

2010

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

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.

No. 20100671-CA

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REPLY BRIEF OF APPELLANT

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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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## ARGUMENT

### I. RESPONSE TO GONZALEZ'S STATEMENT OF FACTS

Gonzalez did not dispute any of the facts detailed in RSC's Brief of Appellant. However, Gonzalez's Brief of Appellee contains a version of "facts" which are disputed by RSC, but have no bearing on whether the trial court erred when: (1) it ruled that RSC, due solely to its status as a general contractor, was liable as a possessor of land under Restatement (Second) of Torts §384; and (2) it erroneously ruled that the Gonzalez's Amended Complaint sufficiently alleged a premises liability claim against RSC. The aforementioned errors are questions of law for this Court to determine. *See, Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731, 733 (Utah 1995) ("A trial court's decision to grant or deny a motion for summary judgment is a legal one and will be reviewed for correctness. Therefore, all issues in this case will be reviewed *de novo*, giving no deference to the trial court's conclusions.")(internal citations omitted). Additionally the trial court's interpretation "of prior precedent, statutes, and the common law are questions of law that we review for correctness." *See, In re Estate of Ostler*, 2009 UT 82 ¶ 7.

Notwithstanding Gonzalez's attempt to create issues of fact by presenting a one-sided version of the same, this Court is not being asked to weigh issues of disputed fact. Rather, this interlocutory appeal requests this Court to determine whether the trial court erred as a matter of law when: (1) it ruled that RSC, due solely to its status as a general contractor, was liable as a possessor of land under Restatement (Second) of Torts §384; and (2) it

erroneously ruled that Gonzalez's Amended Complaint sufficiently alleged a premises liability claim against RSC. Accordingly, RSC requests that, to the extent that Gonzalez's statement of facts do not address the legal issues noted above, this Court not consider the same.

## **II. THE PLAINTIFF'S ALLEGED "DIRECT NEGLIGENCE" CLAIMS ARE ILLUSORY AND INDISTINGUISHABLE FROM THE CLAIMS PROPERLY DISMISSED BY UTAH COURTS.**

Gonzalez urges this Court to ignore the long established general rule in Utah that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." *Thompson v. Jess*, 1999 UT 22, ¶ 13, 979 P.2d 322. While Gonzalez attempts to creatively circumvent this well established legal rule by characterizing his claims against RSC as "direct negligence" claims, Gonzalez's attempts to do so are illusory and are nothing more than an exercise in creative semantics.

Gonzalez readily admits that his allegations of "direct negligence" as contained in his amended complaint are based in premises liability. *See*, Brief of Appellee at 13. While Gonzalez's attempt to re-cast his allegations as "premises liability" claims will be addressed in further detail in III and IV, *infra*, as will be demonstrated below, none of Gonzalez's allegations are properly characterized as "direct negligence" that would fall outside Utah's retained control doctrine.

As pointed out by the Utah Supreme Court in *Magana v. Dave Roth Construction*, 2009 UT 45 ¶ 22, 215 P3d. 143, the retained control doctrine "...recognizes that one who

hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety or the manner or method of performance implemented." (citing *Thompson*, 1999 UT 22, ¶ 13)(emphasis added)). The commonly accepted reason for the aforementioned rule is that, where the principal employer does not control the means of accomplishing the contracted work, the sub-contractor "is the proper party to be charged with the responsibility for preventing the risk [arising out of the work], and administering it and distributing it." *Id.* (quoting Prosser & W. Keaton, *The Law of Torts* 509 (5<sup>th</sup> ed. 1984)(emphasis added).

It is undisputed that Gonzalez was injured while installing soffit and fascia on the north side of building four. (Record 838). It is further undisputed that JCC was responsible for supervising its employees, was responsible for the safety equipment JCC employees utilized, and had complete control over the method and manner in which it performed its work on the Project. (Record 839 - 840). Finally, it is undisputed that on the day of his injury, the only workers present at building four were Gonzalez and his two co-workers. (Record 836). RSC was not present at the jobsite on the date of the injury, and was unaware of JCC's presence on the Project. (Record 836).

While Gonzalez argues that RSC is liable for his injuries because of the manner of the building's construction or overall site safety, similar arguments have consistently been rejected by Utah Appellate Courts and are not considered "direct negligence" claims. For example, in *Smith v. Hales Warner Constr., Inc.*, 2005 UT App. 38, this Court addressed the



issue of whether the “injury causing aspect of the work” relates in a broad overall sense, *i.e.*, all similar activities on a construction project, or in a narrow sense, *i.e.* only over the activity which caused the injury:

Plaintiffs argue that in this case “control over the manner” of the “injury-causing aspect of the work” relates broadly to all carpentry activities, including framing, of the church. On the other hand, Defendants urge a more narrow view of the “injury-causing aspect of the work,” as including only the manner of framing the wall that fell on Decedent. The trial court interpreted “injury-causing aspect” narrowly, finding that neither H & W nor CPB “exerted control over the means utilized by” the framers “at the time of the [a]ccident.” We agree with the trial court that under *Thompson*, retained control requires active participation in the method or operative detail of the injury-causing activity in order to impose liability.

*Id* at ¶ 10 (emphasis added).

Both RSC and Gonzalez have cited to *Magana* in support of their positions. Consequently, a thorough review of the *Magana* case is necessary to properly address the issues before this Court. From the outset, it is important to recognize that the Utah Supreme Court in *Magana* upheld both this Court and the trial court’s determination that all of Magana’s claims, except for one, were barred by retained control doctrine. The sole surviving claim in *Magana* concerned Magana’s allegation that the general contractor’s supervisor directly participated in the negligent rigging of a load of trusses, *i.e.* negligently rigged the load of trusses himself.

Gonzalez’s theory of “direct negligence” is dependant upon his novel premises liability claim. In articulating his “premises liability” claim Gonzalez specifically directs this

Court to subsections (a), (c) and (h) of Paragraph 28. *See*, Brief of Appellee at 29 – 30.

Gonzalez argues that his “direct negligence” claims are similar to the sole surviving claim in *Magana*; however, Gonzalez’s analogy instantly breaks down when Gonzalez’s Amended Complaint and the Amended Complaint<sup>1</sup> filed in *Magana* are compared. A chart comparing the Gonzalez Amended Complaint and the Magana Amended Complaint follows below:

<b>GONZALEZ</b> At ¶28	<b>MAGANA</b> Addendum 4 at ¶30	<b>Dismissed</b> <b>in</b> <b>Magana</b>
(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 bodily harm.	(A) Failure to properly maintain a safe construction site. (B) Failure to enforce safety rules and procedures on the construction site.	YES
(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 were followed, including cutting off power to the power lines, insulating the electrical lines, and protecting the 10 foot safety circle.	(C) Failure to properly inspect the load before lifting it. (D) Failure to properly oversee the rigging procedure. (E) Failure to oversee the proper use of slings for the load being lifted and/or the conditions. (F) Failure to keep the load from overhead the workers (sic).	YES
(h) 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 then and there existed, have known that it was dangerous and unsafe to do so.	(I) Failure to disclose and warn of known dangers. (K) Failure to correct a known hazardous condition. (R) Failure to warn of the dangerous condition that then and there existed.	YES

<sup>1</sup> A true and correct copy of the Amended Complaint in *Magana* is was provided to the trial court. (Record 1113 – 1133).

As noted above, in *Magana*, the only issue that remained for the trial court was whether “[defendant’s supervisor] indeed assisted in the rigging of the load of trusses that slipped and fell on Magana is a question of fact regarding [defendant’s supervisor’s] direct negligence.” *Magana*, 2009 UT 45, ¶ 39 (emphasis added). None of the remaining claims in *Magana*, including, *inter alia*, the failure to properly maintain a safe construction site, the failure to disclose and warn of known dangers, the failure to correct a known hazardous condition or the failure to implement and follow safe work policies and procedures were held by the Utah Supreme Court to constitute “direct negligence.”

Unlike the instant case, the direct negligence claim in *Magana* originated from the general contractor’s supervisor’s alleged direct participation in rigging the load of trusses that fell on Magana. While the Gonzalez claims that RSC “failed to take reasonable steps to make the premises safe for subcontractors,” the Utah Supreme Court specifically stated that the general contractor in *Magana* “did not owe Magana a duty to ensure that [Magana’s employer] conducted the off-loading process safely.” *Id.* at ¶ 35. The *Magana* Court’s conclusion further illustrates what constituted the defendant’s “direct negligence.” Because of its clear application to this case it is quoted at length:

The court of appeals correctly held that DRC, through its agent Campbell, did not retain control of the off-loading of the truss joists by determining where to place the walls of the restaurant, deciding with Circle T where to off-load the lumber on-site, hiring the crane company that assisted in the off-loading, bearing responsibility for on-site safety, and directly participating in rigging the second load of truss joists. In each instance, Magana's claims either exceeded the scope of the injury-causing aspect of Circle T's work or failed to meet the active

participation standard. But the active participation standard does not apply to Magana's direct negligence theory. By asserting that Campbell himself negligently rigged the truss joists, Magana's negligence claim exceeds the scope of the retained control doctrine because the assertion relates to Campbell's acts, and not the acts of Circle T. Further, Magana's testimony that he witnessed Campbell rig the second load is sufficient to create a factual issue as to direct negligence. Therefore, we reverse the court of appeals' decision and remand this case to the district court for further proceedings consistent with this opinion.

*Id.* at ¶ 40 (emphasis added).

Unlike the general contractor in *Magana*, RSC did not participate in JCC's soffit and fascia work. (Record 836). It is undisputed that no one, save JCC's own employees, was even present and working on building 4 at the time of the accident. (Record 836). By asserting that RSC was negligent because it did not warn JCC or take precautions to ensure that JCC's work on the day of the accident was performed safely, Gonzalez attempts to impermissibly shift JCC's responsibility as "the proper party to be charged with the responsibility for preventing the risk" to RSC. *See*, Prosser & W. Keaton, *The Law of Torts* 509 (5<sup>th</sup> ed. 1984). However Utah law is clear that RSC, "owes no duty of care concerning the safety or the manner or method of performance" of JCC's soffit and fascia work. *Magana*, 2009 UT 45, ¶ 23 (emphasis added).

If adopted by this Court, Gonzalez's premises liability argument would directly undermine the holding in *Magana* and other retained control cases and would impose new and onerous duties upon general contractors in Utah. For example, the following claims properly dismissed in *Magana*, would under Gonzalez's novel theory constitute "direct

negligence”: (1) the failure to properly maintain a safe construction site, (2) the failure to disclose and warn of known dangers, (3) the failure to correct a known hazardous condition, and (4) the failure to implement and follow safe work policies and procedures. Similarly, the claims against the general contractor in *Begaye v. Big D Const. Corp.* 2008 UT 4, 178 P.3d 343, would have constituted “direct negligence” under Gonzalez’s premises liability argument. *See, Begaye v. Big D Const. Corp.* 2008 UT 4 at ¶ 5 fn. 2. (“Begaye also argues that Big D had a contractual duty to provide a safe work environment and is therefore liable-as a matter of law-for injuries sustained by a subcontractor.”) However, both this Court and the Utah Supreme Court have consistently held that, “...one who hires an independent contractor and does not participate in or control the manner in which the contractor’s work is performed owes no duty of care concerning the safety or the manner or method of performance implemented.” *Id.* at ¶ 22 (citing *Thompson v. Jess*, 1999 UT 22, ¶ 13)(emphasis added). Because it is undisputed that RSC did not participate in Gonzalez’s work and indeed, was not even present on the day of the accident, RSC could not have been “directly negligent” as outlined in *Magana*. Based upon the foregoing, RSC is entitled to a reversal of the trial court’s decision and RSC should be granted summary judgment as a matter of law.

### **III. PROXIMITY TO HIGH VOLTAGE OVERHEAD POWER LINES IS A RISK INHERENT IN GONZALEZ’S WORK.**

In advocating for the adoption of § 384, Gonzalez claims that all jurisdictions that have considered § 384 have adopted it. However, Gonzalez reluctantly acknowledges that

only three states of the 22 states cited by Gonzalez have applied §384 in the manner advocated here. *See*, Brief of Appellee at 23. The remaining 19 cases Gonzalez cited to the trial court involved infants, children or other third party members of the public – not an employee of a subcontractor. While Gonzalez still claims “[T]he overwhelming weight of authority across the country,” is in his favor, the fact that only three states have adopted §384 in the manner suggested by Gonzalez and the potential ramifications on prior Utah precedent should give this Court pause. By its definition, Restatement §384 imposes certain duties for “bodily harm to caused to others.” *See*, Addendum C. This language is important. The Utah Supreme Court has already examined similar Restatement language and found that, “[S]ections 413, 416, and 427 each speak of liability for injury ‘to others,’ which implies third parties rather than employees of the independent contractor carrying out the contracted work.” *Thompson*, 1999 UT 22, ¶ 31 (emphasis added). In order to avoid the clear precedent cited above, Gonzalez argues (for the first time in his appeal) that the risk he encountered on the jobsite was not a risk inherent in his work. *See*, Brief of Appellee at 24. However, as will be demonstrated below, Gonzalez’s argument that the risk at issue was not inherent in Gonzalez’s work directly contradicts Gonzalez’s memorandum in opposition to summary judgment and should be rejected by this Court.

Gonzalez readily admits 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.” *See*, Brief of Appellee at 20 (quoting *Thompson* 1999 UT 22, ¶ 31.)

Further, Gonzalez acknowledges, “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?” *See*, Brief of Appellee at 24. Finally, Gonzalez concedes that “Sorensen’s concern...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.” *Id.* (emphasis added). Notwithstanding these admissions, Gonzalez astonishingly claims that even though Gonzalez’s work primarily consisted of installing long lengths of conductive metal siding, soffit and fascia on buildings while utilizing tall metal ladders, proximity to power lines and the associated dangers therewith are not dangers that are inherent in his work. *Id.* at 20, 24. Gonzalez’s argument is absurd on its face, contradicts the position taken in his opposition to summary judgment and should be rejected by this Court.

The first case that addressed the inherent risk issue was *Dayton v. Free*, 148 P. 408 (Utah 1914). In *Dayton*, the Plaintiff was employed as a miner by Stewart Mining Company. The Plaintiff was working on a mine owned by Snake Creek Mining and Tunnel and operated by Free & Taylor. The Plaintiff was drilling into the face of the mine when he struck a “missed hole”, an explosive which had misfired, and was injured when the hole detonated. He sued the owner of the mine (Snake Creek) and the operator of the mine (Free & Taylor):

The alleged negligence is that the defendants failed and neglected to notify or warn him of the missed hole, by reason of which he was injured while he and others, without knowledge of the missed hole, were drilling holes at the face of the tunnel.

*Id.* at 409.



In affirming judgment for the defendants, the Utah Supreme Court held that the hazard of a “missed hole” was a danger incident to the work for which the defendants owed no duty of protection:

And, as has been seen, it having neither reserved nor exercised direction or control over the work, or the time or manner of doing it, it owed him no duty to provide a safe place to work, or to warn or notify him of missed holes, or to guard him 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.

*Id.* at 412. (emphasis added). Eighty-five years later, based in large measure on *Dayton v. Free*, the Utah Supreme Court decided *Thompson v. Jess*, 1999 UT 22, the seminal case in Utah regarding the retained control doctrine.

In order to counter nearly one hundred years of Utah case law, Gonzalez argues for the first time in his appeal that the risk of coming into contact with a high voltage power line is not a risk inherent in his work. This argument is a sweeping departure from Gonzalez’s Memorandum in Opposition to Summary Judgment wherein Gonzalez argued that RSC should have anticipated the harm, notwithstanding the fact that the risk was inherent to Gonzalez’s work. In his memorandum in opposition Gonzalez acknowledged:

In this instance, it is *clearly foreseeable that while in the course of doing the soffit and fascia* and (sic) Jose may have been distracted or forgotten a high voltage power line was nearby.

....

In describing the last-named scenario (the “deliberate encounter exception”), Hale cited as an example the very situation present here: *a worker whose job requires him to encounter a dangerous condition.*

....



Similarly, a jury could reasonably conclude that Sorensen *should have anticipated that a subcontractor, who has to work in the immediate vicinity of the power line, holding large objects or tools in his hands, might inadvertently come into contact with the power line.*

(Record 850)(emphasis added).

RSC submits that Gonzalez's new argument on appeal both departs from and contradicts the argument contained in his memorandum in opposition to summary judgment and should be disregarded by this Court. *See, Pratt v. City Council*, 639 P.2d 172, 173-74 (Utah 1981)("Issues not raised [before the lower court] cannot be raised on appeal.")

To further his new argument, Gonzalez provides this Court with several "straw man" examples, rather than address the obvious, *i.e.*, that a subcontractor that installs long pieces of conductive metal while standing on conductive ladders or scaffolding high above the ground faces several risks inherent in the same, including the potential for contacting a high voltage overhead power line. The first "straw man" attempts to limit Gonzalez's risks inherent to the tools he uses, "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." *See*, Brief of Appellee at 17. This "straw man" ignores other inherent risks associated with Gonzalez's work. For example, because Gonzalez was working high above the ground, both proximity to power lines and falling are risks inherent in his work. In this case, Gonzalez climbed upon another trade's scaffolding without permission and failed to wear any fall protection or to protect against a high voltage power line. (Record 884) Indeed, arguing that RSC created the risk due to the proximity of the

building to the power line is akin to arguing that RSC created the risk of Gonzalez falling due to the building's height. This "straw man" example should be disregarded.

The next "straw man" attempts to limit the dangers working near power lines to only those workers that are working directly on the line itself, "If Gonzalez had been hired to repair or sleeve the power, then proximity to the lines would be inherent to his work." *Id.* at 20. Much like the first straw man, this argument unreasonably limits an inherent risk to only those workers that worked on the power line itself. The case of *Hillabrand v. Drypers Corp.*, 2002 WL 31260045 (Ohio Ct. App., October 10, 2002)(unpublished), a case cited by both RSC and Gonzalez in support for their respective positions<sup>2</sup> is instructive.

In *Drypers*, Drypers Corporation ("Drypers") hired Holt Roofing ("Holt") to perform a roof repair on a commercial building Drypers occupied and leased from another entity. The plaintiff was a supervisor of Holt and was injured when, while standing on the roof, he threw metal debris into a dumpster positioned below. A piece of metal debris inadvertently made contact with a power line causing an electrical flash which injured the plaintiff. The plaintiff brought suit against Drypers, claiming that Drypers negligently positioned the dumpster below energized power lines. Drypers moved for summary judgment based upon the retained control doctrine, which was granted by the trial court. In affirming the trial court, the Ohio

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<sup>2</sup> Gonzalez argues that the *Drypers* case supports their argument that another court has "recognized that retained control and premises liability as separate theories of liability against a general contractor." *See*, Brief of Appellee at 22. However, Gonzalez fails to mention that, much like the "general contractor/owner" in *Hale v. Beckstead*, the "general contractor" in *Drypers* was also the lessee of the property in question thus making a premises liability analysis more appropriate.

Third District Court of Appeals held that proximity to overhead power lines was a danger inherent in roof repair. *Id.* at 5.

The final “straw man” is the most obvious. Gonzalez claims that “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.” *Id.* at 24. While Gonzalez does not indicate how often subcontractors on construction sites encounter a “pit of spikes”, it is reasonable to conclude that subcontractors that work high above the ground encounter power lines on a regular basis. Indeed, a common phrase directed towards not only construction professionals, but to the public at large, is “Look up before you go up.” Indeed, this final “straw man” argument completely ignores Gonzalez’s previous argument to the trial court that notwithstanding the fact that Gonzalez knew of and appreciated the risk, RSC should have anticipated that Gonzalez “who has to work in the immediate vicinity of the power line, holding large objects or tools in his hands, might inadvertently come in contact with the power line.” (Record 850).

As pointed out above, Utah law has long recognized that the employer of the injured worker has the most knowledge of the work to be performed, the risks inherent in the same and is in the best position to assess and control the safety precautions for its employees. Gonzalez’s argument would serve to diminish worksite safety rather than promote it as it advocates taking the primary safety responsibility from the subcontractor most knowledgeable with the work and its particular hazards and places it in the hands of the

general contractor. Consequently, Gonzalez' premises liability argument, while beneficial to Gonzalez, would ultimately make Utah construction projects less safe and should be explicitly rejected by this Court.

#### **IV. GONZALEZ'S AMENDED COMPLAINT DID NOT ADEQUATELY PLEAD A PREMISES LIABILITY CAUSE OF ACTION.**

Gonzalez claims that his amended complaint "plainly stated" a premises liability claim against RSC. However, a review of the allegations and claims in the Gonzalez's amended complaint clearly demonstrates that the claims in Gonzalez's complaint are anything but "plainly stated." Although Utah R. Civ. P. 8 does not demand that a complaint be a model of clarity or exhaustively present the facts alleged, it does require, at a minimum, that a complaint give each defendant fair notice of the plaintiff's claim[s] against it and the grounds upon which the claim[s] rest. *See*, Utah R. Civ. P. 8; *Heathman v. Hatch*, 372 P.2d 990 (1962). The amended complaint filed by Gonzalez utilizes a "shotgun" pleading format that lumps all of the defendants together in each cause of action and provides no factual basis to distinguish their conduct. For example Gonzalez's first cause of action states that, "Defendants breached their duty of care to Plaintiff by, among other things...." (Record 130) Paragraph 28 of the amended complaint then enumerates nine allegations (a – i) one of which (d) contains five subparts towards the "Defendants," not to solely to RSC. (Record 130 – 131) Gonzalez's amended complaint does not differentiate which allegation relates to which defendant; instead, Gonzalez alleges the same conduct against all defendants irrespective the actual applicability of the same.

In a case like this, where multiple defendants are involved and many factually distinct claims are raised, the amended complaint should at a minimum contain specific allegations with respect to each defendant. Generalized allegations that lump multiple defendants together without specifying which defendant is targeted by which allegation is insufficient to permit the any one defendant, or the Court, to ascertain exactly what is being alleged and against whom. *See, Gauvin v. Trombatore*, 682 F.Supp. 1067, 1071 (N.D.Cal.1988) (lumping together of multiple defendants in one broad allegation fails to satisfy notice requirement of Rule 8(a)(2)); *Van Dyke Ford, Inc. v. Ford Motor Co.*, 399 F.Supp. 277, 284 (E.D.Wis.1975) (“Specific identification of the parties to the activities alleged by the plaintiffs is required in this action to enable the defendant to plead intelligently.”); *Atuahene v. City of Hartford*, 10 Fed. Appx. 33 (2d Cir.2001)(“[b]y lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, [plaintiff’s] complaint failed to satisfy this minimum standard....”).

As a consequence of Gonzalez’s failure to distinguish his allegations among the several defendants, it is nearly impossible for RSC or this Court to accurately discern the factual underpinning of each claim. Indeed, most of the claims in Paragraph 28, above, are facially inapplicable to certain defendants and violate Utah R. Civ. P. 11. For example, Gonzalez lacks a rational basis, much less a factual basis, to allege that Rocky Mountain Power breached a standard of care related to the erection of scaffolding; however, Gonzalez’s complaint alleges just that. While Gonzalez claims that his complaint “plainly

stated” a claim for premises liability against RSC, to accept this argument, this Court would also have to conclude that Gonzalez’s complaint “plainly stated” a premises liability claim against Rocky Mountain Power and the stucco subcontractor, R.M. Rees Construction. Furthermore, any claim for premises liability asserted against any defendant other than Orchard Vista, the property’s owner, is facially deficient as a matter of law because Gonzalez’s amended complaint fails to allege that any defendant other than Orchard Vista owned or possessed the property. See, Hevelone v. City Market, Inc., 2005 UT App. 215 (“Hevelone’s failure to allege City Market’s ownership or possession of the fire lane where the hazard was located is fatal to her premises liability claim.”)

Gonzalez’s amended complaint can best be described as a “shotgun complaint.” The amended complaint indiscriminately disperses general allegations against all defendants and then places the burden on each defendant and the Court to specifically identify which allegations potentially pertain to which defendant. In defense of his amended complaint, Gonzalez argues that that if any uncertainty existed, the burden was on RSC and the other defendants to ferret out the deficiencies and inaccuracies in Gonzalez’s deficient pleading through motions or discovery. In essence, Gonzalez argues that RSC and the other parties should have filed costly motions and/or conduct time consuming discovery rather than have Gonzalez distinguish which allegations are directed to which defendant. Indeed, given the fact that Gonzalez readily admits that his premises liability claim is premised upon a legal theory that has not been adopted by a Utah Appellate Court, it is unclear exactly what

discovery RSC should have conducted. Gonzalez's position would require defendants to not only conduct discovery on legally recognized causes of action but to anticipate and conduct discovery on potential causes of action as well regardless of whether or not the cause of action is supported by existing law. Gonzalez's position undermines judicial economy and encourages needless motions and/or discovery and should be rejected by this Court.

As mentioned above, this Court has previously held that a Plaintiff's failure to allege a defendant's ownership and possession is fatal to a premises liability claim. *See, Hevelone v. City Market, Inc.*, 2005 UT App. 215. Gonzalez concedes that RSC was not an "owner" or "possessor" of land. *See*, Brief of Appellee at 33. Instead, Gonzalez argues that in RSC should have realized the possibility a premises liability claim could be predicated solely upon RSC's capacity as a general contractor, because as a general contractor, RSC's legal duties are "the same as" or "analogous to" that of an owner or possessor. Claiming that RSC should have realized that a general contractor's legal duties are "the same as" or "analogous to" that of an owner or possessor of land, implicitly assumes that Utah law recognizes such a legal duty. However, Gonzalez readily admits that Utah has not adopted such a legal duty. *See*, Brief of Appellee at 15. ("The only issue, therefore, is whether Utah would join the majority of jurisdictions in adopting §384. Sorenson correctly notes that the Utah Supreme Court has not yet done so.") This Court should reject Gonzalez's fallacious and circular reasoning. RSC could not have been on notice of a claim that even Gonzalez concedes has not been

recognized in Utah<sup>3</sup>. Consequently, the trial court's determination that Gonzalez sufficiently plead a premises liability claim against RSC, notwithstanding the fact that such a claim is not adopted in Utah, is in error and should be reversed by this Court.

### CONCLUSION

Utah law is clear that RSC, as the general contractor on the Project, cannot be liable for the workplace injury of Gonzalez unless RSC exercised affirmative control over the injury causing aspect of Gonzalez' work. Gonzalez' attempt to recast his claims against RSC as direct negligence and premises liability fail as a matter of law, as they conflict with established Utah law. Utah has not adopted Restatement (Second) of Torts §384 and should not adopt it as it is in direct contravention of Utah's general rule of non-liability. Gonzalez's arguments on appeal concerning whether contact with a power line is a risk inherent in his work are inconsistent with his arguments to the trial court and are merely "straw man" arguments that should be disregarded by this Court. Because it is undisputed that RSC did not directly participate in Gonzalez's performance in the injury causing aspect of the work, the trial court erred in denying RSC's Motion for Summary Judgment.

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<sup>3</sup> The absurdity of Gonzalez's circular reasoning is further demonstrated in Issue 2 of Gonzalez's "Issues Presented on Appeal." *See*, Brief of Appellee at 2. Gonzalez argues that RSC failed to preserve the issue of whether Gonzalez adequately plead a premises liability cause of action because it was not raised until RSC's reply memorandum. In Utah, a reply memorandum is limited to "rebuttal of matters raised in the memorandum in opposition." *See*, Utah R. Civ. P. 7 (c)(1)(emphasis added). RSC's first notice of Gonzalez's premises liability claim came in Gonzalez's opposition to RSC's motion for summary Judgment and RSC was therefore entitled to rebut it. In rebutting this argument RSC properly preserved this issue for appeal.

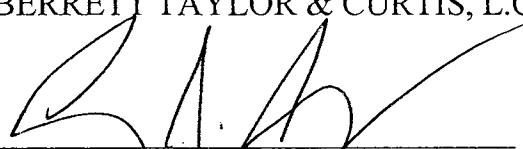


Further, Gonzalez's attempt to impose landowner premises liability duties upon RSC, fail as Gonzalez failed to properly plead or give notice of his premises liability claim. Gonzalez's argument in defense of his deficient pleadings would require a party to anticipate causes of action that are not recognized by Utah Appellate Courts and are inconsistent with established Utah law. Furthermore, because Gonzalez failed to plead that RSC owned or possessed the property in question, his alleged premises liability claim fails as a matter of law.

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

DATED this 29<sup>th</sup> day of July, 2011.

BERRETT TAYLOR & CURTIS, L.C.



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### CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of July 2011, I mailed two true and correct copies of the foregoing Reply Brief of Appellant, postage prepaid to:

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