Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1982

Acculog, Inc. et al v. Keith Peterson : Brief of respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Part of the Law Commons

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Paul W> Mortensen; Harry E. Snow; Attorneys for Appellant;
Nelson L. Hayes; Richards, Brandt, Miller & Nelson; Attorney for Respondent;

Recommended Citation

Brief of Respondent, *Acculog, Inc. v. Peterson*, No. 18133 (Utah Supreme Court, 1982).
https://digitalcommons.law.byu.edu/uofu_sc2/2774

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE

STATE OF UTAH

ACCULOG, INC., a State of Colorado corporation, ROBERT PFISTER and KENTON SHAW, co-partners doing business under the firm name and style of ACCULOG FIELD SERVICES, Plaintiff-Appellant, vs. KEITH PETERSON, d/b/a PETERSON FORD, Defendant-Respondent.	)	Case No. 18133

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY, HONORABLE GEORGE E. BALLIF PRESIDING

NELSON L. HAYES
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110

Attorney for Respondent

PAUL W. MORTENSEN
131 East 100 South
P.O. Box 339
Moab, Utah 84532

Harry E. Snow
82 N. Main
P.O. Box 520
Moab, Utah 84532

Attorneys for Appellant

FILED

SEP 21 1982

Clerk, Supreme Court, Utah

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT OF THE

STATE OF UTAH

ACCULOG, INC., a State of Colorado corporation, ROBERT PFISTER and KENTON SHAW, co-partners doing business under the firm name and style of ACCULOG FIELD SERVICES,	)	
Plaintiff-Appellant,	)	Case No. 18133
vs.	)	
KEITH PETERSON, d/b/a PETERSON FORD,	)	
Defendant-Respondent.	)	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY, HONORABLE GEORGE E. BALLIF PRESIDING

NELSON L. HAYES
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110

Attorney for Respondent

PAUL W. MORTENSEN
131 East 100 South
P.O. Box 339
Moab, Utah 84532

Harry E. Snow
82 N. Main
P.O. Box 520
Moab, Utah 84532

Attorneys for Appellant

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

Page

NATURE OF THE CASE.................................... 1

DISPOSITION IN LOWER COURT.......................... 1

RELIEF SOUGHT ON APPEAL............................. 1

STATEMENT OF FACTS.................................. 2

ARGUMENT.. 6

POINT I: THE VERDICT IN THIS CASE WAS SUPPORTED BY MORE THAN ADEQUATE EVIDENCE ON THE QUESTION OF PLAINTIFFS' COMPARATIVE NEGLIGENCE....... 6

POINT II: THE OBVIOUS EVIDENTIARY BASIS FOR THE JURY VERDICT REQUIRES THAT THE DECISION OF THE COURT BELOW BE AFFIRMED 23

POINT III: THE TRIAL COURT'S DISMISSAL OF PLAINTIFFS' CLAIM FOR LOST PROFITS WAS PROPER INASMUCH AS THE PLAINTIFFS HAD FAILED TO MEET THEIR BURDEN OF PROOF ON THAT SUBJECT. ... 25

CONCLUSION.. 34

CASES CITED

1. McLoud v. Baum, 569 P.2d 1125 (Utah, 1977) 7, 13, 24

2. Thiesen v. Milwaukee Auto Ins., 118 N.W.2d 140 (Wis., 1962)............................... 18

3. State of Alaska v. Kaatz, 572 P.2d 775 (Alaska, 1977)............................. 19

4. Pann Alaska Fisheries Inc. v. Marine Construction and Design Co., 402 F.2d 118 7(W.D. Washington, 1975).. 20

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

5. Pollesche v. Transamerica Insurance Co., 497 P.2d 236 (Utah, 1972) 23

6. Smith v. Shreeve, 551 P.2d 1261 (Utah, 1976) 24

7. Howarth v. Ostergaard, 515 P.2d 442 (Utah 1973) 26

8. Gould v. Mountain States Telephone & Telegraph Co., 309 P.2d 802 (1957) 32

8. Flynn v. Schocker Construction Co., 459 P.2d 433 32

AUTHORITIES CITED

A. Heft & Heft, Comparative Negligence Manual §1,240 16

B. V. Schwartz, Comparative Negligence §17.1 at 276 21

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT OF THE

STATE OF UTAH

ACCULOG, INC., a State of Colorado corporation, ROBERT PFISTER and KENTON SHAW, co-partners doing business under the firm name and style of ACCULOG FIELD SERVICES, Plaintiff-Appellant, vs. KEITH PETERSON, d/b/a PETERSON FORD, Defendant-Respondent.	)	Case No. 18133

BRIEF OF RESPONDENT

NATURE OF THE CASE

Appellants filed suit in the Seventh Judicial District Court, in and for Grand County, against the defendant to recover for damages to their personal property which damage they allege was caused by the negligence of the defendant.

DISPOSITION IN THE LOWER COURT

Appellants' statement of the disposition of this matter in the lower court is accurate and adopted by respondent.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the judgment of the lower court, and the verdict found by the jury, and ask that

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

the verdict be remanded with instructions to the lower court to enter a verdict in favor of the appellants on the question of negligence and to enter a judgment for the stipulated amount of damages. Appellants also ask that the action be remanded to the lower court for a trial on the issue of lost profits and on any other non-stipulated damages.

In the alternative, appellants request a new trial on all issues not stipulated to previously by the parties.

STATEMENT OF FACTS

The facts out of which this case arises are that the appellants, while operating a business for the logging of uranium and other ore materials, for various mineral companies, had a specially-equipped van destroyed, along with its contents, by a fire on or about June 28, 1979.

The fire took place in a remote area south of Moab, Utah at approximately 8:45 p.m.

Prior to the day of the incident, the plaintiffs had experienced difficulty with the van, since its purchase on March 18, 1979. The operators of the van had complained that the van had a tendency to "cut out" and overheat. After experiencing that difficulty for some period of time, they brought the vehicle to the defendant's place of business, requesting repair.

The vehicle was brought to the defendant's garage on the morning of June 28, 1979 and the repair and the evaluation of the problem was handled by one of defendant's employees,

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Mr. Allen Simon. Mr. Simon testified that the vehicle was suffering from three potential problems (T. 237). He determined that there was foreign material in the fuel filter which was precluding the flow of fuel to the carburetor. He testified that there had been a lot of complaints of vehicles "cutting out" and the problem was created by a lot of "dirty gas" around the Moab area. Mr. Simon testified that he replaced the fuel filter, with its accompanying gasket, and the connecting hose, and found no leaks to the system. (T. 242.)

In addition, he found that the overheating could have been possibly caused by a large obstruction, a tire, mounted to the front of the vehicle, which inhibited the flow of air and cooling of the engine. In addition, he found that the ignition system had been altered from that installed by the factory and he was unable to attempt any testing of the ignition system because of the modification. (T. 238.)

Plaintiffs refused to allow any additional work to be done as it related to the emission and cooling systems because of time commitments on the job. (T. 243.)

Thereafter, the plaintiffs' employees picked up the van and drove the van to the drilling site approximately 30 miles south of Moab. Their trip to the logging site was uneventful and their movement of the vehicle between logging holes was without incident. As they began to return from the site, their first indication of a problem as indicated

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

by the driver, was "the strong smell of gasoline when we started down the hill." (T. 85.) They continued to descend down the hill at a very slow speed due to the rocky surface, for up to two minutes. It was at this point that they heard a "popping" sound and discovered the existence of a fire coming from under the wheel wells. The driver and passenger then attempted to extinguish the flames in the engine by opening the hood and throwing dirt and rocks onto the engine. No attempt was made to secure or find a fire extinguisher and what was initially a fire around the carburetor resulted in the total and complete destruction of the van and its contents. (T. 89.)

INVESTIGATION AND EVALUATION OF FIRE

Various opinions were offered at the time of trial to answer the question as to the cause of the fire. Plaintiffs called an engineer by the name of Mr. Robert J. Caldwell who testified that he examined the van several months after the fire as it was parked in a salvage yard in Moab. He indicated that the vehicle had been salvaged and much of the van and equipment had been carried off. He concluded, following his examination, that the fire was fuel fed and concluded that the fire had been caused by the repair work done by Peterson Ford. It was not until several months after his examination and observations that he finally concluded that the defendant had failed to install a gasket with the fuel filter at the time of the repair. However, at the time of trial he indicated that his conclusions were based upon

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

probabilities and he could only assign his conclusion an 80 percent probability. The remaining probabilities were that the engine malfunctioned and that the fire was created or caused by ignition of excessive fuel in the carburetor. (T. 96-155).

Defendant called two expert witnesses who both testified that under circumstances where there is dust and debris or small particles in the fuel which have escaped the filter, that there is a probability that the needles and seats of the carburetor had malfunctioned and an excess of gas is allowed to build up in the carburetor. This situation coupled with the bouncing and jostling of the vehicle would cause the gasoline to "slosh" out onto the manifold, thus causing ignition and a fire. Both of defendant's experts, one a mechanical engineer and another a master mechanic, testified that more than likely the fuel smelled by the driver and the passenger immediately prior to the fire was created by the buildup of gas in the carburetor which subsequently ignited. (T.269-280; T.288-315).

The question of the comparable negligence of the plaintiffs and the defendant was given to the jury and the jury returned a special verdict finding the plaintiffs 86 percent at fault for the injury and damage they sustained and the defendant only 14 percent responsible for the same. The court thereafter entered a judgment, no cause of action, and the plaintiffs filed a motion for a new trial which was denied.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

ARGUMENT

POINT I.

THE VERDICT IN THIS CASE WAS SUPPORTED BY MORE THAN ADEQUATE EVIDENCE ON THE QUESTION OF PLAINTIFFS' COMPARATIVE NEGLIGENCE.

Throughout plaintiffs' entire brief, they have selected, erroneously, the basis for the jury's finding and verdict in this case. They have attempted to demonstrate to this court that there is only one basis upon which the jury was able or capable of finding the plaintiffs negligent. There is nothing in the record which indicates that the jury relied upon one of the acts of negligence of the plaintiffs, more than any of the other acts. Plaintiffs have also thus erroneously characterized the trial tactic of the defendant and in particular its closing argument in this case. Plaintiffs specifically indicate that "the only facts argued by defense counsel during closing argument to prove that plaintiffs were comparatively negligent were facts relating to the plaintiffs' failure to have a fire extinguisher in the van and the plaintiffs' company policy that fire extinguishers should be placed in each van for safety purposes." (P. 49 Appellants' Brief.) That statement, being fatally incorrect, is a misstatement of the proceedings of the trial in this case. It should be recognized by plaintiffs' counsel that defendant's closing argument was only a statement of the facts as seen by counsel and was not necessarily representative of all facts upon which the jury made their findings.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

On page 385 of the transcript in this matter, counsel's argument as to plaintiffs smelling the gasoline prior to the ignition or explosion is clear and proffered for the jury's consideration.

In reviewing a court's ruling on a Motion for a Directed Verdict and a subsequent Motion for a New Trial, it has been this court's position:

> In reviewing the trial court's rulings pertaining to motions for a directed verdict or judgment N.O.V., this court reviews the evidence in the light most favorable to the non-moving party and to afford him the benefits of all inferences which the evidence fairly supports. If reasonable persons could reach different conclusions on the issue in controversy, a jury question exists and the motion should be denied.

McLoud v. Baum, 569 P.2d 1125 (Ut. 1977).

Keeping this pronouncement in mind, let us consider the position taken by the plaintiffs. Plaintiffs assert that the only evidence considered by the jury as to the negligence of the plaintiffs had to do with their failure to equip their van with a fire extinguisher. Respondent takes the position that singular act of negligence in and of itself was sufficient for the jury's finding but certainly was not the only basis for their finding. During the cross-examination of Mr. Shaw, a part-owner and employee of the plaintiffs' business, the circumstances immediately prior and during the fire were examined. Mr. Shaw testified that after completing the day's work they had started on their way home

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

and driven a mile or two which took approximately ten minutes. The reason the going was so slow was because of the very rough and steep terrain which they were required to traverse.

(T. 84.) Mr. Shaw was then asked,

> "What is the first thing you noticed coming down the hill that seemed out of the ordinary?"

He responded,

> "The strong smell of gasoline when we started down the hill." (Emphasis added)

(T. 85.) Mr. Shaw was then asked:

> Q. How long did you smell the gasoline before the popping sound? I would like you to think really hard about this. How long did you smell the gasoline before you heard the popping sound?
>
> A. I would say about a minute or two. (Emphasis added)
>
> Q. A minute or two?
>
> A. Yes.
>
> Q. And you were traveling down this steep terrain, and going less than five miles an hour in less than a minute or two?
>
> A. Yes.
>
> Q. Did you talk to Mr. Gates about this? Did you say, "We've got to stop," or "We've got to check this out and see what the problem is"?
>
> A. I had it in my mind that I was going to stop at the bottom of the hill and check it out. But I don't remember saying anything to Jim.
>
> Q. But the smell was strong enough that it created some concern to the extent that you were going to stop at the bottom of the hill?
>
> A. Yes.

(T. 86, 87.)

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Mr. Shaw went on to testify that after a minute or two elapsed from the time that he noticed the strong smell of gasoline, he heard a "pop." He characterizes the pop as something similar to a tire blowing out. He then saw flames coming out from under the wheel well and jumped out of the van. When asked whether he turned the engine off, he answered that he was not sure that he turned the engine off but he was sure that he placed the vehicle in "park," and put the emergency brake on. (T. 86.) Mr. Shaw and Mr. Gates, employees and owners of the plaintiffs' vehicle, subsequently attempted to put the fire out by opening the hood and throwing dirt and rocks on the engine where the flame was centered. Their efforts were futile and eventually they stood back and watched the van be consumed by the flames. (T. 86-88.)

Clearly, the actions of Mr. Shaw, the driver of the vehicle, demonstrate a factual situation which reasonable persons could differ on their conclusions as to his negligence and causation of the actual fire. For the sake of argument, we will assume for a minute that the eventual fire was created by the existence of fuel in the engine compartment, either from the fuel filter or from the carburetor itself. In this circumstance, it is clear that at the point Mr. Shaw first noticed the existence of the "strong smell of gasoline" he had up to two minutes to stop his vehicle and investigate the source of the gasoline. It is clear that the jury,

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

given the total factual circumstance as indicated in the record, coupled with the terrain involved and the prior problems encountered by the plaintiffs, could and did find that the plaintiffs themselves were negligent to a degree greater than that of the defendant. It is certainly reasonable for a person to reach the conclusion that if Mr. Shaw had responded to his concerns about the smell of gasoline prior to the actual ignition or "popping" that there probably would have been no fire, explosion or damage to the engine or any other portion of the van. Mr. Shaw himself admits that he had it in his "mind" that he was going to "stop at the bottom of the hill and check it out." His delay of one or two minutes under the circumstances was the actual and proximate cause of the fire and explosion and eventual destruction of the van, etc.

Accordingly, the trial court's denial of Plaintiffs' Motion for a Directed Veridct was proper and mandated. In addition, its denial of the plaintiffs' Motion for a New Trial was proper and was not an abuse of discretion inasmuch as the evidence clearly supported the finding of negligence on the part of the plaintiffs.

In the plaintiffs' attempt to direct the court's attention to one isolated argument, they have missed some of the critical evidence offered at the time of trial, out of the mouth of their own witness.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

There is additionally other evidence that was offered at the time of trial from which the jury, acting as reasonable persons, could conclude that the plaintiffs were negligence. It was the plaintiffs who did not allow a more in-depth examination and evaluation of their vehicular problems on the day of the incident. Mr. Allen Simon testified that it was his finding that there were three possible problems with the vehicle that were creating the symptoms experienced by Mr. Shaw and Mr. Gates. He testified that he undertook to correct one of them, the possible fuel filter problem, but was precluded from doing further work on the ignition system or the cooling system. His testimony on the matter is as follows:

> Q. What happened, Mr. Simon, after you finished checking the filter and the fuel line to see whether it leaked?
>
> A. I went to the service manager, Mr. Charles Lovingood, and explained to him that the two things that I thought were wrong with the van. One being a possible malfunction in the electronic ignition. Also, an inability to test the ignition.
>
> And also I believe the overheating problem was probably caused by a very large spare tire winch assembly on the extended bumper, which was mounted directly in front of the radiator.
>
> Q. Now, tell us a little bit about this ignition system, if you would. First of all, explain to us where it was located on the engine, and as it related to the carburetor system that we had been talking about.
>
> A. Okay, the ignition coil is located approximately right here, and the distri-

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

butor right here. They are both in front of the carburetor. The ignition control box control module is what they call it, is mounted up on the fire wall of the vehicle over here on the van, as visualized in the relation there.

> The factory wiring harness and ignition control box had been removed, and an accessory unit had been put in or substituted, which consisted of some unshielded versus the stock factory shielded connection to the coil.
>
> Q. Can you explain what you mean by "unshielded?"
>
> A. It was not insulated. They were just baked, ah, light strips of copper wire and a little thumb screw that hooked the wires together. It was not a slip-on wire that is shielded against moisture and shortening, type system. They were unshielded and were just bare connections.
>
> Q. Did you have any involvement with the van after having this conversation with Mr. Charles Lovingood?
>
> A. No, he came back to me and said, "They don't have the time to have any of these things done. The vehicle has to be out in the field, so they are going to pick it up. So just put it out in the sidewalk." (Emphasis added)

(T. 243.)

It is reasonable to conclude that the jury additionally found that the plaintiffs were negligent in their refusal to have the vehicle completely and properly inspected and evaluated on the day it was brought into the defendant's facility. If for instance, the jury concluded by the evidence offered, which is clearly demonstrated in the testimony offered by Mr. Lovingood (T. 272-285), that the ignition

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

system was related to the problems being experienced by the plaintiffs, then their refusal to have that ignition system tested or modified requires a finding of negligence. Due to the fact that no one is certain as to the cause of the fire, [plaintiffs' own expert was willing to assign only 80 percent to his opinion,] then the jury was allowed to form their own opinion, based upon the evidence offered, as to how the fire was actually created.

The record in the specific parts indicated above demonstrates that there is more than sufficient evidence to support the jury's finding in this matter, even without considering the question of the lack of a fire extinguisher. As this court has stated:

> In reviewing a trial court's exercise of discretion upon a motion for a new trial, this Court examines the record to determine whether the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. _If there be an evidentiary basis for the jury's decision the denial of the new trial must be affirmed._ (Emphasis added).

McLoud v. Baum, _supra_, p. 1127.

As is indicated above, plaintiffs erroneously choose for the jury which fact it relied upon in answering the special verdict. Plaintiffs' brief emphasizes, and appropriately so, that plaintiffs themselves recognized a standard of care in their industry but due to only time pressures, allowed themselves to breach that duty to themselves.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Mr. Shaw, a part-owner of plaintiffs' business, stated on cross-examination that it was standard procedure, which is what the normal cautious person would do under like circumstances, to have a fire extinguisher on the vehicle. The pertinent part of that questioning went as follows:

> Q. You had an interest in that van, and the contents of the van, isn't that correct?
>
> A. Yes.
>
> Q. And there was expensive equipment in the van?
>
> A. Yes.
>
> Q. And I think "sophisticated" has been the word that has been used, but it was expensive equipment in the van, is that right?
>
> A. Yes.
>
> Q. Have you ever made any attempt to get a fire extinguisher for that van?
>
> A. Well, it was standard practice to have one in our vans. But it was a new van. We just hadn't got around to putting on in it yet.
>
> Q. You hadn't put a fire extinguisher in it yet?
>
> A. No. (T. 90.)
>
> Q. Okay. But it's your testimony at this time, that it's standard procedure to have fire extinguishers on this type of vehicle?
> A. Yes.
>
> Q. And what would be the purpose for having a fire extinguisher on a van like this?
> A. Just safety reasons.
>
> Q. You heard Mr. Gates testify that he felt like at one time you might have contained the fire, is that correct you heard him testify as to that?

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

A. Yes, I heard him.

Q. Did you have the same thought at any time?

A. Well, when I first saw it, I thought we could put it out. (T. 91.)

Q. Is it your opinion that if you have had a fire extinguisher, you would have been able to put that fire out, initially?

A. It's hard to say.

Q. But there is a pretty good chance that you could have though.

A. Yes I think we had a chance.

Q. And you would have put it out at that point, the point that we are talking about, you would have just had an engine fire, is that correct?

A. Yes.

Plaintiffs take the position that the failure to have a fire extinguisher on the van could not be a factor in apportioning negligence. Plaintiffs admit that they cannot find any case law to support the argument but attempt to draw an analogy between the case at bar and those controversies existing over seatbelts and the negligence to be attributed to the non-user. The plaintiffs state in their brief on page 15 that "the seatbelt law is overwhelming to the effect that a plaintiff's failure to use a provided seatbelt cannot be used to bar his recovery." However, the cases cited are those cases which follow the contributory negligence rule and the harsh remedy imposed by that law differs from the philosophy

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

of comparative negligence.

With the adoption of comparative negligence in Utah, Utah adopted a fault concept that apportions liability for damages in proportion to the contribution of each tort-feasor causing the injury or damage. Simply speaking, the comparative negligence concept suggests that every person is and should be responsible to another to the extent he caused the injury or damage. See Heft & Heft Comparative Negligence Manual, §1.240.

When comparative negligence is applied, it abrogates contributory negligence, thus the result need not be an all-or-nothing situation. With the change was ingested into the procedures a blending of contributory negligence with other common law defenses into an aggregate of all the negligence into the apportionment question. In particular was the abolition of the assumption or risk defense.

> With the abolition of assumption of the risk, the doctrine of active and passive negligence arose in the entire comparative negligence concept. Active negligence is contributory negligence which by its nature is the basis of liability and could be a bar to recovery. Passive negligence is the commission or omission of a negligent act that could reduce damage or injury but could never be the basis of liability.

Heft & Heft, supra, §1.240 at 47.

Plaintiffs suggest that seatbelt cases most closely parallel the instant matter. This reasoning appears to be in

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

error. The closest cases for comparison have to do with the Guest versus Host cases.

> When the guest's exposure of himself to a particular hazard is unreasonable, or he fails to exercise ordinary care for his own safety, such conduct is negligence, and is subject to the comparative negligence statute.
>
> Obviously, a guest could be actively negligent and cause a collision. Examples might be where the guest would interfere with the operation of the vehicle; or where he might fail to look under circumstances when he was actively engaged in assisting the operation of the vehicle such as in the fog; or he might fail to warn under certain circumstances, or be actively negligent in some act or omission that was a cause of the collision.
>
> On the other hand, the guest might be passively negligent by riding with a host driver whose known habits and lack of skill presented a hazard. Another example would be where the guest failed to wear a seatbelt. Such negligence would not be a cause of the collision but might be a cause of the injuries suffered by the guest from such hazard.
>
> . . . As the doctrine developed, the court consistently held that a person riding in a vehicle driven by another was under a duty to exercise such care as the ordinary prudent person would exercise under similar circumstances to avoid injury to himself. A test of the guest's negligence was whether under the circumstances he acted with the care that a reasonable prudent man would have exercised under those circumstances. The rule under comparative negligence in Wisconsin is that a person riding in a vehicle driven by another is under the duty of exercising such care as an ordinary

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> prudent person would exercise under similar circumstances to avoid injury to himself. Negligence of a guest is his failure to exercise ordinary care for his own safety.

Heft & Heft, supra, §1.240 at 47-48.

The concept of active and passive negligence was explained by Mr. Chief Justice Hallows of the Wisconsin Supreme Court, in a case where he said:

> By the term "passive negligence" we include conduct of a guest in failing to use ordinary care for his own safety in entering the car or in riding with the host when knowing of a hazard, whether the hazard be a condition of the car, the condition of the driver, his lack of skill, or any other hazard. Such negligence may contribute to or be a cause of the guest's injury or may not, depending on the facts of the accident and the conduct of the host, but such negligence is not a cause of the collision nor the accident. In such a case, the collision or accident may be termed the immediate cause or conduct through which the negligence of the host or other driver, or both caused the injuries to the guest. If a cause of the accident is related to the hazard in respect to which the guest was negligent, such passive negligence of the guest is a contributing cause of his injuries. Active negligence on the part of a guest in failing to exercise ordinary care for his own safety consists of his acts or omissions which directly may be a cause of the accident or collision, e.g., interference with the operation of the car or its operator.

Thiesen v. Milwaukee Auto Ins., 118 N.W.2d 140 (Wis., 1962).

Some jurisdictions have not liked the passive and active label used in the process of comparing fault, but have followed the same basic reasoning as enunciated above. A

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

recent holding of the Alaska Supreme Court closely paralells the reasoning being espoused by respondent in the instant matter. In the case of State of Alaska v. Kaatz, 572 P.2d 775 (Alaska, 1977), the Alaska Supreme Court held that in comparative negligence cases what is being compared is negligent conduct, fault or culpability not causation, either physical or legal. 572 P.2d at 782.

The Kaatz case involved a suit against the State of Alaska for the death of the plaintiff's husband who was killed while riding on a frontend loader which overturned on an icy highway. The plaintiff alleged that the death resulted from the defendant, State's, failure to properly maintain and sand the highway. The State alleged that the decedent's own negligence contributed to his death, "Because he knew the hazardous condition of the highway and the extremely unstable operating characteristics of the machine on which he was riding."

The Court, in summarizing the facts as demonstrated at the time of trial, indicated that the decedent Kaatz, had driven the section of the highway in question before riding as a passenger on the loader. The trial court found that Kaatz was familiar with the characteristics of the loader and knew the conditions of the road, and the company policy forbidding persons to ride as passengers on the loader.

The trial Court, by jury verdict, returned a finding that the State was 85 percent negligent, and Kaatz, 15 percent negligent, even though he was not the operator of the vehicle,

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

but merely a passenger at the time of the incident. The State, however, contended that the decedeant, Kaatz should have been found at least 50 percent responsible for his injuries and damages. The State's argument was made in the context of active and passive negligence, and the Alaska Supreme Court reasoned as follows:

> 'The State asserts that Kaatz was actively negligent and the State passively negligent, and therefore as a matter of law, the greater percent of negligence must be assigned to Kaatz. The State takes the active/passive concept from factual context different from this one. It is not clear that the State's negligence should be classified as passive, and Kaatz as active. In any event, we see little to be gained in importing the active/passive distinction in the comparison of negligence. One of the virtues of comparative negligence is its greater flexibility. See Schwartz, supra, §21-2 at 340. Introducing various standards and concepts from other areas of tort law, and creating from them rigid rules to use in comparing negligence would destroy much of that flexibility. . .
>
> . . . We cannot offer specific quidelines on how to compare negligence. Every case must turn on its own facts. The trier of fact, whether judge or jury must apply its ordinary human experience to the facts revealed by the evidence.'

As the Supreme Court of Alaska so clearly stated, even though it found the concepts of active and passive in-appropriate, the comparison to be made under comparative negligence statutes is conduct, fault, or culpability not causation, either physical or legal. See also, Pann Alaska Fisheries Inc., vs. Marine Construction and Design Co., 402 F.2d 1187 (W.D. Washington, 1975); V. Schwartz, Comparative

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Negligence §17.1 at 276.

The Courts, whether using the active or passive distinction, or simply following the rationale used by the Alaska Court, have made it clear that the negligence of the injured party, where it was not the proximate cause of the accident, could not be used in determining responsibility for injuries to third persons. However, the negligent conduct of the injured party should and has to be used to determine the extent of relief extended to the injured party.

In line with this reasoning is a jury finding that makes the injured or damaged party respond for his own negligence which was not the actual cause of producing the occurrence but added solely to extend the injured party's damages. This appears to be the dilemma the court was faced with in the instant matter as it related to apportionment of negligence. In the discussion that took place, on the record in chambers, it was clear that the court was struggling with the question of comparative negligence under the circumstances presented by this case. In fact, the court considered at one point whether the appropriate principle of law to be mitigation. That consideration was abandoned inasmuch as it did not appropriately apply to the tort concepts being considered nor was the jury being given an opportunity to determine damages and thus, make a determination as to what point damages should be cut off for plaintiffs' failure to act prudently. The court could clearly

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

see from the evidence that whatever the causation, the fire would have caused such nominal or minimal damages had not the plaintiffs been negligent in their duty to protect themselves and their property. In addition, as pointed out by the court in its ruling, there was more than one alleged negligent act from which the jury would be making a determination. The Court stated:

> But I think it's a legitimate matter and can be handled by both of you in your arguments in having it considered as one of the negligent acts, if it is considered to be a negligent act by the jury that affects some portion of the damages, possibly.
>
> (Emphasis added.)

(T.340-242).

The Court's ultimate position on the question is illustrated by the Special Verdict given to the jury for making its determination. Question No. 5 of the Special Verdict reads as follows:

> If you have answered all of the previous questions "yes," then and only then are you to answer this question.
>
> Taking the combined negligence that caused the damage as 100 percent (100%), what percentage of that negligence was attributable to plaintiffs and what percentage was attributable to the defendant. (Emphasis added.)

The question clearly illustrated that the negligence to be compared was that conduct which caused the damage, not that which created the fire. The jury properly responded by apportioning the negligence, or the culpability or fault

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

of both parties as the evidence dictated.

The folly in plaintiffs' position comes from the fact that they have misconstrued the evidence offered as being only one possible act of negligence on the part of the plaintiffs. When the evidence and the record is viewed in a light most favorable to the respondent, and affording the respondent the benefit of all inferences which the evidence fairly supports, it is obvious that the trial court did not abuse its discretion in denying plaintiffs' Motion for a New Trial or a directed verdict on the grounds of insufficiency of evidence. See Pollesche v. Transamerica Insurance Co., 497 P.2d 236 (Utah 1972).

POINT II. THE OBVIOUS EVIDENTIARY BASIS FOR THE JURY VERDICT REQUIRES THAT THE DECISION OF THE COURT BELOW BE AFFIRMED.

Plaintiffs claim, in their Second Point on Appeal, that the trial court erred in refusing to grant the plaintiffs a new trial based on his claim of insufficiency of evidence to justify the jury's verdict. Once again, the totality of their argument is that defense counsel only argued one act of negligence to the jury upon which the jury could make a finding.

The arguments made in Point I of this Brief are reiterated briefly. First, defendant's counsel argued more than one act of negligence on the part of the plaintiff, and accordingly the second point of their appeal is erroneous.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Secondly, even if only one act is argued before the jury, it did not bind the jury to a consideration of that one act of negligence only. As Judge Ballif stated in his decision on plaintiff's motion for a Directed Verdict the jury was entitled to consider the fire extinguisher question, as "one" of the negligent acts.

This Court's decision in the matter of Smith v. Shreeve, 551 P.2d 1261 (Utah, 1976), clearly states the controlling rule of law:

> It must be kept in mind that the granting or refusing to grant a new trial is largely a matter of discretion with the trial judge, and this court will reverse the trial court only for an abuse of discretion in the refusal.

551 P.2d at 1262.

In the case of McLoud v. Baum, 569 P.2d 1125 (1977), this Court was also asked to reverse the lower's Court decision denying a motion for a new trial. In that particular case, this Court concluded that there was nothing in the record to support the plaintiff's claim that there was an abuse of discretion since there was an evidentiary foundation for the jury verdict.

The court further announced that:

> In reviewing denials of motions for a direct verdict, judgment, N.O.V., or in the alternative for a new trial, this court must view the evidence in a light most favorable to the party against whom the motion was made.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> In reviewing a trial court's exercise of discretion upon a motion for a new trial, this Court examines the record to determine whether the evidence to support the verdict was completely lacking, or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. If there be an evidentiary basis for the jury's decision, then denial of the new trial must be affirmed.

It is clear from the record and the inferences which the evidence fairly supports that the questions of negligence and the comparability of negligence were ones which were jury questions, and the jury accordingly ruled. As in the McLoud case, it is clear that there is nothing, nor is anything proffered by the plaintiff's to substantiate that the trial court abused its discretion in denying plaintiff's motion for a new trial.

POINT III.

THE TRIAL COURT'S DISMISSAL OF PLAINTIFF'S CLAIM FOR LOST PROFITS WAS PROPER INASMUCH AS THE PLAINTIFFS' HAD FAILED TO MEET THEIR BURDEN OF PROOF ON THAT SUBJECT

The question of damages is a moot subject if this Court affirms the decision of the court and jury below. However, defendant feels that at least some discussion is required relating to appellant's third point. Point III of Appellant's Brief urges this Court to find that the trial court committed error in granting defendant's motion for a directed verdict as it applied to plaintiffs' claim for loss

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

of profits. Once again, a reflection to the record points out that plaintiffs' failed to meet their burden by establishing those damages to a reasonable certainty necessary for the court to allow the matter to be considered by the jury. A general statement of the law is found in the case of Howarth v. Ostergaard, 515 P.2d 442 (Utah, 1973), wherein the Court stated:

> The problem as to when and under what circumstances damages may be recovered for loss in operating a business is, as is true in so many controversial areas of the law, a coin that has at least two sides to it. The basic and general rule is that the loss of anticipated profits of a business venture involve so many factors of uncertainty that ordinary profits to be realized in the future are too speculative to base an award of damages thereon. The other side of the coin is that damages to a business or enterprise need only be proved with sufficient certainty that reasonable minds might believe from a preponderance of evidence that the damages were actually suffered.

515 P.2d at 445.

It appears that the qualifying factor in finding loss profits is "sufficient cetainty."

In this case being reviewed, the record is replete with numerous statements by plaintiffs' witnesses which clearly demonstrate that the plaintiffs' them selves felt no certainty as to the profits being claimed. Their apparent lack of certainty clearly justified the Court's

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

finding that there was nothing for the jury to rely upon in making an award of such damages. Mr. Cantor, plaintiffs' witness as to the lost profits claim, when testifying concerning the purported contracts and work the plaintiffs were to complete for Amoco Minerals, responded to questioning as follows:

> Q: Now, you testify that on October 10, 1979, you received a contract for the New Mexico Job and that you signed it.
>
> A: Yes.
>
> Q: Were you aware of the Alzada job prior to that time.
>
> A: Yes
>
> Q: And had you made this verbal bid:
>
> A: At that time I signed the contract I had two bids with Amoco
>
> Q: And what are your understandings as to the size of those jobs.
>
> A: It was my understanding the Alzada job was considerably larger.
>
> Q: Did you make any attempt to contact Steve Lewis prior to signing that contract to see if you were being considered for the other job?
>
> A: Yes.
>
> Q: And what did he say?
>
> A: I can't remember specifically, I think I told him that I needed to accept the Lordsburg job because we had only one truck available, or that our second truck had not been completed yet. We were asked if we would do the work, and we said yes, and we would accept the job, but this was before the analysis was final on the Alzada job.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> Q: Are you telling me that you knew the Alzada job would be bigger and would bring more profit to you and you elected to take the New Mexico job anyway.
>
> A: Well, we didn't have any certainty at all that we would have got the bid on the Alzada job. So rather than pass up an opportunity to work on the one month job in New Mexico, we accepted that work rather than risk loosing both jobs.
>
> Q: And you are telling me though, that Mr. Lewis called you four days later and told you that you were their chosen company for doing the project?
>
> A: Yes.
>
> Q: In that conversation you had with Mr. Lewis prior to that time, didn't lead you to believe you were standing in a position to have the job should the contract be formalized.
>
> A: Well I felt I could have both jobs. . . .

(T. 224-225.)

Plaintiffs' uncertainty as to their future business in contracting is explained by their practice in bidding for more jobs than they could possibly handle. (T. 225.)

In fact, when Mr. Cantor was asked concerning work that he had bid on for a unit which had not yet been completed, he made the following admissions:

> Q: Mr. Cantor did you just say that you entered into some contracts for the utilization of that unit that hadn't yet been completed?
>
> A: I hadn't entered into a contract formally, No.
>
> Q: What you are talking about--
>
> A: We had accepted the offer of work.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> Q: Your term, "contract" is that the same term you are using with Mr. Lewis' type of arrangement?
>
> A: Yes.
>
> Q: But it's not a contract, right?
>
> A: No, it wasn't a signed contract.

(T. 232.)

The evidence at trial demonstrated that the plaintiffs' practice was to try to line up enough work to keep their units busy, accordingly, their practice was to talk with any contractors on the basis of doing the work, when in fact they never considered their conversations to be in the nature of an agreement, or contract. In this particular case, the two contracts, which were the subject of plaintiffs' claim for lost profits were identified for the jury and the court as the July, 1979 contract, and the October 30, 1979 contract. Mr. Cantor, during cross examination, indicated that these never became contracts, nor did he consider his conversations with the contractor binding upon the plaintiffs or the contractor. The questioning went as follows:

> Q: On which day did you sign the contract for the Amoco job that was scheduled to start in July, 1979.
>
> A: I didn't sign the contract.
>
> Q: On which day did you sign the contract that was scheduled to start on October 30, 1979
>
> A: I did not sign that contract.
>
> Q: Mr. Cantor, isn't it customarily the

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

practice that if you enter into a contract regarding doing work with these companies that there would be written contract?

A: Yes.

Q: And in this case, there were no written contracts.

A: They were forthcoming. They ususally don't deliver the contracts until immediately before the work is to be done, customarily.

Q: Okay, then until you sign that contract do you feel you are bound on those contracts.

A: No.

Q: Do you think Amoco Minerals was bound on the contract:

A: No.

(T. pp. 216 and 217.)

The reason that Mr. Cantor had the uncertainty, as he described in the portion of the transcript extracted, was that the individual who he was dealing with from Amoco did not have the authority to bind Amoco, nor did he have the authority to contract with Acculog.

Mr. Steven Lewis, an employee of Amoco Minerals, was plaintiffs' principal witness as to loss profits portion of their damages claim. In fact it was Mr. Lewis, upon which they relied for the claimed loss of profits, which would have resulted from the July, 1979, and the October 30, 1979 contracts However, on cross-examination, Mr. Lewis admitted that he was merely an exploration geologist and had no authority to bind Amoco Minerals to any contract, nor did he have authority to

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

make payments on contracts. That examination was as follows:

> Q: Can you sign contracts for Amoco Minerals.
>
> A: No.
>
> Q: Could you, between June and December, 1979 sign contracts?
>
> A: No.

(T. 186.)

> Q: Isn't it also true that before any contract could be entered into with Amoco Minerals during this time, that he had to have the approval of Mr. Squyres?
>
> A: Yes. He had to sign the contract.
>
> Q: And isn't it also true that as a matter of procedure that contracts entered into with logging outfits were done on a written basis, a written formal basis?
>
> A: Contracts were written up, yes.
>
> Q: And at the bottom of those contracts, the contracting party for Amoco Minerals, Mr. Squyers would sign that contract?
>
> A: Yes.

(T. 187.)

Mr. Lewis went on to explain that after the bid proposals were prepared, one of which was that of the plaintiffs, they were presented to Mr. Squyres and he was the one that would make the decision as to the placement of the contract (T. 188.)

No evidence was offered that Mr. Squyres approved any contract with the plaintiffs inasmuch as no contracts were ever signed between Amoco Minerals and the plaintiffs

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

regarding the two contracts. Mr. Lewis' entire testimony was based upon speculation of what Mr. Squyres would or would have not done, and no direct testimony was offered upon which the jury could rely in making their decision. This court has repeatedly indicated that the proof of loss profits must not be completely speculative, or uncertain. See, Gould v. Mountain States Telephone & Telegraph Co., 309 P.2d 802 (1957).

Plaintiffs' additional fatal flaw in the presentation of their claim for lost profits is amplified by their brief on appeal. Their entire argument surrounds that particular evidence, which is demonstrated by the exhibits attached to the brief, of the costs incurred by Amoco Minerals to a separate contractor on the projects in question. That offer of proof merely demonstrated the gross cost of the project to Amoco Minerals, but failed to provide the jury with some ligitimate means of determining the proper measure of damages. In the case of Flynn v. Schocker Construction Co., 459 P.2d 433 (Utah, 1969), the Court stated that a mere offer of the net profits on other jobs was:

> . . .entirely immaterial as the true rule of damages to which he would be entitled in case his contract was wrongfully breached would be the contract price less the amount of money he would have necessarily expended in completing the job."

459 P.2d at 435.

That same measure of damages is applicable in this

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

case inasmuch as even if the contracts had been formed, the plaintiffs' entitlement would have been owing to the difference between the contract price and their cost of performing said contracts. During Mr. Cantor's cross-examination, he was unable to provide for the jury, or the Court, a figure which would be representative of his actual profit. (T. 227.)

The bottom line of this discussion is that the jury found that the plaintiffs' negligence was greater than that of the defendants, and, accordingly, they were not entitled to any relief. However, the Court's ruling granting defendant's motion for a directed verdict as to lost profits was mandated by two important factors:

(1) The fact that no contracts were ever entered into, nor was there any real reliance on those agreements by either the plaintiffs or the contractor.

(2) The proof offered as lost profits, even if the contracts had been performed, were not sufficient for the court to allow the jury to speculate as to those alleged damages. Accordingly, the Court's ruling should be affirmed.

CONCLUSION

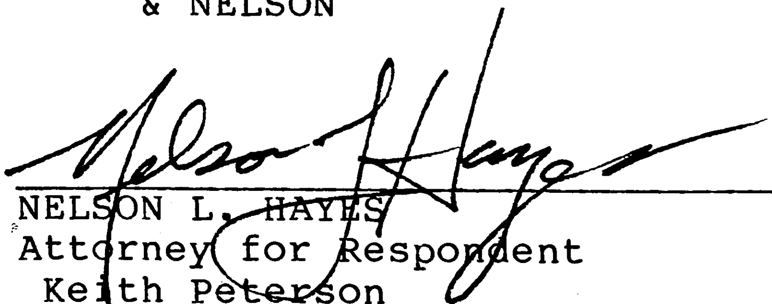
It has always been the position of this court that upon review of a jury's verdict and finding, the evidence must be viewed in a light most favorable to the party against whom the motion for a new trial is made. In this particular case, the jury, based upon numerous factors, concluded that the negligence of the plaintiffs was greater than that of

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

the defendant. To disrupt that particular finding in the face of clearly sufficient evidence on the question of plaintiffs' comparative negligence would be unfair and unsupportable. To intrude upon that province of the jury would undermine participants in the judicial systems reliance upon the jury system, and the respect that it is entitled to in the dispute-settling process. Accordingly, defendant urges the Court to affirm the jury's verdict and the court's findings, including that of its verdict as to the lost profits question.

RESPECTFULLY SUBMITTED this 21 day of September, 1982.

RICHARDS, BRANDT, MILLER
& NELSON



NELSON L. HAYES
Attorney for Respondent
Keith Peterson

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF RESPONDENT was mailed, first-class, postage prepaid on this 21 day of September, 1982 to Paul W. Mortensen, 131 East 100 South, P.O. Box 339, Moab, Utah 84532; Harry E. Snow, 82 North Main, P.O. Box 520, Moab, Utah 84532, Attorneys for Appellant.

Valoy Campbell

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.