1971

Leon C. Smith v. Alfred Brown Company : Appellant's Brief

Utah Supreme Court

Jackson Howard; Attorney for Plaintiff-AppellantsRaymond M. Berry; Attorney for Defendant-Respondent

In The Supreme Court of The State of Utah

LEON C. SMITH,
Plaintiff and Appellant,

vs.

ALFRED BROWN COMPANY,
Defendant and Respondent.

Case No. 12,399

APPELLANT'S BRIEF

Appeal from Judgment the
Fourth Judicial District Court,
Utah County, State of Utah
The Honorable Allen B. Sorensen, Judge

Jackson Howard, for:
HOWARD AND LEWIS
Delphi Building
120 East 300 North
Provo, Utah
Attorney for plaintiff-appellants

Raymond M. Berry
Seventh Floor, Continental Bank Bldg.
Salt Lake City, Utah
Attorney for defendant-Respondent

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STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries sustained by plaintiff as a consequence of defendant's negligence in failing to provide a safe place for plaintiff to work and defendant's failure to comply with general safety orders of the Utah Industrial Commission.

DISPOSITION IN LOWER COURT

The court granted defendant's motion for summary judgment in favor of the defendant and against the plaintiff, no cause of action.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks an order remanding the case to the trial court for a new trial.

STATEMENT OF FACTS

Defendant Brown contracted with Brigham Young University for construction of a high rise dormitory kown as Deseret Towers Resident Hall V. Brown entered into a subcontract with Ashton Construction Company on December 30, 1968, wherein Ashton was to do certain masonary work (See subcontract agreement R169). Plaintiff, Leon C. Smith, age 49, and a mason since 1951, was employed by Ashton as a brick mason on the project. In the course of employment, Smith fell out of a sixth story window and was injured. The window opening was not barricaded as required in the general safety orders of the Industrial Commission of Utah (See safety provisions R-94). Smith testified in his deposition (R-108) that he was working on an interior partition wall and had constructed the wall up to the ceiling. He had to lay the last block by splitting it. He stepped down from the scaffold which was located on the safe side

of the interior wall and saw that the last block was not in proper position. He stepped up on the scaffold which was approximately two and one-half feet high and reset the block. He stepped backward the second time off the scaffold in order to restrike another wall when he stepped on an unknown object that rolled with him. He lost his balance and back peddled some eight feet to ten feet and thence through the window opening and fell six stories to the ground.

Plaintiff filed a motion for summary judgment on August 31, 1970, attaching thereto the affidavit of G. E. Knowlton (R-67) and the Subcontract Agreemet (R-69). The Motion came on regularly for hearing before the court on the 25th day of September, 1970, and the court ordered the deposition of Leon C. Smith published whereupon Mr. Berry made a motion for summary judgment on the following oral grounds: (1) lack of negligence; (2) same employer; and (3) no duty was owed to the plaintiff (R-73).

The court ordered counsel to file memorandum within ten days with the proviso that if the court was leaning in favor of the motion that the court would set the matter for further oral arguments. On December 18, 1970, the court set the matter for trial on May 3, 1971, with a jury (R-77). On December 28, 1970, the court, on its own motion, set the matter for

further oral arguments on the motion for summary judgment (R-76). Oral arguments were heard January 8, 1971, at which time counsel for plaintiff and defendant were instructed to direct their arguments to the matter of causation in particular, contributory negligence, and whether the failure of the defendat to barricade the window could be the proximate cause of the injury and also the question of workmen's compensation (R-81). Even though the court called up the matter of further oral arguments, there was no record kept concerning the arguments. Arguments as to workmen's compensation were tabled and at the court's request, counseln addressed itself to the proposition posed by the court that plaintiff's contributory negligence was the proximate cause of the accident, that the defendant's negligence in failing to barricade the window was not the proximate cause of the accident and therefore, plaintiff was barred from recovery. The only evidence before the court was a description of the accident by the plaintiff in his deposition and other attached exhibits including the Subcontract Agreement.

The court rejected counsel's arguments that there was negligence on the part of the defendant for failing to barricade the windows as required by the safety regulations and that this ommission was a

proximate cause of the accident in that it could have prevented the accident which was a foreseeable occurrence and a reason for the Industrial Commission's safety order requiring barricades on windows to prevent exactly the tpye of accident which occurred. The court at the hearing did not rule on the case after hearing arguments but took the matter under advisement. On January 15, 1971, the court granted defendant's motion for summary judgment (R-82), and ruled on January 18, 1971, that plaintiff had no cause of action and granted summary judgment in favor of defendant and against plaintiff, dismissing the action with prejudice (R-78).

Plaintiff moved the court to enter Findings of Fact and Conclusions of Law (R-86) along with a Motion for New Trial (R-88) which defendant resisted (R-83) and which motions the court denied (R-101). Plaintiff then took its appeal to this honorable court.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN NOT PREPARING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Because of the complex nature of this case and

the many issues involved, plaintiff requested by a motion to the trial court that it enter findings of fact and conclusions of law. The court refused to enter its findings of fact and conclusions of law even after such motion knowing nfull well that plaintiff had to appeal its decision and that counsel was not sure of the basis for the court's ruling. Thus, counsel is left in a puzzled state inasmuchas the basis for the court's granting of a general summary judgment is unknown. Counsel can only second guess the court in its findings and prepare its arguments to this court based upon what he thinks to be the basis of the court decided. This makes appellant's brief very difficult in that counsel must anticipate all reasons upon which the court may have based its decision.

It is true that Rule 52 generally does not require findings of fact and conclusions of law on decisions under Rule 56, however, Rule 52 also has an exception which says:

" . . . or any other motion except as provided in Rule 41 (b)."

Rule 41 (b) states:

> "If the court renders ***judgment on the merits*** against the plaintiff, the court shall make findings as provided in Rule 52 (a). ***Unless***

> ***the court in its order for dismissal otherwise specifies,*** a dismissal under this subdivision and any dismisal not provided for in this rule other than a rule for lack of jurisdiction or for improper venue, operates as an ***adjudication upon the merits.***"

Plaintiff felt that the court in the above case even though it had not heard any testimony from witnesses, and made a determination based upon the merits of the case which had the same effect on plaintiff as if the trial were held, testimony taken, and the court then dismissed the case, no cause of action. Plaintiff felt that by a motion to make findings of fact and conclusions of law to aid in both the appeal, and the knowledge of the court's decision, that the court under Rule 41 (d) was required to make the requested findings of fact and conclusions of law.

A review of the Federal rule from which the Utah rule is modeled reveals that,

> "with respect to Rule 56, the 1946 Amendment adopts the theory that a motion for summary judgment under Rule 56, only questions of law are presented and no findings of fact and conclusions of law are necessary. There is no necessity for findings of fact where facts are not at issue and summary judgment presupposes that there are

> no triable issues of material fact. Although findings are not necessary on a motion for summary judgment, some district judges state in their opinions the reasons for their conclusions that there is no genuine factual issue in dispute or set forth facts which they regard as definitely established. At least one district court has by rule required the moveant to serve and file with his motion 'proposed findings of fact and conclusions of law and proposed summary judgment'. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue." Moores Federal Practice, Vol. 6, Section 56.02 (11), p. 2047.

The theory of no findings of fact because there are no facts at issue is clearly inadequate if facts are in issue and counsel does not know why the court rules as it does. In ***Winter Park Telephone Co. v. Southern Bell Telephone and Telegraph Co.*** 181 F2d, 341, 14 FR Serv. 56 c.41, Case 2, the Fifth Circuit Court reversed a summary judgment for the plaintiff and remanded the case for the making of specific findings of fact and conclusions of law either from the facts in the record or from the trial of the issues in due course as the trial court may deem adviseable and stated where inconsistent hypotheses might reasonably be drawn and as to which the

minds of men might differ . . . In so far as the court holds that, in the absence of a final submission of the case, by both parties, the court may draw fact inferences on a motion for summary judgment, ***it is in error.***" (Emphasis added)

Plaintiff feels that the facts of the case were not before the court in a form that would allow the court to assume the facts were stipulated to or that both parties agreed to the facts. In fact, there are no documents before the trial court which outlined the facts for purposes of stipulating the facts nor was there a document wherein defendant set forth its specific grounds and reasons for its motion for summay judgment. It is submitted that the failure of the court not to submit findings of fact and conclusions of law and in deciding the case without facts to which counsel had stipulated, was in error in this case for the reason that Leon C. Smith, the plaintiff, has not had his day in court, has not had an opportunity ot present evidence in his behalf, and the court refuses to tell him the basis upon which he is kept from his day in court which is at least a breach of the constitutional protections of due process.

POINT II

THE TRIAL COURT ERRED IN CALLING ON

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON ITS OWN MOTION AND IN NOT ESTABLISHING A RECORD UPON WHICH AN INFORMED APPEAL CAN BE BROUGHT BEFORE THIS HONORABLE COURT.

There is no place in the present record where the trial court has established and delineated the issues in the present case and the reasons for granting defendant's motion for summary judgment. It is evident that the motion for summary judgment does not give the grounds and reasons why judgment should be granted except to say that, "there is no genuine issue of fact and that under facts most favorable to plaintiff, the defendant is entitled to judgment in its favor." That statement is incorrect to begin with because plaintiff has never had the chance to present to the court the facts most favorable to him.

The court had stated that it would call the motion for summary judgment on for additional oral arguments only if it were inclined to grant the motion for summary judgment. If it is in fact true that the court was leaning toward granting the motion for summary judgment, it was incumbent upon the court to establish a record upon which an appeal could be made, including a transcript of the oral arguments. It should also be remembered that at the time

the court was hearing defendant's motion for summary judgment, the trial on the matter had been set following a pre-trial conference and plaintiff was preparing for that trial.

Rule 56 (c) has been interpreted not to allow the court to draw factual inferences in favor of the moving party. The moving party has the burden of clearly establishing that there is no genuine issue of fact. While the existence of an important, difficult or complicated question of law is not a bar to a summary judgment, the record must be adequate for decision of the legal question presented by the motion for summary judgment. In ***Moores Federal Practices***, Vol. 6, Sec. 56.16, p. 2447, there is an admonition to district judges that,

> "District courts should not, however, allow the summary judgment procedure to be used in such a manner that almost as much expense and effort is incurred in demonstrating that summary judgment should be denied and that the case should go to trial as the expense and effort involved in the actual trial. And the record before the court must be adequate for decision of the legal issue presented by the motion for summary judgment."

It is submitted that plaintiff has had his case decided against him on an inadequate record. There is

no showing of facts upon which to base a decision - the issues have ot been specifically framed for decision. There are complex issues involved and many disputed matters which require a trial with its direct and cross examination before the legal issues will be brought into focus.

POINT III

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

For purposes of clarification, counsel will address himself to what he thinks are the three main issues of the case: Subsection A. will deal with contributory negligence which counsel believes is the basis of the court's decision; subsection B. will deal with the question of proximate cause which counsel feels influenced the court's decision; and subsection C. will deal with the question of Workmen's compensation which counsel does not feel the court reached and thus did not influence the court's decision, but which counsel will treat in the event the court did base its decision on workmen's compensation.

Rule 56 of the Utah Rules of Civil Procedure has been interpreted many times by this court and the following cases establish guide lines to be followed.

The court in ***Welchman v. Wood,*** 9 U2d 25, 337 P2d 410, stated,

> "Summary judgment is a drastic remedy and courts should be reluctant to deprive litigants of an opportunity to fully present their contentions upon a trial, and therefore, summary judgment should be granted only when under the facts viewed in the light most favorable to the plaintiff, he could not recover as a matter of law."

The court stated in ***Young v. Felornia,*** 121 U 646, 244 P2d 862, certiorari denied, 73 S. Ct. 186, 344 US 886, 97 L. Ed. 685,

> "Where there is any genuine issue as to any material fact, motion for summary judgment should be denied."

The court stated in ***Richards v. Anderson,*** 9 U2d 17, 337 P2d 59 that,

> "Summary Judgment is a severe measure which courts should be reluctant to use and doubt should be resolved in favor of allowing a full trial in the case."

To the same effect was ***Calder v. Siddoway,*** 8 U2d 174, 330 P2d 494,

> "Where pleadings filed and representations made to a trial court at the hearing disputed plaintiff's claim sufficiently to

raise an issue of fact, plaintiff's motion for summary judgment was properly denied."

The court in ***Watkins v. Simonds,*** 11 U2d 46, 354 P2d 852, said,

"Summary judgment as a remedy should be granted with great caution."

The cases of this type containing pronouncement on summary judgment are legion; however, the above cited decisions clearly limit the trial court in its granting of a summary judgment. Also it is established that when a summary judgment is granted against a party, he is entitled to have the Trial Court and Supreme Court on review, consider all of the evidence and every inference fairly to be derived threfrom in a light most favorable to him. Richards v. Anderson, Supra. It has been further stated that on defendant's motion for summary judgment, plaintiff's contentions must be considered in light most favorable to his advantage and all doubts resolved in favor of permitting him to go to trial and only if, when the whole matter is so viewed, he could, nevertheless, establish no right to recovery, should motion be granted. ***Samms v. Eccles,*** 11 U2d 289. To the same effect is ***Foster v. Stead,*** 19 U2d 435, 432 P2d 60. ***Controlled Receivables, Inc. v. Harmon*** 17 U2d 420, 413 P2d 807 and ***Thompson v. Ford Motor Company,*** 395 P2d 62, 16 U2d 30.

The court has also held that a motion for summary judgment is in effect a demur to claim of plaintiff. ***Samms v. Eccles,*** Supra, also, ***Williams C. Moore and Company v. Sanchez,*** 6 U2d 309, 313 P2d 461.

It is submitted that the trial court erred in granting summary judgment in that it decided the case when there were issues of fact and on wcihh reasonable minds could disagree. For purposes of this appeal, it is submitted that the plaintiffs complaint states a claim upon which relief can be granted. Plaintiff alleges that the injuries sustained by him were a result of defendant's negligence and carelessness in failure to cover a wall opening which defendant had a duty to barricade because of the general safety rules of the Utah Industrial Commission, promulgated for the protection of workers and had the defendant complied with the Industrial Commission orer, the accident would not have occurred, and at the time of the plaintiff's injury, the defendant had the exclusive control and management of the facilities where the plaintiff was working and that the accident causing the injuries suffered by plaintiff was one which would not ordinarily happen if the defendant had used proper care and control of the facilities. Thus, if the complaint taken as true, which is required by the cases above stated, the plaintiff has made out a prima facia case based upon

defendant's negligence. In answer to the complaint, the defendant said that the accident was caused by plaintiff's contributory negligence and later amended its answer to allege that workmen's compensation was the paintiff's sole remedy.

The questions of defendant's negligence and workmen's compensation both involve many questions of fact which could never be reconciled. For instance, the subcontract declares Ashton to be an independent contractor which is a major factor to consider in showing that Brown, the prime contractor is not the emplyer of Smith and that it is liable under third person liability as provided by statute. The effect of the safety regulations to show defendant's negligence is also at issue. It must be assumed that the court's major premise for granting defendant' motion is contributory negligence since it was pleaded and the other questions are irreconcilably at issue.

a. ***Contributory Negligence:***

Contributory negligence has long been regarded by the courts as a jury question. There are instances in which summary judgment has been granted where the facts were ot in dispute or were stipulated to and the law was applied as to contributory negligence, however, the record in this case contains no evidence of there being any stipulation of fact, or

soable man which has long been the province of the jury was applied by the judge to the instant case; or did the court consider whether the plaintiff had ever stepped off a scaffold backwards, or whether he had tripped before, or whether he was conscious of th danger of the open window, or whether he should have stepped off on a different place on the scaffold because of the closeness of the window, or whther he thought it was safe to step off the scaffold at the particular place which was close to the window, or whether the duty of safety and care the employee owes himself is increased with the nearness to the window or how far from the window would one have to be before it would be considered safe for him to step off a scaffold. Also unanswered are the questions of what caused plaintiff to stumble, and whether stumbling off a scaffold is a common occurence, and who left the debris on the floor which plaintiff stepped on, and whether the premises was a safe place to work by legal standards.

Under the court's ruling, the stepping off of a scaffold backwards and the stumbling over a piece of debris and losing one's balance is always contributory egligence because the court must base summary judgment on the basis that reasonable minds could not hold otherwise. The cases cited hereinafter clearly show that the standard of care required by a

indeed any testimony based upon the adversary system of direct examination and cross examination concerning the accidet and the facts upon which the question of contributory negligence could be raised. There is the deposition of the plaintiff whereby defendant's counsel through the interrogative process of question and answer tries to elicit from Mr. Smith the facts of the accident itself. A reading of the deposition of the plaintiff (R-108) from page 24 to page 46 reveals quickly that it is not clear exactly what happened and in fact, quite the opposite is apparent, that the deposition, because of the question and answer type of testimony is inconsistent: for example, the plaintiff could not have stepped off the north end of the scaffold as stated on page 30, line 13, and there is question as to exactly where the plaintiff stepped off of the scaffold and the direction in which he was facing, the distance from the window and whether Mr. Smith was on the safe side or danger side of the interior wall; all of which questions are relevant to the question of contributory negligence.

It is submitted that the court assumed facts not properly in evidence and ruled that plaintiff was negligent as a matter of law for stepping off the scaffold backwards and to trip on something and lise his balance. One may ask if the standard of the rea-

is the language of the court concerning negligence wherein, the court stated,

> "Unless the question of negligence is free from doubt, a court cannot pass upon it as a question of law, and if the court is in doubt whether reasonable men might arrive at different conclusions, then such doubt determines the question to be one of fact for the jury and not one of law for the court." (citing cases).

In ***Rogalski v. Phillips Petroleum Company,*** 3 U2d 203, 282 P2d 304, an employee fell into a vat containing caustic soda while spring cleaning his employer's truck on a concrete ramp. The court stated that,

> "Contributory negligence is a question for the jury unless all reasonable men could draw the same conclusions from the facts as they are shown."

The court further stated,

> "A plaintiff will not be held to have been guilty of contributory negligence if it appears that he had no knowledge or means of knowledge of danger."

The court submitted the question of contributory negligence to the jury. To the same effect are the cases of: ***Glen v. Gibbons and Reed Company,*** 1 U2d 308, 265 P2d 1013, wherein the court said,

reasonable man is a matter for a jury to decide and must be based upon all of the facts and circumstances relative to the incident. The case of ***Allison v. McCarthy,*** 106 U 278, 147 P2d 870, involved a railroad employee who was injured as a result of a collision between track cars, one of which he was riding on. The issue in the case was the alleged contributory negligence of the employee who allegedly violated certain safety rules. The court ruled that the question of contributory negligence and the question of the violation of a safety rule as negligece as a matter of law was a question for the jury based upon all the facts available. The court stated,

> "In order to be guilty of negligence as a matter of law, the evidence must be undisputed and the facts must not be conflicting and must clearly prove that persons alleged to be negligent acted in the manner in which a reasonably prudent person would not have acted under the circumstances, or that he failed to act in such a manner as a reasonably prudent person would have acted under the circumstances."

Webb v. Olin Mathieson Chemical Corp., 9 U2d 275, 342 P2d 1094, (1959), involves a case in which a man was injured by an exploding cartridge and the contributory negligence of the man in modifying the rifle. The importance of the case to the istant matter

the information of Ellis, Hansen, and Breeze was a very different accident from that described by Leon C. Smith himself, in his deposition. It is submitted that the plaintiff should be given the opportunity to present his case through direct evidence as to what actually happened so that there would be no question as to the facts involved in the case.

A plaintiff's right to recover is not affected by his having contributed to his injury unless he was in fault in so doing. Fault can be predicated upon the plaintiff's conduct only where such conduct was in violation of a duty on his part to exercise care. Contributory negligence, it has been said by the courts, is the neglect of the duty imposed upon all men to observe ordinary care for their own safety. It is the doing of something that a person of ordinary prudence would not do, or the failure to do something that a person of ordinary prudence would do under the circumstances, before one can be held to have been guilty of contributory negligence, ***the court must find that some specific act or omission did not meet the standards exacted by law." 38 Am Jur, Negligence,*** Sec. 181, p. 858. (Emphasis added)

The standard of care by which contributory negligence is to be measured is well set forth in ***38 Am Jur, Negligence,*** Sec. 190, p. 866 wherein it states,

> "Where more than one inference can be drawn as to what a reasoably prudent man would do under patricular circumstances, the question of contributory negligence is one for the jury.";

Moore v. Miles, 108 U 167, 158 P2d 676, states,

> "The question of contributory negligence is for the jury where different conclusions may be reasonably rawn by different minds from the same evidence.";

and ***Yoshitaro Okuda v. Rose,*** 5 U2d 39, 96 P2d 287, where the court said.

> "Wherever there is uncertainty as to the existence of negligence or contributory negligence, the question is one of fact to be settled bya jury regardless of whether the uncertainty occurred because of conflict of evidence or because from the facts adduced, men might honestly draw different conclusions."

From the above cases. it is clear that the question of contributory negligence as a matter of law is actually a question for the jury based upon all the evidence as to plaintiff's reasonable actions in light of his occupation and circumstances. A reading of the depositions of Leon C. Smith, Roy F. Breeze, Martell Ellis, Anthony Hansen and Paul Glen Rasmussen, clearly show that the accident based upon

"The measure of care required by a person in the interest of his own safety is ordinary or reasonable care, according to the circumstances of the case. In other words, ***one must exercise the same degree of care for his own safety as is required of another who is under a duty to protect him against injury.*** No fault is properly to be imputed to a man for not doing what it would have been useless for him to have done. ***The fact alone that the plaintiff sustained an injury does not establish a want of care on the part of either him or the defendant.*** Contributory negligence is to be determined not according to what the plaintiff or decedent might have done, but according to what a reasonable person would have done under the circumstances. Due care for one's own safety does not require the exercise of the highest possible degree of care, or the anticipation of events which while possible, are only slightly probable . . . ***if a person charged with contributory negligence is shown beyond the possibility of reasonable contradiction, to have exercised that degree of care for his own safety which persons of ordinary prudence and like circumstances are accustomed to use, it may be declared as a matter of law that he is not guilty of such negligence. Ordinarily, however, the question whether the plaintiff has exercised ordinary and reasonable care is to be decided by the***

jury." (Emphasis added).

> "Whether a question of contributory negligence is one of law for the court or of fact for the jury must be determined on the afcts of the particular case. Generally, however, the question of contributory negligence is for the jury to decide upon proper instructions. The question of contributory negligence is for the jury when it arises upon a state of facts from which reasonable men fight draw different conclusions, either as to the facts or the conclusions or inferences to be drawn from the facts." 38 Am Jur, Negligence, Sec. 349, p. 1053.

It is obvious that there will be many times in which a person stepping backward off of a scaffold will not be contributorily negligent, or many times in which a person stumbles on something which he does not see for which he will not be contributorily negligent. It is submitted that the duty of care owed plaintiff by himself would best be established by considering the custom of the industry and whether brick masons step backward off scaffolds and whether or not any of them have tripped and lost their balance in doing so. If it is established that there was no fault on the part of the plaintiff, Mr. Smith, in doing what he has done many times before, the question of the negligence of defendant in failing to barricade the window becomes important in

is made." (citing cases)

It is clear that proximate cause can be an omission and defendant's failure to comply with the safety order and provide a safe place to work can be the basis of holding efendant liable in the event plaintiff is ot contributorily negligent.

The following cases demonstrate that a violation of a safety standard such as failure to provide a safe place to work or failure to barricade windows as required by the safety regulations of the State Industrial Commission of Utah impose liability on the defendant for negligence to the extent that contributory negligence as a defense is often barred or at least becomes a jury question.

Among the numerous cases dealing with the question of a person or corporation violating safety standards and being held liable for injuries sustained is ***Butz v. Union Pacific Railway Co.,*** 233 P2d 332, where the court held that whether a railroad in the exercise of ordinary prudence and care should have reasonably foreseen the likelihood of injury and whether additional precautions should have been taken by the railroad to provide employee with a safe place to work were questions for the jury. In ***Stout v. Schll,*** 241 P2d 1109, the court stated,

"It is the ***nondelegable*** duty of a master

that the barricade could have prevented the injury to Mr. Smith.

B. ***Proximate Cause***

The issue of proximate cause was initially raised by the court in oral argument wherein the court posed the question and requested counsel to respond. The issue as the court saw it was to the effect that if plaintiff is contributorily negligent then defendant's negligence cannot be the proximate cause of the accident. Counsel tried to persuade the court that an omission or failure to discharge a duty can be a proximate cause of an accident. It was argued that defendant could have prevented the accident if it had complied with its duty of safety and that failure to do so was a proximate cause of the accident. The court rejected the argument with the contention that proximate cause was an affirmative act.

Proximate cause is defined in ***38 Am Jur, Negligence,*** Sec. 50, p. 695, as,

> "That act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another without which act or omission the injury would not have been inflicted; the cause which leads to produces or contributes to produces, or contributes directly to, the production of the injury of which complaint

to use ordinary care and prudence in providing his servants with a reasonably safe place in which to work, reasonably safe tools and appliances with which to work and reasonably safe and competent fellow servants with whom to work; ***failure*** of any one or more such duties will render the master liable for damages approximately resulting from such failure (citing cases)." (Emphasis added.)

Kelly v. Vogue, 153 P2d 277, involved injuries to an employee when she fell descending a stairway and the employer had violated a safety ordinance by failing to have the stairway provided with a handrail. The jury concluded that the employer was guilty of negligence which was the proximate cause of the injury. The Empoyee had contended that the forward edge of the step gave way causing her to fall, and the employer contended that the risk that xisted in the use of the stairway was open and known to the employee. The question of employees contributory negligence was for the jury.

In ***Powell v. Vracin,*** 310 P2d, 27, involved injuries sustained by defendant's baby sitter when attempting to retrieve dangerous object with which the child had been playing she used a wall opening designed for eventual use as a door, but which had not yet been

provided with outside steps. The court ruled that the evidence would sustain findings of negligence and did not require finding as a matter of law that the baby sitter was contributorily negligent.

Restatement of Torts, Section 483, provies that,

> "If defendant's neguigence consists in the violation of a statute enacted to protect a class of people from their liability to exercise self-protective care, a member of such class is not barred by his contributory negligence from bodily harm caused by a violation of such statute."

The above cases are all in point to a facet of the instant case. The Kelly case is factually similar to the instant case and a the cases have pronouncements of the court as to the duty of the person or entity charged with the safety of the premises. In his case, the one charged with the duty of barricading the windows was the defendant, said duty being a nondelegable duty. Violation of safety regulations has the effect as shown in the Kelly case of abolishing common law defenses. It is submitted that the safety regulations in the instant case were violated and that defendant is negligent and that said negligence abolishes the common law defense of contributory negligence or as stated in other cases makes plaintiff's contributory negligence a jury question.

It is clear that the question of proximate cause, contributory negligence and defendant's negligence are interrelated questions all of which depend on the facts of the case. The cass cited indicate there are fact situations wherein a jury of reasonable men have concluded that plaintiff could recover. It is submitted that these same cases would allow Leon C. Smith to recover in the instant case had not the court erroneously ruled that as a matter of law plaintiff is contributorily negligent and barred from recovery.

If the court's reasoning on proximate cause were correct law, there would be no recovery for railroad crossing cases where the signals or other warning devices failed to work. The reason for safety regulations is to protect against forseeable injury. Certainly, the reason for the safety regulation with which defendant failed to comply was for the protection of workers so they would not fall out of the window. It is forseeable that without fault a workman might stumble and lose his balance and for that reason the forseeable accident is avoided by barricading the window so that it cannot happen. The court did not correctly consider forseeability and the effect of defendant's negligence as the proximate cause of the accident and erred in its decision granting summary judgment.

C. ***Workmen's Compensation.***

The question of workmen's compensation was pleaded as an affirmative defense by defendant by way of amended complaint and was not discussed by the court during oral argument. Counsel believes that workmen's compensation was not the basis of the court's decision but will treat the subject in this brief on the assumption that since the issue was raised, it may have entered into the court's deliberations.

Under Utah Statute, it is clear that workmen's compensation is not always a workmen's exclusive remedy. U.C.A. 35-1-62, states that:

> "When any injury or death for compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee, or in case of death, his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person."

Unless defendant can show that plaintiff was in its "employment" defendant is liable for injuries it caused under the statute.

The term "not in the same empoyment" can best

be interpreted in light of other statutes such as UCA 35-1-42 which states:

> "When any employee procures any work to be done wholly or in part for him by a contractor over whose work he retains supervisin or control and such work is a part or process in the trade or business of the employer, such contractor and all persons employed by him and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed within the meaning of this section, empoyees of such original employer."

and UCA 35-1-42 goes on to say:

> "Any person, firm or corporation engaged in the performance of work as an independent contractor shall be deemed an employer within the meaning of this action."

The statutes have the effect of making Ashton an independent contractor and for purposes of the act, the employer of Smith. There is a question of supervision and control, however, this question is laid to rest because of the agreement between Ashton and defendant Brown wherein paragraph eight entitled "insurance" the relationship of the parties is clearly defined as to workmen's compensation as

follows:

> "Subcontractor shall provide and maintain at all times during the performance of this subcontract the following insurance: (1) liability insurance for protection of subcontractor's employees . . . All insurance required hereunder shall be maintained in full force and effect in a company or companies satisfactory to contractor, shall be maintained at subcontractor's expense until performance in full hereof . . . "

and in paragraph twelve the contract declares Ashton to be an independent contractor and an employing unit as follows:

> "The subcontractor specifically agrees that he is, or prior to the start of work hereunder ***will become, an independent contractor*** and an employing unit as an employer, to all applicable unemployment compensation so as to relieve the contractor of any responsibility or liability for treating subcontractor's employees as employees of the contractor for the purpose of keeping records, making reports and payment of unemployment compensation and workmen's compensation taxes or contributions . . . " (Emphasis

added)

Thus, it is crystal clear that by agreement, the defendant made Ashton an independent contractor and an employing unit for purposes of workmen's compensation. Thus, Ashton, becomes an employer under 35-1-42 of Utah Code Annotated. Defendant, by contract, is relieved from the responsibility of paying the premiums of its independent contractor Ashton and in the bargain loses immunity from suit given to workmen's compensation then exposing itself to liabiity for its negligence under UCA 35-1-62.

A review of the cases dealing with workmen's compensation is rendered somewhat moot in that the question to be determined in those cases is whether or not the employer is an independant contractor which question is decided in the instant case by contract. Representative of the cases are ***Stricker v. Industrial Commission,*** 55 U 603, 188 P 849, 19 ALR 1156, distinguished in 63 U 221, 224 P 885; ***Angel v. Industrial Commission,*** 64 U 105 228 P 509; ***Bison v. Industrial Commission,*** 81 U 58, 21 P2d 536; ***Murch Brothers Construction Company v. Industrial Commission,*** 84 U 494, 36 P2d 1053; and ***Plewe Construction Company v. Industrial Commission,*** 121 U 375, 242 P2d 561. The above cases would all support the proposition that Ashton is an independent contractor. Almost all cases dealt with whether a workman

was covered under workmen's compensation.

Workmen's compensation was based upon a mutual exchange of rights and liabilities between employers and employees. As applied to the instant case, workmen's compensation, because of the quid pro quo concept and the mutual exchange of rights and liabilities, bars plaintiff from suing Ashton, his employer, but does give him the right to sue Brown for Brown's negligence inasmuch as Brown did not pay any premiums and in no way has contributed quid pro quo for immunity from suit. There could be no possible quid pro quo on Brown's part because of the agreement with Ashton that Brown be released from all responsibility under workmen's compensation.

It is submitted that Ashton, plaintiff's employer, is an independent contractor for purposes of workmen's compensation and that the statutes of Utah are written for the mutual benefit of plaintiff and Ashton for purposes of workmen's compensation. Ashton has paid premiums and under a quid pro quo exchange of mutual rights and liabilities is entitled to immunity from suit by plaintiff for injuries incurre on the job. Defendant on the other hand, has paid no premiums, has specifically made Ashton an independent contractor for the purpose of relieving Brown from any responsibility and liability under workmen's compensation, and is not entitled to im-

munity under workmen's compensation statutes, but is subject to liability for its negligence under UCA 35-1-62, which allows an injured empoyee to bring suit against third parties.

CONCLUSION

The court erred in granting defendant's motion for summary judgment in that it had to make factual inferences to make its decision which is a violation of Rule 56 which requires that there be no issues of fact left unresolved. The instant case involves many unresolved issues of fact. The law outlined above set forth guideines for ruling on a summary judgment and the question is a jury question. It is submitted that this plaintiff has not yet had his day in court and this plaintiff appeals to this honorable court for an order remanding the case back to the trial court for trial on the merits and the establishing of an adequate record. The court further erred in not providing findings of fact and conclusions of law which would have aided in the preparation of this brief.

Plaintiff is entitled to a fair trial as provided by the constitution and for that reason prays the court to remand the case to the trial court for that purpose.

Respectfully Submitted,

Jackson Howard