

1989

# Gary Hunt v. ESI Engineering, Inc., Domtar Industries, Inc., Lake Point Salt Co., Inc. : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Edward T. Wells; Robert J. Debry and Associates; Attorneys for Plaintiff/Appellant.

Craig R. Mariger; Sue Vogel; Jones, Waldo, Holbrook and McDonough; Attorneys for Defendant/Appellee.

---

## Recommended Citation

Legal Brief, *Hunt v. Domtar Industries*, No. 890719.00 (Utah Supreme Court, 1989).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/2781](https://digitalcommons.law.byu.edu/byu_sc1/2781)

This Legal Brief 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 by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.



GARY HUNT,	)	
	)	
Plaintiff/Appellant,	)	PETITION FOR WRIT OF CERTIORARI
	)	
vs.	)	
	)	
ESI ENGINEERING, INC., a	)	
Corporation, DOMTAR INDUS-	)	
TRIES, INC., a Corporation,	)	
LAKE POINT SALT CO., INC.,	)	Supreme Court No. 910259
a Corporation, and JOHN DOES	)	
I-X,	)	Court of Appeals No. 890719-CA
	)	
Defendants/Respondents.	)	
	)	

EDWARD T. WELLS - A3422  
ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiff/Appellant  
4252 South 700 East  
Salt Lake City, UT 84107  
Telephone: (801) 262-8915

CRAIG R. MARIGER  
SUE VOGEL  
JONES, WALDO, HOLBROOK & McDONOUGH  
Attorneys for Defendant/Respondent  
ESI Engineering, Inc.  
170 South Main, #1500  
Salt Lake City, UT 84101  
Telephone: (801) 521-3200

I.

TABLE OF CONTENTS

	<u>Page</u>
I. <u>TABLE OF CONTENTS</u> . . . . .	ii
II. <u>TABLE OF AUTHORITIES</u> . . . . .	iii
III. <u>QUESTIONS PRESENTED FOR REVIEW</u> . . . . .	1
IV. <u>OFFICIAL REPORTS</u> . . . . .	1
V. <u>STATEMENT OF THE CASE</u> . . . . .	1
VI. <u>FACTS</u> . . . . .	1
VII. <u>ARGUMENT</u> . . . . .	2
<u>CERTIORARI IS ESPECIALLY APPROPRIATE WHERE A</u> <u>CONSTITUTIONAL RIGHT IS INVOLVED</u> . . . . .	2
A. <u>Applicable Law.</u> . . . . .	2
B. <u>Legal Argument.</u> . . . . .	4
1. <u>Modification of the conveyor did not</u> <u>relieve ESI of its negligent failure to</u> <u>design safety devices into the conveyor</u> <u>system.</u> . . . . .	4
2. <u>ESI had a duty to design safety devices</u> <u>into the conveyor system.</u> . . . . .	5
VIII. <u>CONCLUSION</u> . . . . .	6

II.

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<u>Anderson v. Toone,</u> 671 P.2d 170 (Utah 1983) . . . . .	2
<u>Apache Tank Lines, Inc. v. Cheney,</u> 706 P.2d 614 (Utah 1985) . . . . .	2
<u>FMA Acceptance Co. v. Leatherby Insurance Co.,</u> 594 P.2d 1332 (Utah 1979) . . . . .	2, 6
<u>Hunt v. ESI Engineering, Inc.,</u> 158 Utah Adv. Rep. 26 (Utah App. 1991) . . . . .	1
<u>International Harvester Credit Corp. v. Pioneer Tractor &amp; Implement, Inc.,</u> 626 P.2d 418 (Utah 1981) . . . . .	2
<u>Lamkin v. Lynch,</u> 600 P.2d 530 (Utah 1979) . . . . .	2
<u>Rice v. Sioux City Memorial Cemetery, Inc.,</u> 349 U.S. 70 (1955) . . . . .	3
<u>Webb v. Olin Mathieson Chemical Corp.,</u> 9 Utah 2d 275, 342 P.2d 1094 (1959) . . . . .	3, 5
<u>OTHER AUTHORITIES</u>	
<u>Rules of the United States Supreme Court, Rule 10</u> . . . . .	3
<u>Utah Rules of Appellate Procedure, Rule 46</u> . . . . .	3

III.

QUESTIONS PRESENTED FOR REVIEW

1. Certiorari is proper because the court of appeals did not follow binding precedent of this court.

2. Certiorari is proper because the court of appeals misapplied the rules established by this court for the review of grants of summary judgment.

3. Certiorari is proper because the ruling of the trial court denies Gary Hunt his constitutional right to a jury trial.

IV.

OFFICIAL REPORTS

This case is reported at Hunt v. ESI Engineering, Inc., 158 Utah Adv. Rep. 26 (Utah App. 1991).

V.

STATEMENT OF THE CASE

This case is stated in the Petition for Writ of Certiorari at pp. 1-2.

VI.

FACTS

The facts are set forth in the Petition for Writ of Certiorari.

VII.

ARGUMENT

CERTIORARI IS ESPECIALLY APPROPRIATE WHERE  
A CONSTITUTIONAL RIGHT IS INVOLVED

A. Applicable Law.

The right to a jury trial in a civil case is guaranteed by Article I, Section 10 of the Utah Constitution. International Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc., 626 P.2d 418, 421 (Utah 1981).

Summary judgment, when granted, removes the case from consideration by a jury. For this reason, the Utah Supreme Court stated "summary judgment should be granted with great caution in negligence cases." Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614, 615 (Utah 1985). "[negligence issues] are clearly factual matters to be determined by the finder of fact." Lamkin v. Lynch, 600 P.2d 530, 531 (Utah 1979). In FMA Acceptance Co. v. Leatherby Insurance Co., 594 P.2d 1332, 1335 (Utah 1979), this court stated:

Issues of negligence ordinarily present questions of fact to be resolved by the fact-finder. It is only when the facts are undisputed and where but one reasonable conclusion can be drawn therefrom that such issues become questions of law.

In Anderson v. Toone, 671 P.2d 170, 172 (Utah 1983) this court stated:

Unless the evidence is free from doubt so that all reasonable men would come to the same conclusion, negligence is a question of fact.

The balance to be struck between summary judgment and the constitutional right to a jury trial in a negligence case is best stated in Webb v. Olin Mathieson Chemical Corp., 9 Utah 2d 275, 285, 342 P.2d 1094 (1959).

It is the declared policy of this court to zealously protect the right of trial by jury and not to take issues from them and rule as a matter of law except in clear cases.

The criteria given in Rule 10 of the Rules of the United States Supreme Court<sup>1</sup> for granting a petition for writ of certiorari are substantially similar to the criteria for granting certiorari set forth in Rule 46 of the Utah Rules of Appellate Procedure<sup>2</sup>. The United States Supreme Court has ruled that when issues reach constitutional dimensions, the special and important reasons for granting certiorari exist. See, Rice v. Sioux City Memorial Cemetery, Inc., 349 U.S. 70 (1955).

---

<sup>1</sup>Rule 10 of the Rules of the United States Supreme Court provides:

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered: . . .

<sup>2</sup>Rule 46(c) of the Utah Rules of Appellate Procedure provides: Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered: . . .



**B. Legal Argument.**

The Brief in Opposition to Petition for Writ of Certiorari (hereinafter "Opposition Brief") sets forth two arguments which ESI claims support the appeal court's decision. These are: 1) ESI did not design the conveyor which injured Hunt, (Opposition Brief at 12), and 2) ESI did not have a duty to design safety devices. (Opposition Brief at 14).

1. Modification of the conveyor did not relieve ESI of its negligent failure to design safety devices into the conveyor system.

Defendants argue "the factual issue of whether ESI was negligent in its design of the transfer conveyor is reached only if a court first finds that ESI in fact designed the transfer conveyor at issue." Opposition Brief at 13. This is not the real issue. Hunt claims that had ESI designed tail pulley guards into the original system (a duty Hunt's expert witnesses testified ESI could not avoid without negligence) the tail pulley guards would have remained in place when the new frame was installed in 1985. See Petition at 7-17. These tail pulley guards would have prevented Hunt's injury. The real issue is whether failure to design tail pulley guards into the original system was a proximate cause of Hunt's injury. Hunt's experts said yes. Id. Hunt has a constitutional right to have a jury determine whether the 1985 frame change was the reason there were no tail pulley guards in the conveyor system or whether there were no tail pulley guards when

Hunt was injured because ESI negligently failed to design them into the original conveyor system.

The answer to this question is not so "clear" that only one reasonable conclusion can be drawn. See, Anderson v. Toone, supra; FMA Acceptance Co. v. Leatherby, supra; Webb v. Olin Mathieson Chemical Corp., supra. Reasonable minds can differ as to whether the guards were missing because of ESI's negligence or because of the modifications in 1985. Thus, the summary judgment on this issue denied Hunt his constitutional right to have a trial by jury. Webb v. Olin Mathieson Chemical Corp., supra.

2. ESI had a duty to design safety devices into the conveyor system.

ESI claims it had no duty to design safety devices on the conveyor system. Opposition Brief at 14. The testimony quoted at pages 15-18 of the opposition brief to support this claim does not do so. When asked whether there was discussion of guards on the conveyor system, Bonell avoided answering the question. See, Testimony of Bonell, Opposition Brief at 15-16.

However, Hunt's expert testified that the standard of care for design engineers required ESI to design safety systems into the conveyor system. See, Petition at 13-14.

This presents a classic factual dispute. ESI says "we were not asked to design safety." Hunt's experts say "the standard of care requires safety design whether asked for or not."

This is not a case where "but one reasonable conclusion can be drawn." FMA Acceptance Co. v. Leatherby Ins. Co., supra. A reasonable minded juror could certainly conclude ESI had a duty to design a safe system.

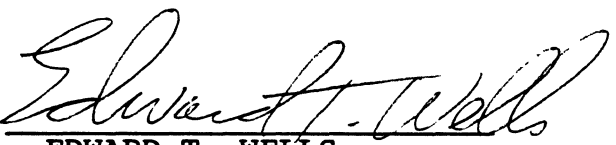
VIII.

CONCLUSION

Certiorari should be granted to determine whether the decision of the court of appeals denies to Hunt his constitutional right to a jury trial on disputed negligence issues. At stake in this case is the constitutional right to trial by jury. Because a constitutional right is involved, review of this case by Writ of Certiorari is warranted.

DATED this 6<sup>th</sup> day of August, 1991.

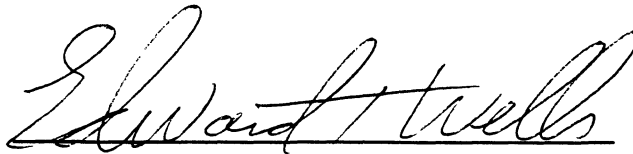
ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiff

BY:   
EDWARD T. WELLS

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing PETITION FOR WRIT OF CERTIORARI (Hunt v. ESI Engineering, Inc., et al.) were mailed this 17<sup>th</sup> day of August, 1991, to the following:

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

A handwritten signature in cursive script, reading "Edward H. Wells", written over a horizontal line.

2397-065\jn