact that landowners, like contractors, are not typically responsible for the negligence of independent contractors, yet premises liability remains a separate, viable theory against such owners. (See Brief of Appellant, p. 16, citing *Hale*; see also *Price v. Smith's Food and Drug Centers, Inc.*, 2011 UT App 66, ¶ 26, --- P.3d --- ("Generally, an employer is not liable to third persons for the torts of an independent contractor. . . . 'One exception is that [the] owner of the premises . . . [has] a nondelegable duty to keep the premises reasonably safe for business invitees'" [citations omitted].).

Sorensen's argument would thus produce the ironic result that a distant or ignorant landowner could be liable to worker-invitees for hazardous conditions on the property, but not the general contractor who created the conditions or knowingly permitted them to remain. No public purpose would be served by such a result. As the Utah Supreme Court observed in *Kessler*, a contractor is in the best position to assess and remedy dangerous conditions on site. 2000 UT 95, ¶ 10 ("Given the rapidly changing nature of a residential construction project, the homebuilder is in the best position to recognize hazards and to protect children from the danger.").

Other arguments by Sorensen against the adoption of § 384 appear to misapprehend the nature of the duty argued by Gonzalez and recognized by the trial court. Accordingly, it seems useful to clarify what that duty does – and does not – entail:

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section is not at issue in the appeal. In any event, Sorensen has taken the position in this case that it exercised exclusive control over the site on the day of the accident, alleging that it had "closed" the site to "all subcontractors" that day. (R. 656.)

1. No duty to supervise method or manner of work performance.

Gonzalez does not contend that Sorensen has a duty to supervise or exercise control over the method or manner by which its subcontractors perform their work, as Sorensen suggests. (*See* Brief of Appellant, pp. 19, 29-30.) The Utah Supreme Court has already held otherwise. *Thompson v. Jess, supra*. Gonzalez's injury had nothing to do with the method or manner in which soffit is installed – Gonzalez did not injure himself by using a nail gun improperly, for example. Rather, the injury arose from a hazardous condition on the premises to which anyone working in the area would be exposed.

The Tenth Circuit (applying Utah law) recognized this basic distinction in *Titan Steel Corp. v. Walton*, 365 F.2d 542 (10th Cir. 1966). In that case, suit was brought against a general contractor and owner for the death of a subcontractor's employee. The general contractor challenged the trial court's instruction of the jury as to the duties owed by it to the worker under *Restatement* § 343, the Tenth Circuit affirmed, stating:

As applied to a general contractor in control of a structure or premises upon which work is being done, the rule is that such contractor is liable to an employee of another contractor rightfully using any portion of the premises for negligence in failing to keep it in a safe condition and to give warning of latent or concealed perils. This rule is not inconsistent nor incompatible with the general rule of non-liability of a general contractor for torts of an independent contractor. . . . As Judge Warren L. Jones put it, "*there is a distinction between an unsafe condition incident to or resulting from the work to be done and an unsafe condition inhering in the premises where it is to be done.*"

365 F.2d at 546 (citations omitted; emphasis added); *see also Harsch v. City of New York*, 78 A.D.3d 781, 910 N.Y.S.2d 540 (N.Y. App. Div. 2010) ("Where, as here, a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather,



from an alleged dangerous or defective condition on or at the subject premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site, and either created, or had actual or constructive notice of, the dangerous condition.”)

2. No duty to remedy “all known or knowable” dangers.

Gonzalez does not contend that Sorensen had an automatic duty to remedy “all known or knowable” dangers, as Sorensen suggests. (*See* Brief of Appellant, pp. 17, 29.) With respect to invitees, a possessor of land (to which Sorensen’s duty analogizes) owes only the duties summarized by the Supreme Court in *Hale*, all of which hinge upon reasonableness. *See* pp. 27-28, *infra*. It is not strict liability.

Sorensen’s duty to licensees and trespassers would be further limited. *See Restatement* §§ 333-339, 341. In *Kessler*, the Utah Supreme Court rejected a contention that permitting attractive nuisance liability would place “an unnecessary burden on homebuilders” and drive up insurance costs and housing prices, noting that a plaintiff must still prove his claim, after all: “Homebuilders will not become liable automatically for all accidents to children caused by conditions on the site.” 2000 UT 95, ¶¶ 8, 15.

Nor would a possessor (contractor) be responsible for transient conditions, or conditions of which it could not reasonably have been aware and remedied, as Sorensen suggests. (Brief of Appellant, p. 17.) *See Price*, 2011 UT App 66, ¶ 10 (plaintiff must show “(1) the defendant ‘had knowledge of the condition, that is, either actual knowledge or constructive knowledge because the condition had existed long enough that he should

have discovered it'; and (2) 'after [obtaining] such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it'" (citations omitted)).<sup>6</sup>

In this case, the power lines did not suddenly gravitate toward Building No. 4 on the day of the accident; they had been in place for more than a year, and Sorensen admits knowledge of their proximity. Sorensen further admits knowing that the situation could have been remedied in various ways, *e.g.*, by calling Rocky Mountain Power or sheathing the lines.

With respect to the proximity, Sorensen's brief asserts a factual argument for reversal that was raised for the first time below in its reply memorandum, *i.e.*, that it was Orchard Vista, not Sorensen, who was responsible for placement of the building so close to the lines. According to Sorensen, all that it did was follow Orchard Vista's plans. (Brief of Appellant, pp. 8, 15.) The problem with this argument is twofold.

First, Gonzalez's experts disagree, indicating that the original plans appear not to have been followed. (*E.g.*, R. 910, R. 991.) Second, Sorensen's argument overlooks the fact that contractors cannot blindly follow unreasonable plans. As Comment f to § 384 states:

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

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<sup>6</sup> "[T]his notice requirement does not apply if the [unsafe] condition or defect was created by the defendant himself or his agents or employees." *Id.* (alteration in original; internal quotation marks and citation omitted).

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.

Utah law is the same. *Trujillo v. Utah Dept. of Transp.*, 1999 UT App 227, ¶§ 39, 42, 986 P.2d 752 (issue of fact as to whether plans were unreasonably dangerous; summary judgment for contractor reversed), and cases cited.<sup>7</sup>

3. No duty regarding risks inherent in the work.

Gonzalez does not contend that Sorensen had a duty with respect to risks that are peculiar to, or inherent in, the work performed by subcontractors, as Sorensen suggests. (See Brief of Appellant, pp. 20, 25-27.) The Supreme Court has correctly observed that, when risks “inhere to the manner in which the work is done,” it is more reasonable and promotes safety to require the subcontractor to protect itself from such risks. *Thompson*, 1999 UT 22, ¶ 31.

If Gonzalez had been hired to repair or sleeve the power lines, then proximity to the lines would have been inherent to his work. If a worker is hired to do welding, then use of a welder inheres to his work. Unreasonably close live power lines are not inherent to the installation of soffit (or stucco, or fascia, or to framing, or the other work that exposed workers to the wires).

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<sup>7</sup> Sorensen also asserts that “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’s accident.” (Brief of Appellant, p. 15.) If a defendant digs a hole and then leaves, has not the defendant directly contributed to the accident when an invitee falls in the hole? The same is true of a defendant who creates and/or ignores a known power line hazard for more than a year, knowing that anyone who works in that area will be exposed.

After dispelling the various dire scenarios averred by Sorensen, it becomes evident that adoption of *Restatement* § 384 will not shake the foundations of the construction industry. It is instead, as the trial court concluded, sound policy. That reality is reflected in the fact that all jurisdictions to have considered it have adopted § 384. *See Smithey v. Stueve Constr. Co.*, No. 04-4067, 2007 WL 172511, at \*4 (D.S.D. Jan. 18, 2007), listing jurisdictions and stating that the court is unaware of any jurisdiction rejecting it.<sup>8</sup>

AM.JUR.'s summary of the law is the same:

A person put in control of premises by the owner is under the same duty as the owner to keep the premises in safe condition. To similar effect, one who does an act or carries on an activity on land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused to others on or outside of the land as though he or she were the possessor of the land. In such cases, the decisive test of liability is control of the work, and not the actual transfer of possession by contract. The duty of care owed by a possessor of premises, however, exists only where the possessor, in the exercise of reasonable care, knows or should know of such conditions. The duty of a possessor to maintain reasonably safe conditions for use by an invitee is nondelegable: a contract for its performance by another does not necessarily eliminate an owner's responsibility, and does not extend to latent defects or conditions that could not have been discovered by reasonable care, whatever conduct that standard may require in a particular case.

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<sup>8</sup> While acknowledging (and listing) the string of jurisdictions that have adopted § 384, Sorensen argues that "other states have considered and rejected Gonzalez's premises liability argument." (Brief of Appellant, p. 23, citing *Branum v. Petro-Hunt Corp.*, No. 4:09-CV-035, 2010 WL 1977963 (D.N.D. Mar. 15, 2010).) But that case – which does not mention § 384 – does not aid Sorensen's position. *Branum* involved the question of "whether plaintiff can hold [a general contractor] *vicariously liable* for any fault of [a subcontractor]," not *directly* liable for its own breach of duty. *Id.* (emphasis added.) Indeed, *Branum* concluded its discussion of premises liability by noting that its reasoning "applies to any claim for premises liability that goes *beyond holding the owner of the premises liable for its fault and imposes vicarious liability* for the acts of an independent contractor." *Id.* at \*5 (emphasis added).

In short,

Independent contractors employed by the owner or occupant of premises to perform work thereon are generally held to be invitees to whom the owner or occupant owes a duty to exercise reasonable care to keep the premises in a safe condition. . . . Such duty has been said to exist not because of any contractual relation between the owner and the contractor, but because of the general principle that an owner or occupant of premises is bound to use ordinary care toward persons who come upon the premises for a purpose in which the owner is interested. If the landowner or lessee relinquishes possession and control of the premises to an independent contractor, the duty of care shifts from the landowner or lessee to the independent contractor.

L. Lehr, 2 PREMISES LIABILITY 3d § 39:7, and authorities cited.

Moreover, a number of courts (including the Utah Supreme Court in *Kessler*) have recognized the applicability of premises liability to general contractors without explicitly citing § 384. See, e.g., *Cooper v. Nelson*, 211 F.3d 1008, 1015 (7th Cir. 2000) (applying Illinois law); *Eischeid v. Dover Constr., Inc.*, 217 F.R.D. 448, 460 (N.D. Iowa 2003) (“[T]he Iowa Court of Appeals has recognized that a more general ‘premises liability’ exception, based on a ‘possessor’s’ control of the land, is also applicable to general contractors.”).

Indeed, Sorensen’s own memorandum in support of summary judgment attached two cases that recognized retained control and premises liability as separate theories of liability against a general contractor. See *Hillabrand v. Drypers Corp.*, No. 9-02-37, 2002 WL 31260045, ¶ 21 (Ohio Ct. App., Oct. 10, 2002) (unpublished) (R. 730), (“The duty owed to frequenters, i.e., including employees of other companies, is no more than a codification of the common-law duty owed by an owner or occupier of premises to

invitees, requiring that the premises be kept in a reasonably safe condition, and that warning be given of dangers of which he has knowledge. . . .”); and *Rapoza v. Willocks Construction Corp.*, No. 22052, 2004 WL 27460, at \*17 (Haw. Jan. 2, 2004) (R. 735) (in suit by subcontractor’s employee, jury was correctly instructed that general contractor Willocks had a “duty to provide a reasonably safe place to work. This duty runs to whomever the Defendants require to perform work on the premises,” and that “an owner or occupier of the property owes a duty of reasonable care to all persons anticipated to be on the premises.”).

Sorensen points out that in a number of cases citing § 384, the plaintiffs are members of the general public, rather than employees of a subcontractor. That is correct. Other cases do involve workers. *See, e.g., Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614 (Iowa 1990); *Lloyd G. Oliphant & Sons Paint v. Logan*, 12 So.3d 614, 618 (Miss. Ct. App. 2009) (“The general rule is that a general contractor on a construction job who is in control of the premises is burdened with the duty to use ordinary care to provide a safe place for employees of a subcontractor to work.” (citations omitted)); *Franklin v. OSCA, Inc.*, 825 S.W.2d 812, 815 (Ark. 1992) (“[T]his court explained the duties of a general contractor to a subcontractor’s employees. The court analogized the duties of a general contractor to those of an owner of the premises.”).

Significantly, Sorensen cites no authority adopting the distinction it urges between worker-invitees and general public-invitees in a premises liability case. Instead, Sorensen relies only upon the Utah Supreme Court’s exemption of workers from

protection under the “peculiar” and inherent” risk theories of liability in *Restatement* §§ 413-414, 416, and 427. See *Thompson v. Jess*, *supra*.

As discussed above, however, the court’s interpretation of those sections followed naturally from the fact that – by definition – the risks there were inherent in the manner of work being done by the subcontractors. Why should a general contractor have to protect a subcontractor from a risk that is part and parcel of the very job for which the subcontractor was hired?

The same cannot be said for a hazardous condition on the premises. It was not inherent in the job for Gonzalez to encounter an unreasonably close power line on the site any more than it would have been inherent for him to encounter a pit of spikes. Moreover, *all* subcontractors working in the area were exposed to the condition.

As a final contention, Sorensen argues that the court should consider the Utah Workers’ Compensation Act. (Brief of Appellant, pp. 27-28 (citing “incentive inherent in the [Act] for injured workers and the workers compensation carrier to shift liability to other parties”).) Sorensen expresses dismay that, under § 384, a worker or compensation carrier could shift the loss for an injury to a general contractor.

That is true – because that is what the legislature has dictated. The Supreme Court has repeatedly recognized that the Workers’ Compensation Act is a compromise, part of which is the express right of employees and carriers to assert claims against negligent third parties. *Gudmundson v. Del Ozone*, 2010 UT 33, ¶ 28, 232 P.3d 1059.

Sorensen’s concern about unfair shifting of burdens might have merit if the alleged duty involved liability for a risk inherent in the work, which risk should be

allocated to the subcontractor/worker himself. In such circumstance, it would indeed be anomalous for the worker or his carrier to recover from a third party. *See Thompson*, 1999 UT 22, ¶ 31. The opposite is true, however, when the risk is *not* inherent in the subcontractor's work – in that case, it is unfair for the worker or his carrier to bear the burden, rather than the negligent party.

## **II. THE TRIAL COURT CORRECTLY FOUND ISSUES OF FACT ON GONZALEZ'S NEGLIGENCE CLAIMS.**

Sorensen's brief does not appear to challenge the trial court's denial of summary judgment if, as a general contractor in charge of the premises, it owed duties to Gonzalez. Ample evidence supports the trial court's determination that issues of fact exist.

### **A. Fact issues exist as to whether Sorensen created the dangerous condition.**

As noted, Sorensen built Building No. 4, which was too close to the power lines. Although Sorensen seeks to point fingers at Orchard Vista, even if Sorensen followed Orchard Vista's specifications, a jury could easily find the erection of a building too close to live power lines on its face unreasonable. (*See pp. 19-20, supra.*)

### **B. Fact issues exist as to whether Sorensen took reasonable steps to protect invitees from the dangerous condition once it existed.**

Because a general contractor's liability under § 384 is co-extensive with that of the owner or possessor of land, the next step is to analyze Sorensen's (in)actions as if Sorensen were the owner or possessor. In this regard, it is instructive to explore *Hale* in some detail. The facts there, as described by the Supreme Court, were as follows:

Beckstead, acting as his own general contractor, hired Hale to paint the interior of his semiconstructed home in Santa Clara, Utah in 1996.



Beckstead purchased the paint supplies and indicated generally how he wanted the paint to look, but otherwise exercised no control over the manner in which Hale was to accomplish the job for which he was hired. Because the house was still under construction, a railing had not been installed on the second floor balcony. While painting one day, Hale was injured when he accidentally stepped off the second floor balcony and fell to the floor below.

*Hale*, 2005 UT 24, ¶ 3.

Hale filed suit against the owner/general contractor. The district court granted summary judgment against him, reasoning that the owner owed no duty toward the painter because the allegedly dangerous condition (lack of a railing) was open and obvious. The case next went to the Court of Appeals, which affirmed.

This Court began its analysis by rejecting the defendant's argument (and Sorensen's here) that the plaintiff's claim should be analyzed under retained control principles, noting that the retained control doctrine has nothing to do with liability as a possessor of land:

Beckstead asks us to decide this appeal by applying the rules of liability for employers of independent contractors as outlined in the Restatement section 409, its companion sections, and the case of *Thompson v. Jess*, 1999 UT 22, 979 P.2d 322, which applies various sections of chapter 15 of the Restatement, including section 409. *See id.* at 13. Beckstead's reliance on these authorities is misplaced. Thompson dealt with issues of the "retained control" doctrine and the "peculiar risk" and "inherently dangerous work" doctrines under the Restatement sections 413, 426, and 427, *Thompson*, 1999 UT 22 at 11 (quotations omitted), issues not relevant to this appeal. More importantly, Thompson contains no analysis with regard to the duty owed by a possessor of land to an invitee. *See id.* And while section 409 has some applicability with regard to the relationship between Beckstead and Hale (where Beckstead did not participate in or control the manner in which Hale performed the painting, such that Beckstead owed Hale no duty of care concerning the safety of the manner or method of performance Hale chose to implement), this analysis is not dispositive. As we discuss in detail

below, Hale was a business visitor, an invitee on Beckstead's land—a status wholly separate from any status he may have had as an independent contractor, which no one disputes.

*Hale v. Beckstead*, 2003 UT App 240, ¶ 11 n.2, 74 P.3d 628.

Analyzing Hale's negligence claim under §§ 343 and 343A, this Court concluded that the claim was barred because the hazard (lack of a railing) was open and obvious, and the owner/general contractor "could reasonably expect that Hale 'would take the necessary safety precautions'" and "had no reason to anticipate that Hale would proceed to encounter the unprotected balcony without taking the necessary safety precautions." *Id.*, ¶ 20 (brackets omitted).

The Utah Supreme Court reversed the latter ruling. The court first agreed that an owner/general contractor's duty to subcontractors' employees is defined in *Restatement* §§ 343 and 343A. *Hale*, 2005 UT 24, ¶ 7. Under those sections, a defendant may be liable for failing to make a worksite reasonably safe even if a dangerous condition is open and obvious. The court noted: "The *Restatement* does not so strictly define a landowner's duty as to eliminate any duty to protect or warn his invitees of obvious dangers." *Id.* at ¶ 25.

The Supreme Court described a number of circumstances in which a duty exists in the presence of an "open and obvious" danger on the possessor's property. For example:

- First, "if a landowner 'should expect that [an invitee] will . . . fail to protect [himself] against [a dangerous condition],' the landowner must exercise reasonable care to protect him." *Id.* (quoting § 343(b), (c)).
- Second, "a landowner has a duty to protect his invitees from obviously harmful conditions or activities on the property if the landowner 'should

anticipate the harm’ despite the obvious nature of the danger.” *Id.* (quoting § 343A(1)).

- Third, a possessor may be liable for a failure to warn or to take other reasonable steps to protect the invitee “[w]here 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.” *Id.* at ¶ 26 (quoting § 343A cmt. 1(f)).
- Fourth, a possessor may be liable if it “has reason to believe that ‘the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.’” *Id.* (quoting § 343A cmt. 1(f)).

Applying these standards to the facts of this case, the trial court correctly found issues of fact regarding the reasonableness of Sorensen’s conduct. A jury could obviously conclude that Sorensen had reason to “anticipate the harm”: Sorensen had built the structure too close to the power lines, knew that workers would be exposed to them, and took no steps to correct or protect against the dangerous condition. The trial court correctly denied summary judgment.

### **III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT SORENSEN HAD ADEQUATE NOTICE OF GONZALEZ’S NEGLIGENCE CLAIMS.**

In a secondary argument, Sorensen faults the trial court for concluding that Sorensen was sufficiently on notice of Gonzalez’s negligence claim. According to Sorensen, it did not realize until Gonzalez “recharacterized” his claim in response to the motion for summary judgment that Gonzalez might argue premises liability. (Brief of Appellant, pp. 30-34.)<sup>9</sup>

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<sup>9</sup> Although not part of its argument for reversal, Sorensen’s brief alleges that, after oral argument, Gonzalez’s counsel “attempt[ed]” to submit “additional argument” “ex parte

Sorensen's claim of surprise is rather perplexing, because it was Sorensen's motion, not Gonzalez's response, that sought to add a cause of action to Gonzalez's amended complaint that did not exist. Gonzalez's amended complaint did not state a cause of action for vicarious liability, nor retained control.

In other words, Sorensen accuses Gonzalez of abandoning a claim that was not there in the first place. The amended complaint asserted two causes of action: negligence and hazardous activity. The first paragraph of the negligence claim plainly stated that it was based upon exposure to a hazardous condition on the property, alleging, *inter alia*, that Sorensen:

a. Fail[ed] 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*;

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and without leave of Court.” (Brief of Appellant, p. 9.) Sorensen refers to two trial court rulings to which Gonzalez's counsel referred during argument in response to Sorensen's characterization of Gonzalez's argument as “novel.” (See Exh. 2, pp. 15-16.) Sorensen says that “neither the trial court nor counsel for RSC accepted the copies offered by Plaintiff's counsel.” (Brief of Appellant, p. 9.) No citation is offered for that statement, which is incorrect. With a 15-minute time limit (R. 1165, Exh. 2, p. 3), the undersigned expressed willingness to provide copies of the referenced rulings, but did not ask to approach the bench nor address counsel at that time. (Exh. 2, pp. 15-16.) Afterward, the copies were provided as promised, with a cover letter stating only, “During the oral argument in the above-captioned case, I made reference to the ruling in the following cases [two cases identified]. 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.” (Brief of Appellant, Exh. B.) It is hard to see how this was either “additional argument” or “ex parte,” but in any event, the trial court did not abuse its discretion in implicitly rejecting Sorensen's motion to strike the letter, characterizing the decisions as informative. (R. 1585; see Rulings attached as Add. Exh. 3.)

c. Fail[ed] 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; . . . .

\* \* \*

h. Allow[ed] individuals to work on the unsafe scaffolding and within 10 feet of the power lines when they knew or should have known it was unsafe to do so.

Would Sorensen have claimed surprise if the complaint referred to hazards on the “premises”? It is doubtful, yet “property” and “premises” are essentially synonymous. *See, e.g., Roget’s Desk Thesaurus* 415 (1996) (synonyms for premises include “buildings and grounds, property, site”); *Webster’s Encyclopedic Unabridged Dictionary of the English Language* 1526 (1996) (defining “premises” as “c. the property forming the subject of a conveyance or bequest”). Utah law has never adopted a “magic word” requirement for pleadings. *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1374 (Utah 1996).

If uncertainty existed, Sorensen had recourse. For example, it could have filed a motion for a more definite statement. *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218, 1222 n.3 (Utah 1996). It could have submitted “contention” interrogatories. Two years of discovery and motions provided ample opportunity to flesh out the parties’ positions. For example, Sorensen’s principal Russell Sorensen was expressly questioned during his deposition regarding the creation, location, and knowledge of the hazardous condition. (*E.g.*, R. 923, 945-950, 952-953, 1348-1349, 2067-2072.)

Other indicia suggest that Sorensen was not, or should not have been, surprised by Gonzalez's citation to premises liability:

Sorensen's answer set forth a premises liability defense. (R. 168, Tenth Defense: ("Discovery may reveal Plaintiff's damages were the result of an open and obvious risk of which Plaintiff was or should have been aware and, accordingly, Plaintiff's claims are barred.").)

Sorensen's expert designation, filed a year before its motion, recognized Gonzalez's claim as involving the presence of a hazardous condition. (R. 610 ("Since Mr. Sorensen had not given permission, to John Clayton Construction, for work on the north side of unit 12 he couldn't have anticipated that John Clayton Construction was *going to be exposed to the hazard of the power line and scaffold.*"), and asserting that UOSH "had the best information with regards to the actual *site conditions.*" (Emphases added).)

Sorensen's own motion for summary judgment cited cases brought by worker-plaintiffs that expressly recognized premises liability as an independent basis of liability against general contractors. *See* pp. 22-23, *supra*.

In light of the wording of the complaint and the accompanying circumstances, the trial court did not abuse its discretion in concluding that Sorensen was (or should have been) on notice of a claim based upon a hazardous condition on the property, *i.e.*, a premises liability claim. Rule 8 requires only a "short and plain" statement of the claim. Although Gonzalez correctly identified his claim as sounding in negligence, a party is not even required to plead legal theories. *Casaday v. Allstate Insurance Co.*, 2010 UT App

82, ¶ 12, 232 P.3d 1075; Baicker-McKee, et al., FEDERAL CIVIL RULES HANDBOOK § 8(a), p. 285 (Thomson/West: 2008) (legal theories need not be pled under F.R.Civ.P. 8(a)); *see also Records v. Briggs*, 887 P.2d 864, 868 (Utah Ct. App. 1994) (“In characterizing a cause of action, Utah courts look to the nature of the action and not the pleading labels chosen.”).

Sorensen cites various cases in which trial courts felt differently, ruling that a party was not on notice of a claim. (Brief of Appellant, pp. 30-31.) Notably, however, the offending parties in those cases there were attempting to change their *factual* predicates. That cannot be claimed here – this case has been all about the power lines from day one.

“The fundamental purpose of our liberalized pleading rules is to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to their dispute while leaving issue-formulation to the discovery process. These principles are applied with great liberality in sustaining the sufficiency of allegations stating a cause of action.” *Casaday*, 2010 UT App 82, ¶ 11 (*quoting Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (court’s brackets and ellipses omitted)); *see also Mack v. Utah State Dep’t. of Commerce*, 2009 UT 47, ¶ 17, 221 P.3d 194 (Rule 8 is to be liberally construed in favor of the plaintiff).<sup>10</sup>

---

<sup>10</sup> Even on a Rule 12 motion to dismiss, the trial court must “accept any reasonable interpretation of plaintiff’s claims.” *Baker v. Angus*, 910 P.2d 427, 431 (Utah Ct. App. 1996) (reversing trial court’s dismissal of complaint on grounds that vicarious liability claim was not cognizable, because complaint could “reasonably be interpreted to be a claim of direct personal responsibility” on the part of the defendant).

In this case, Sorensen failed to recognize the possibility that a claim based on “hazards . . . on the Property” might constitute a premises liability claim. To explain its misapprehension, Sorensen says that Gonzalez should have affirmatively alleged that Sorensen was an “owner” or “possessor” of land. (Brief of Appellant, pp. 2, 32-33.) But such an allegation would have been incorrect.

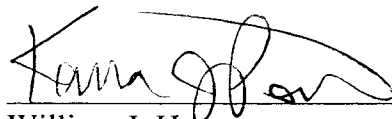
As stated in § 384 and the other authorities cited above, the general contractor’s duty is “the same as” or “analogous to” that of an owner or possessor – but the general contractor does not thereby *become* an owner or possessor. Gonzalez’s identification of Sorensen as the general contractor was correct.

### CONCLUSION

For the reasons set forth above, appellee Gonzalez respectfully requests that this Court affirm the trial court’s denial of Russell Sorensen Construction’s motion for summary judgment.

DATED this 27th day of May, 2011.

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in black ink, appearing to read "William J. Hansen", is written over a horizontal line.

William J. Hansen

Karra J. Porter

Tyler V. Snow

*Attorneys for Appellant*



## CERTIFICATE OF SERVICE

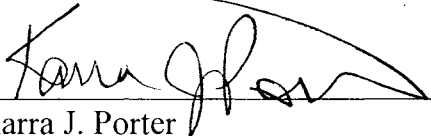
I hereby certify that two copies of **BRIEF OF APPELLEE** were mailed to the following this 27th day of May, 2011:

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Karra J. Porter

# **Exhibit 1**

## **Memorandum Decision, July 30, 2010**

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

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MEMORANDUM DECISION

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,

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MEMORANDUM DECISION

¶ 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

GONZALEZ V. ORCHARD VISTA ET AL.

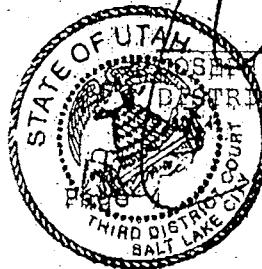
MEMORANDUM DECISION

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. FRATTO, 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.

MAIL: ORCHARD VISTA LLC, UT

FAX: BARBARA K BERRETT (801)531-7711

FAX: WILLIAM J HANSEN (801)355-3472

FAX: RICK L ROSE (801)532-7543

FAX: TRYSTAN B SMITH (801)363-0400

FAX: JAMES BLACK

Date:

7/30/10



Deputy Court Clerk

## **Exhibit 2**

### **Transcript, July 21, 2010 Hearing**



JOSE M. GONZALEZ,  
  
Plaintiff,  
  
vs.  
  
5 STAR INVESTMENTS, et al,  
  
Defendant.

Hearing  
Electronically Recorded on  
July 21, 2010

BEFORE: THE HONORABLE JOSEPH C. FRATTO  
Third District Court Judge

Transcribed by: Natalie Lake, CCT

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Grantsville, UT 84029  
Telephone: (435) 884-5515

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P R O C E E D I N G S

(Electronically recorded on August 20, 2010)

THE COURT: We are gathered here in the matter of Jose M. Gonzalez vs. Orchard Vista and others, specifically Russell Sorensen Construction, and they are the defendants. Then we have Pacific Corp Corporation -- Pacific Corp, a third party plaintiff vs. John Clayton Construction, the defendant.

What I have in front of me here and noticed for hearing is Russell Sorensen Construction's motion for summary judgment. We've allotted a half an hour. I did observe that from James R. Black a letter that -- and some courtesy copies of responses to this motion I believe were included in this, together with a request, if you will, of their other motions, that it might make some sense that we entertain those motions during the course of these proceedings.

Normally what I would have if Counsel were agreed to have these matters considered during the course of these proceedings and hear argument I would do that, but it seems to me our time is limited, and I want the benefit -- quite frankly, it's a good argument here regarding the motion that's in front of me. So the request is denied.

Let's have your appearances and the argument on Russell Sorensen Construction's motion for summary judgment.

MS. PORTER: Karra Porter, Heidi Goelbel and William Hansen for the Gonzalez plaintiffs.

1 THE COURT: For the plaintiffs.

2 MR. CURTIS: Timothy Curtis and Mark Taylor for Russell  
3 Sorensen Construction.

4 MR. ROSE: Your Honor, Rick Rose for Pacific Corp.

5 MR. BLACK: James Black and Matthew Black for John  
6 Clayton Construction.

7 MR. BARRETT: Joseph Barrett from Snow, Christensen  
8 and Martineau along with Tony Johnson on behalf of RM Rees  
9 Construction.

10 THE COURT: Who was anticipated to be arguing today?

11 MR. CURTIS: Your Honor, I'll be arguing on behalf of  
12 Russell Sorensen Construction.

13 MS. PORTER: And I'll be arguing on behalf of Gonzalez.

14 THE COURT: Mr. Curtis, your motion.

15 MR. CURTIS: Good morning, your Honor. As I stated  
16 earlier, I represent Russell Sorensen Construction. Russell  
17 Sorensen Construction was a general contractor on a residential  
18 construction project in Midvale, Utah. The project consisted  
19 of 13 separate housing units that were housed in four total  
20 buildings. The plaintiff was employed by John Clayton  
21 Construction.

22 John Clayton Construction was a subcontractor of  
23 Sorensen Construction, and John Clayton Construction was hired  
24 to install soffit, fascia and siding on the buildings in the  
25 project. An additional subcontractor, RM Rees was hired by

1 Sorensen Construction to perform stucco work on the project.

2           On June 22<sup>nd</sup> the plaintiff and two of his co-workers  
3 had arrived at the project to perform soffit and fascia work on  
4 the fourth and final building of the project. The plaintiff and  
5 his co-workers were the only workers present at that building on  
6 the date of the accident, but while working on the project the  
7 plaintiff was attempting to install a 12-foot piece of aluminum J  
8 channel that came in contact with high voltage overhead power  
9 line and was injured during that contact.

10           Utah has a long established general rule that the  
11 employer of an independent contractor is not liable for the  
12 physical harm caused by another -- by an act or omission of  
13 a contractor or its servants. For ease and reference we've  
14 referred to this as Utah's general rule of non-liability so  
15 we don't have to continue to repeat the long phrase.

16           The one exception to the general rule of non-liability  
17 is the retained control doctrine. Our motion for summary  
18 judgment is straightforward. Utah law is clear that Sorensen  
19 Construction as the general contractor on the project cannot be  
20 liable for the workplace injury of John Clayton's employee unless  
21 Russell Sorensen Construction exercised affirmative control over  
22 the injury causing aspect of the work. Now --

23           THE COURT: Wouldn't it -- I don't mean to interrupt you  
24 here, but that sort of -- that's sort of a rubber hits the road  
25 on this one.

1 MR. CURTIS: Yes.

2 THE COURT: Isn't that a factual question whether they  
3 have exercised that kind of control that would make them liable?

4 MR. CURTIS: Absolutely. I think that's a factual  
5 question, and it's a factual question that's been undisputed by  
6 the parties.

7 THE COURT: Well, that was my next question. What --  
8 where does that stand here in terms of a material fact not  
9 reasonably in dispute?

10 MR. CURTIS: I believe --

11 THE COURT: That (inaudible) the question.

12 MR. CURTIS: Absolutely. I believe we've set forth  
13 facts in our motion for summary judgment that are not in dispute  
14 by either the plaintiff or by John Clayton Construction. Russell  
15 Sorensen Construction apart from scheduling and sequencing the  
16 work on the project, he wasn't swinging hammers or pounding nails  
17 on the project. He scheduled and sequenced the work.

18 John Clayton Construction, it's undisputed in the  
19 test -- in the deposition of John Clayton and its workers that  
20 Russell Sorensen Construction didn't instruct them on how to do  
21 their work, what safety measures to undertake, what materials  
22 they were going to use, what method or manner in which they were  
23 going to perform their work, and it's undisputed that John  
24 Clayton Construction had complete autonomy over how they  
25 performed their work on this project. I don't believe that fact

1 has been disputed by anybody in this process.

2 John Clayton and its employees determined the lengths  
3 of materials that they would use and that they would install on  
4 the project. They determined when, where and how to perform  
5 their work. They -- when they arrived at the project there was  
6 some scaffolding that was installed by another subcontractor,  
7 Mr. Rees. The employees for John Clayton Construction decided  
8 without consulting with either Russell Sorensen Construction or  
9 RM Rees to utilize the scaffolding.

10 At no time on this project did Russell Sorensen exercise  
11 operative control over the mode or manner in which John Clayton  
12 Construction performed its work. In Utah merely possessing  
13 supervisory control over an independent contractor is not  
14 sufficient to trigger the retained control doctrine. That's --

15 THE COURT: Well, as -- what does the record show here  
16 in terms of as the general contractor what they actually did in  
17 relation to Sorensen. What did they do?

18 MR. CURTIS: What Sorensen did in relation to --

19 THE COURT: Well, I know what they didn't do.

20 MR. CURTIS: -- John Clayton Construction?

21 THE COURT: I understand your position in terms --

22 MR. CURTIS: Sure.

23 THE COURT: -- of what they didn't do, but what did they  
24 do?

25 MR. CURTIS: They would schedule and sequence the work.

1 They would let the subcontractors know when the project was ready  
2 for them to come and perform their work, but they left how the  
3 work was to be performed up to the individual subcontractors.  
4 The subcontractors come out, put a bid on the project, and it was  
5 left up to them -- you know, Russell Sorensen may have said, you  
6 know, we'd like brown soffit and fascia, may have controlled like  
7 the color of the fascia or the soffit or the siding, but as far  
8 as how John Clayton Construction performed its work on the  
9 project, those are things that were left in the complete and  
10 total discretion of John Clayton Construction.

11 THE COURT: So is it a -- just so I understand your  
12 position, as the record shows -- the record in front of me shows  
13 that other than scheduling the work to be done, and apparently  
14 making some decisions regarding color of soffit and fascia,  
15 gutters, that was the extent?

16 MR. CURTIS: That was the extent, yes, your Honor.  
17 Indeed the only issue pertinent to whether Russell Sorensen  
18 Construction is liable for the plaintiff's actions is whether  
19 they affirmatively controlled the method or operative detail or  
20 the work.

21 Now in order to counter our motion for summary judgment,  
22 the plaintiff has raised for the first time a premises liability  
23 argument. Now this is an argument that was never presented in  
24 their original pleadings. It was presented for the first time in  
25 their opposition to summary judgment. The reason why they've



1 kind of taken this tact is because there is a case that was  
2 released back in I believe 2009. It was the Magana case that  
3 both sides have argued or used in their favor.

4 Now we believe that the facts and holding of the Magana  
5 demonstrate the Russell Sorensen Construction is entitled to  
6 summary judgment. We also argue that the plaintiff can't for the  
7 first time in an opposition raise new and novel theories in order  
8 to try to defeat the summary judgment motion.

9 Most importantly, the argument that plaintiff is making  
10 is premised upon a legal theory that -- they argue the adoption  
11 of a restatement section that has not been adopted by Utah  
12 Courts, which would be inconsistent with Utah's general rule of  
13 non-liability. If the Court were to accept plaintiff's argument  
14 it would severely undermine all of the retained control precedent  
15 that came before it.

16 Now in Magana -- so this is a case that both sides have  
17 argued -- argues in their favor. The Court in Magana pointed out  
18 that the general rule of non-liability recognizes that one who  
19 hires an independent contractor and does not participate or  
20 control the manner in which the contractor's work is performed  
21 owes no duty of care concerning the safety or manner or method of  
22 the performance implemented.

23 Now the Utah Supreme Court in Magana upheld the trial  
24 court and the Court of Appeals' determination that all of  
25 Magana's claims -- all of the plaintiff's claims were properly

1 dismissed by the trial court, and that decision was properly  
2 upheld by the Utah Court of Appeals except for one, and that  
3 claim was a direct negligence claim that was premised upon the  
4 allegation that the defendant's supervisor personally assisted  
5 and personally rid a load of trusses that fell onto the plaintiff  
6 in Magana. None of the remaining claims for failing to properly  
7 maintain a safe construction site, failure to disclose and warn  
8 of known dangers, the failure to correct known hazards, the  
9 failure to implement and follow safe work policies and procedures  
10 were considered by the Utah Supreme Court to constitute direct  
11 negligence.

12 Now the Utah Supreme Court clearly demonstrated what it  
13 considered the direct negligence of the defendant when it said,  
14 "By asserting that Campbell himself negligently rigged the truss  
15 joints, Magana's negligence claim exceeds the scope of the  
16 retained control doctrine because his assertion relates to  
17 Campbell's acts and not to Circle T's acts."

18 Now unlike the Magana case, in the instant case Russell  
19 Sorensen Construction didn't participate or assist in the  
20 performance of John Clayton or the plaintiff's work. It's  
21 undisputed that the plaintiff and his two co-workers were the  
22 only workers present at the job site on the day of the accident.  
23 They were the only (inaudible) present on that building on the  
24 date of the accident. So there's nobody other than John Clayton  
25 employees that the plaintiff can claim directly participated

1 alongside them in the performance of their work.

2 Now while the plaintiff asserts that its claims were  
3 based on premises liability, we've argued -- we've pointed out  
4 four cases where the Utah appellate courts have said you can't  
5 raise new and novel theories, you can't attempt to amend your  
6 complaint in an opposition for a motion for summary judgment.

7 Now in each of those cases a plaintiff's failure to  
8 properly plead their new and novel theory resulted in the Court  
9 disregarding the arguments and the dismissal of the unpled  
10 claims. The plaintiff's amended complaint, they filed their  
11 complaint, I believe, in '07, amended it within three or four  
12 months after filing it.

13 Now the plaintiff's amended complaint never alleges that  
14 Russell Sorensen owned or possessed the property. In fact, the  
15 plaintiff's complaint alleges that Orchard Vista, a co-defendant  
16 in this case, owned and possessed the property. Throughout the  
17 entire discovery process plaintiff has been building its claim  
18 for premises liability against Orchard Vista and has directed  
19 its claims against Russell Sorensen Construction in another  
20 direction. It's only now at this point that they're attempting  
21 to change their claims and say that Russell Sorensen Construction  
22 now owes the duty of a land owner.

23 THE COURT: Mr. Curtis, may I ask this? In terms of  
24 what the state of the record is, I understand your argument  
25 regarding raising this issue regarding the premises liability,

1 but the state of the record in terms of the material facts to  
2 that claim would be what? That is what -- let me ask that as a  
3 question.

4 MR. CURTIS: Sure.

5 THE COURT: What are the material facts that --

6 MR. CURTIS: I think that's an interesting point that  
7 you've seized on. If you were to look at the plaintiff's  
8 opposition to our motion for summary judgment, there's not a  
9 material fact that's alleged that says Russell Sorensen owned the  
10 property or that Russell Sorensen controlled the property. The  
11 argument is made in the body. There's no material fact that's  
12 been alleged, I believe, in the plaintiff's statement of material  
13 facts.

14 So there's no real evidence before the Court other than  
15 the plaintiff's allegation that Russell Sorensen was a general  
16 contractor. If you apply the Restatement 384, Restatement 384  
17 says that an owner can delegate its responsibilities to the  
18 general contractor, and their argument is he's a general  
19 contractor. Restatement 384 says he can have the same  
20 liabilities as a landowner.

21 They neglect to point out that Restatement 384 also says  
22 that the general contractor can then delegate those same duties  
23 to the subcontractors, but there's been no material allegation.  
24 There's been no allegation of material fact made by the plaintiff  
25 to properly establish that Russell Sorensen should be liable

1 under a premises liability theory apart from the legal argument  
2 that was contained in the body of their opposition.

3 THE COURT: So would it be -- well, is the record in  
4 front of me in terms of what are the undisputed material facts,  
5 or the disputed material facts for that matter regarding premises  
6 liability, there is no record -- I mean there is no record in  
7 front of me, actual record in front of me?

8 MR. CURTIS: I think the only record that was presented  
9 was things that we've pointed out in our reply memorandum where  
10 we've demonstrated that the plaintiff's experts raised premises  
11 liability arguments against Orchard Vista and not Russell  
12 Sorensen Construction. So apart from that, I'm not sure of any  
13 allegations of material fact raised by either Russell Sorensen or  
14 the plaintiff that would establish premises liability type claim  
15 against Russell Sorensen Construction.

16 Now the way they get --

17 THE COURT: It appears to me, I suppose, your time is  
18 up.

19 MR. CURTIS: Can I just stress one case briefly, your  
20 Honor?

21 THE COURT: I'll give you 30 seconds.

22 MR. CURTIS: Okay. The one case that they use to  
23 allege this premises liability case I believe is completely  
24 distinguishable. The Hale vs. Beckstead case that they use, and  
25 they say it's a Hale claim, the general contractor in Hale was

1 also the owner of the property. I think that's a distinguishing  
2 factor in this case. The plaintiff in Hale alleged premises  
3 liability initially in their complaint against the defendant.

4 THE COURT: Thank you.

5 MR. CURTIS: Thank you, your Honor.

6 THE COURT: Ms. Porter?

7 MS. PORTER: Thank you, your Honor. I think it's  
8 obvious from both the argument today and the opposing memo  
9 that Russell Sorensen doesn't really dispute our analysis of  
10 applicable premises liability law, hence the fact that they spent  
11 88 percent of their opposing memo trying to claim that they  
12 weren't on notice of it and that's why they didn't raise it.

13 Let me do a couple of things, if I may. One, I want to  
14 briefly address the assertion that we did not present any factual  
15 record with respect to a premises liability claim. Then I will  
16 go ahead and address what is really their main if not only  
17 argument which is that we didn't use the right magic words in  
18 our complaint.

19 With respect to the merits of the argument, I think  
20 Counsel forgot the key case. It wasn't really Magana. Magana,  
21 in our view, just stated the obviously, vicarious liability,  
22 direct liability. The two are totally different. That's what  
23 Magana said, and that -- we always thought was fairly obvious.

24 What Counsel left out was the fact that the case law on  
25 this has been established since 2005. It's been almost five

1 years that general contractors have been on notice that premises  
2 liability claims are viable. There's a big difference between  
3 what they call this general rule of non-liability. What it  
4 should really be called is general rule of non-vicarious  
5 liability, because that's what Magana said. They said, "You  
6 can't just assume that every claim by a subcontractor's employee  
7 must be based on vicarious liability and therefore must have to  
8 show retained control element." Frankly, I don't know any  
9 respectable plaintiff's attorney since 2005 that would still be  
10 arguing retained control when you've got the beauty of Hale vs.  
11 Beckstead.

12           Then we hear, "Well, this is a novel" -- by the way,  
13 we hear for the first time in the reply memorandum that this is  
14 a novel theory, this is a desperate theory. I believe it's an  
15 established principle of law, your Honor, that the more often a  
16 party calls the other party desperate the more trouble they know  
17 they're in.

18           When I reread that last night, I thought, you know what,  
19 this right here -- Judge Hansen from March of this year agreeing  
20 with our desperate and novel theory that 384 is a cognizable  
21 cause of action against all contractors in Utah, subcontractors,  
22 employee, same type of pleadings that we've asserted here.

23           Here's Judge Lindberg from May 26<sup>th</sup>, so two months ago  
24 agreeing with our desperate and novel theory as to Section 384.  
25 There is not a Court anywhere in the country, and you notice they

1 couldn't find one either, that has said, "No, we reject Section  
2 384."

3 I brought copies of these -- they're memorandum  
4 decisions, but technically they have no precedential support. We  
5 haven't cited them, but I'm happy to provide them to the Court  
6 and Counsel. Any time we get called desperate, you know, it's  
7 fair game to show that well, gee, that's funny because so far all  
8 the judges we've presented this theory to have agreed with us.

9 THE COURT: What factually do we have here beyond that  
10 Sorensen is the general contractor that commends their liability?

11 MS. PORTER: They did a couple of things. First they  
12 created a dangerous condition on the premises. Remember we're  
13 talking about an actual physical condition on the premises, i.e.,  
14 way too close, built this thing way too close to power lines.  
15 Now they say --

16 THE COURT: Building the building too close it was.

17 MS. PORTER: Yes, physically. In fact, Mr. Sorensen  
18 in his deposition was asked, "Well, did you know because of this  
19 configuration here that subcontractors were going to have to get  
20 within 10 feet of these live power lines to do their work?"  
21 "Yes." He completely admitted it. So that's the first thing,  
22 they created the dangerous condition.

23 Now we read in their reply memo, "Well, the city okayed  
24 this and yeah, we didn't follow these plans, but we did follow  
25 these plans. Our expert says this, our expert says that."



1 That's a flaming fact issue. If they can -- they can present  
2 to a jury if they think they had a good reason for building,  
3 constructing a building dangerously close to live power lines,  
4 they can take that to a jury.

5 The second things is -- so first they create the hazard.  
6 Second, they allow invitees to be on the premises without taking  
7 affirmative steps to protect them. Now we quoted at length from  
8 Hale vs. Beckstead where the Utah Supreme Court went on and on  
9 about the different duties that are owed to invitees. It's  
10 undisputed that subcontractors and employers are invitees.

11 You have to under the conditions we laid out in our  
12 memo, and I won't belabor those given our time constraints, but  
13 you have to basically take affirmative steps -- reasonable steps  
14 to protect the invitees from these hazards. No one, by the way,  
15 has suggested it wasn't a hazardous condition. It was.

16 Did they take any steps at all to provide invitees? No,  
17 which they admit. The closest I think they came in any of their  
18 deposition testimony was, "Well, we were going to. We were going  
19 to later. We were going to tell the individuals they needed to  
20 call Rocky Mountain Power." I think I saw that in some of the  
21 testimony they attached.

22 Yet at the same time other testimony was by then -- by  
23 the time Mr. Gonzalez was injured, there had already been quite a  
24 few subcontractors, employees already working in that area near  
25 those power lines. So again, is the jury really going to believe

1 that he meant to do something and he would have done something?

2 You know, that's a jury question.

3 So we have creating a hazardous condition on the  
4 property, and then failing to take any steps, let alone  
5 reasonable steps, to protect invitees from that property.

6 Now our expert -- or excuse me, that condition.

7 Our experts gave some pretty easy examples. I mean  
8 they -- Sorensen could have put a sleeve on it, could have called  
9 Rocky Mountain Power like he was supposed it and had it shut down  
10 during periods of time or gone over the -- you know, et cetera.  
11 You know, those are the kinds of steps. They -- he didn't do any  
12 of that, not one thing.

13 THE COURT: May I ask this? The liability stems from  
14 the fact that I as the general contractor that built a building  
15 that was too close to the power lines that created this hazard  
16 for subsequent work.

17 MS. PORTER: Well, not subsequent work. This is work  
18 that is going while I'm still the general contractor, while I'm  
19 still --

20 THE COURT: Well, I mean subsequent to building the  
21 building.

22 MS. PORTER: Oh, right.

23 THE COURT: I suppose.

24 MS. PORTER: Or either subsequent to or in conjunction  
25 with. I mean if you -- the building may be done on other parts

1 or may be done on this part, but the fact is that it has to be --  
2 they know that workers are going to be on this part and it's too  
3 close. That -- and remember, this -- we're talking about  
4 liability because of their status of a general contractor. The  
5 general contractor owes the same duties under 384 which every  
6 single Court to look at has adopted, and one of those is to take  
7 the affirmative steps to protect people. We even laid it out,  
8 you know, for them, and they haven't disputed, by the way, that  
9 those would have been reasonable steps and that they didn't take  
10 any of them.

11           So this is really a classic premises liability case.  
12 So what do we get? We get, "Well, we didn't know you were  
13 pleading -- you were arguing premises liability. We thought you  
14 were arguing vicarious liability." You know what's ironic here?  
15 Look at our complaint. Look for the words vicarious liability in  
16 here that they claim they thought we were pleading. It's not in  
17 here.

18           Every allegation we have against Sorensen is negligence.  
19 We don't ever allege vicarious liability in here, and they say,  
20 "But that's the only theory you should look at, your Honor. You  
21 know, we want you to assume that's what they're pleading even  
22 though it's not in here, and don't let them actually point to  
23 what is in here."

24           Our very first cause of action, very first sentence in  
25 our cause of action is an allegation that the defendants were

1 negligent because they -- the property -- I'll get to that.  
2 That's apparently the word we didn't use right, because we said  
3 that they failed to maintain the place of employment which was  
4 free from recognized hazards that were likely to cause death or  
5 serious physical harm to individuals working on the property.  
6 That's paragraph 28 of our amended complaint, our very first  
7 statement there.

8           Now their argument apparently is, "Well, it says  
9 property, it didn't say premises, so we didn't realize property  
10 could be premises." Is that what their argument is, because I  
11 could not find any case law under Rule 8 that says we have to  
12 cite our case law, or even that we have to cite restatement  
13 provisions. We said you have a hazardous condition to  
14 individuals working on the property. That is a classic premises  
15 liability claim.

16           I don't honestly see how they can say that -- I mean  
17 I would be a little embarrassed if I were defense Counsel five  
18 years after Hale came down and said, "Gee, we didn't realize that  
19 a general contractor," which by the way --

20           THE COURT: Let me -- in Hale the dangerous condition  
21 was what?

22           MS. PORTER: The dangerous condition is the proximity of  
23 the area where the invitees were going to be to a live wire. Now  
24 that could have been rectified by, for example, making the wire  
25 not live or insulating that portion of the wire. So it is -- we

1 know the invitees are going to be right here, and we know there's  
2 a live wire practically within arm's length of that. That is a  
3 dangerous condition on the property -- on the premises.

4         See, one thing that we keep hearing is -- well, for  
5 example, we heard the facts in Magana. That just shows it right  
6 there. Magana, if I remember correctly -- and I did look at the  
7 complaint they attached -- dealt with operation of a drill. It  
8 did not deal with an actual, you know, condition on the property.  
9 Then they say, "They didn't mention premises liability in  
10 Magana." Well, I'd be surprised if they did because that wasn't  
11 the form of negligence alleged in Magana.

12         We alleged negligence. We used the negligence term. We  
13 used the individuals working on the property. I mean should we  
14 have said premises? Okay. We can -- you know, but get out a  
15 thesaurus for goodness sake. Don't try to say, "We were  
16 completely caught by surprise."

17         So the fact is -- oh, then there's one other I think  
18 allegation. They say well, we didn't allege that they were  
19 controlling the property, but we actually did allege -- remember,  
20 all Rule 8 requires is notice pleading and inferences. You know,  
21 if you're confused, why didn't they send us -- if they didn't  
22 know what we were alleging, why didn't they send us any  
23 interrogatories or something that said -- we didn't get any  
24 contention interrogatories in this case. We didn't get word boo  
25 that said, "We don't know what your theory is." They didn't pick

1 up the phone to say, "What's your theory?" What it is is they  
2 don't like premises liability because they are dead on that  
3 claim.

4 So instead, they're trying to force us to make a claim  
5 that we haven't made since 2005. We specifically referenced to  
6 the fact that Sorensen was acting as the general contractor for  
7 the development of the property and for the project, which were  
8 defined terms, and they admitted it. As far as we were  
9 concerned, that issue was done. They admitted it and we moved  
10 on. We talk about hazardous condition in virtually every single  
11 deposition. They don't claim otherwise.

12 The suggestion that we had to plead Hale vs. Beckstead  
13 in our complaint, I dare them to show me a case that says that.  
14 We said negligence. We said hazardous conditions on the  
15 premises, or (inaudible) property. That should have done it.  
16 Given our time constraints, your Honor, unless the Court --

17 THE COURT: Well, you have about one minute left.

18 MS. PORTER: Oh, all right. Well, in that case I'm  
19 going to point out a few other things. The -- I'd mention that  
20 they both created and allowed the hazardous condition to maintain  
21 and that they failed to take any steps. There was a -- we  
22 actually addressed a lot of this.

23 We laid out quite a few of the facts. In fact, you'll  
24 notice that we successfully, in my view, disputed almost every  
25 one of their facts, and their only response and reply was, "Well,

1 those were irrelevant facts that we asserted." We agree,  
2 actually, because it was an irrelevant theory they were arguing.

3 We also think John Clayton, to the extent that it added  
4 anything different in his factual allegations, we agree with  
5 those, and we would incorporate those. The fact is we pled under  
6 any reasonable interpretation of that pleading of Rule 8, we've  
7 pled and we have given you tons of facts, most of which are  
8 undisputed as to the premises liability of Sorensen Construction.

9 THE COURT: In sum, though, you -- if I understand you  
10 correctly in terms of what you agree here also is it's really a  
11 premises liability analysis that is what you're advancing as  
12 opposed to a dispute with the contract that Sorensen has with the  
13 subcontractors?

14 MS. PORTER: Right. I mean inherently they forced  
15 the subcontractors to work in an extremely dangerous condition.  
16 That's not really the same thing as contacting. They didn't tell  
17 them how to hold their, you know, torches or how to hammer. They  
18 didn't tell them any of that stuff, and we're not claiming that.  
19 What they did was they did actually force them to work around an  
20 extremely dangerous condition.

21 We know from Hale that it's not good enough to say,  
22 "Well, that was their choice," or, "Well, the employee was  
23 negligent or the employee's boss was negligent." The Supreme  
24 Court in Hale said, "Whoa, whoa, those are all fact issues.  
25 That's all comparative fault."

1           So yeah, our theory -- we haven't pled vicarious  
2 liability. That's why it's kind of insulting for them to keep  
3 telling you that's all we've pled. It's not in their complaint  
4 anywhere.

5           THE COURT: I understand your position.

6           MS. PORTER: Thank you.

7           THE COURT: Thank you. The time has expired, and I'm  
8 going to take the matters under advisement. I appreciate --  
9 yeah, I'll take the matter under advisement. I appreciate all  
10 your efforts. Thank you.

11          MS. PORTER: Thank you, your Honor.

12          MR. BLACK: Your Honor, regarding those other matters,  
13 what we'd like to know is are you going to consider those on the  
14 written memorandums, or are we to have oral argument on those?

15          THE COURT: Let me -- I note that -- in fact, let me  
16 see here. I made note here on the -- there were five motions,  
17 and on the 16<sup>th</sup> of July, which is the same date -- I guess this  
18 was connected with your notice to submit. Was there a request  
19 for oral argument made by any -- either -- any of the parties?

20          MR. BLACK: I think we were asking for oral argument  
21 for -- if it was to be for the Court to happen at this time,  
22 obviously leaving that to your discretion as to whether to hear  
23 them now.

24          THE COURT: Well, it was now, but I mean is the notice  
25 to submit or the motions themselves -- the memoranda -- request



1 oral argument?

2 MR. BLACK: That was my intent. If it was left out, I'd  
3 request that now.

4 THE COURT: Well, it's been my procedure here that -- my  
5 policy that if the parties request oral argument I grant it.

6 MR. BLACK: Very well.

7 THE COURT: But we're not able to -- at this point to  
8 schedule the hearing on that. Let me take a look at -- I do have  
9 the notice to submit, and that was one thing I was going to  
10 indicate. There is a notice to submit, and so it is handled in  
11 due course. We'll arrange to set it for -- Nicki's going to say  
12 something to me that --

13 (Court confers with court clerk)

14 THE COURT: Nicki reminds me that I had broached the  
15 subject with her and we decided to take a minute or two here, see  
16 if we couldn't schedule it if everyone is prepared to schedule  
17 it.

18 MR. BARRETT: Your Honor, may I add just one other  
19 thing, at the risk of being presumptuous. We had gone to the  
20 effort -- and it's been no small effort because of the number of  
21 parties -- to schedule mediation, and that's scheduled for July  
22 20<sup>th</sup> --

23 MS. PORTER: August 20<sup>th</sup>.

24 MR. BARRETT: August 20<sup>th</sup>, sorry. August 20<sup>th</sup>, a little  
25 (inaudible). I think that this particular issue between Sorensen

1 (inaudible) is pivotal if that's going to be successful, and I  
2 know there's heavy demands on the Court's calendar, but I just  
3 want to make the Court aware of that.

4 THE COURT: All right. That's -- when is your  
5 mediation?

6 MR. BARRETT: August 20<sup>th</sup>.

7 THE COURT: August 20<sup>th</sup>. All right. As I say, my  
8 question is is in terms of these five motions, which there is a  
9 notice to submit, we thought we might see if you're in a position  
10 to take just a minute here and with everyone present and try to  
11 schedule that. Is everyone in a position to do that?

12 MR. CURTIS: Sure.

13 THE COURT: All right.

14 MR. ROSE: Your Honor, could I just make one comment?  
15 Rick Rose on behalf of Pacific Corp. One of the motions that  
16 John Clayton has filed that I don't think is subject to that  
17 notice to submit is a motion for summary judgment on Pacific  
18 Corp's indemnity claim. We intend in the next about a week or so  
19 to file an opposition to that and a cross motion for indemnity  
20 against the other parties.

21 So I don't know if you want to -- as we're talking about  
22 scheduling a hearing date to include that in that hearing, or  
23 even have yet a third hearing. I just wanted to raise the issue  
24 that we do anticipate there being motions for summary judgment  
25 filed on Pacific Corp's indemnity claim -- third party indemnity

1 claim.

2 THE COURT: Well, let me say this. I want to do that  
3 in just a minute or two if we can do it. If we can't do it in a  
4 minute or two, we will find some other way to do it, but I think  
5 we need to schedule a hearing and give you sufficient time, but  
6 if it's going to be an omnibus hearing all pending motions, then  
7 I'm willing to do that. All pending motions?

8 MR. BLACK: I did agree that the motion that Mr. Rose  
9 is talking about was my motion dealing with the High Voltage  
10 Overheard Lines Act. I'm certainly willing to have all those at  
11 the same time provided they have adequate time to respond.  
12 That's -- that I would give them.

13 THE COURT: Well, we can set it that way, but I --

14 MR. BLACK: The sooner the better, but with the time  
15 that Mr. Rose needs to respond.

16 THE COURT: Well, the argument there would be -- well,  
17 I want to be efficient with this, but I don't want to be in a  
18 situation in which we have so many motions, so many parties to be  
19 heard that everyone gets about three minutes. That's not very  
20 helpful to you or to me.

21 MR. ROSE: I think it makes sense probably for our  
22 indemnity claim, let's just argue that separately.

23 THE COURT: Well, that may be what I'm thinking  
24 here. So I think maybe these five motions outlined in your --  
25 Mr. Black, in your letter here of the 16<sup>th</sup>, or your request of the

1 16<sup>th</sup>, if we set that at one time, all five of those, that seems to  
2 make sense. Is everyone agreed to that? Does that make sense --

3 MR. BLACK: Yes, it does.

4 THE COURT: -- to argue those five together. If I gave  
5 you 45 minutes?

6 MR. ROSE: I need an hour, I think.

7 THE COURT: An hour sounds good? I'll give you an hour.  
8 That needs to be sometime after -- oh, no, I guess at any time  
9 here that we can find an hour. What I'm going to have to do  
10 because of -- in terms of -- the calendar is pretty well filled  
11 up here, but any day at 1 o'clock, 1 to 2. Let me throw out  
12 Tuesday, August the 3<sup>rd</sup>.

13 MR. BLACK: Tuesday, August 3<sup>rd</sup>.

14 MS. PORTER: I think we can do that. We don't really  
15 have a bog in most of that pipe.

16 THE COURT: All right. I am looking for (inaudible)  
17 Ms. Porter.

18 MS. PORTER: Yeah.

19 THE COURT: For those that -- 1 o'clock the 3<sup>rd</sup> of  
20 August, does that work for everybody -- for those --

21 MR. ROSE: August 3, not 3-0? August 3<sup>rd</sup>.

22 THE COURT: August 3<sup>rd</sup>, which is Tuesday, 1 o'clock, 1  
23 hour, these five motions. Thanks for coming in. We'll send out  
24 notice of that to you.

25 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH            )  
                              ) ss.  
COUNTY OF UTAH        )

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have authorized Natalie Lake to prepare said transcript, as an independent contractor working under my license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

\_\_\_\_\_  
Natalie Lake  
Official Court Transcriber

WITNESS MY HAND AND SEAL this 9<sup>th</sup> day of October 2010.

My commission expires:  
February 24, 2012

\_\_\_\_\_  
Beverly Lowe  
NOTARY PUBLIC  
Residing in Utah County

## **Exhibit 3**

**Decision, *Aguirre/Rosales v. Newell K. Whitney*  
March 3, 2010, the Hon. Steven L. Hansen**

**Memorandum Decision,  
*Christensen v. J. L. Hardy Construction Co.*  
May 25, 2010, the Hon. Denise P. Lindberg**

FILED

MAR 08 2010

4th DISTRICT  
STATE OF UTAH  
UTAH COUNTY 2

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

<p>GUADALUPE RUIZ ORDUNEZ, GUADALUPE ELEN LAZARO ROSALES, and BEATRIZ CHAVEZ SANDOVAL,</p> <p>Plaintiffs,</p> <p>v.</p> <p>NEWELL K. WHITNEY, RISUN TECHNOLOGIES, and MUDDY BOYS, INC.,</p> <p>Defendants.</p>	<p>DECISION</p> <p>Date: March 3, 2010 Case No. 080400743 Judge Steven L. Hansen Division 2</p>
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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*.

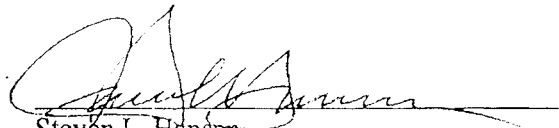
Neither the Utah Court of Appeals nor the Utah Supreme Court has explicitly adopted this section, but Plaintiffs argue that it applies to render each of the Defendants “possessors of land” within the meaning of the open and obvious danger rule. It appears that there are genuine

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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Date: 3-5-10

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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. Plaintiff's 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.

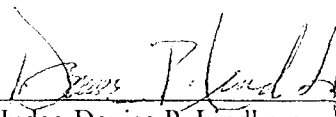
In the present case, even taking the facts in the light most favorable to the Plaintiff, Plaintiff simply cannot show that Defendant “retained control” over the injury-causing activity. It is

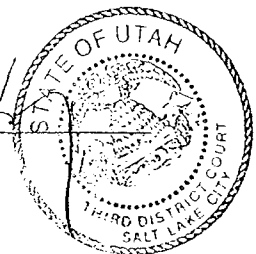
undisputed that Defendant never ordered Cobble Creek to build the wall in a certain manner. Instead, Plaintiff asserts that Defendant should be held *vicariously* liable for the injury suffered because the combined effect of all of Defendant's actions (leaving the trench open, placing dirt hills in inconvenient places, requiring Cobble Creek to keep working or be replaced) effectively controlled Plaintiff's actions to the extent that Plaintiff's 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 Plaintiff's claim under the "retained control" theory fails.

### 3. Causation

Defendant's final argument is that no one saw Christensen's accident and so Plaintiff's can't prove what caused it. This argument lacks merit. Though Plaintiff's 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, Plaintiff's 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.

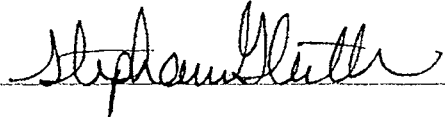
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Date: 5-25-10

  
Deputy Court Clerk