1971

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

Utah Supreme Court

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

IN THE SUPRE
OF THE STA

LEON C. SMITH,
Pla

v.

ALFRED BROWN CO
Defendan

RESPO

Appeal from the
Ge
Honor

Jackson Howard
HOWARD AND LEWIS
120 East 300 North
Provo, Utah 84601
Attorney for Appellant

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CASES CITED

RELIEF SOUGHT ON APPEAL

Alfred Brown Company seeks affirmance of the judgment below.

PRELIMINARY STATEMENT

The parties are referred to as they appeared in the court below. All italics in this brief have been added.

STATEMENT OF FACTS

The appellant in his brief has failed to state clearly and completely the undisputed facts.

This action for personal injuries arose out of an accident that occurred June 25, 1969, during the construction of a high rise resident hall at Brigham Young University.

The defendant, a general contractor, was awarded a contract with Brigham Young University for the construction of "Deseret Towers Resident Hall V." Thereafter the defendant entered into a subcontract on December 30, 1968, with Ashton Construction Company for the masonry work. The plaintiff, age 49, was employed by Ashton Construction as a mason on the above job. He had worked as a mason since 1951 and for Ashton Construction since 1962 (Plaintiff's deposition at 4).

He was the first bricklayer on the job. *Id* at 7.

Once the exterior walls of the resident hall were completed the plaintiff began constructing interior partition walls on each floor of the building.

On the morning of June 25, 1969 the plaintiff worked on the west end of the sixth floor until about 10:00 a.m. *Id.* at 24.

He then went to the east end of the sixth floor and began work on another interior partition wall. To complete the upper portion of the wall he used a 2 1/2 foot high scaffolding parallel to and placed on the west side of the interior partition wall. *Id.* at 28. The east side of the wall was part of the interior of a dormitory room opposite which was an opening in the building's east exterior wall in which a window was eventually to be placed. *Id.* at 26. The window space was approximately 8 feet from the north end of the scaffolding which extended through the door space into the room. See diagram on page 4.

As the plaintiff completed the wall he picked up his tools and jumped backwards off the scaffolding in the direction of the window opening. His foot struck something and rolled with him. *Id.* at 29.

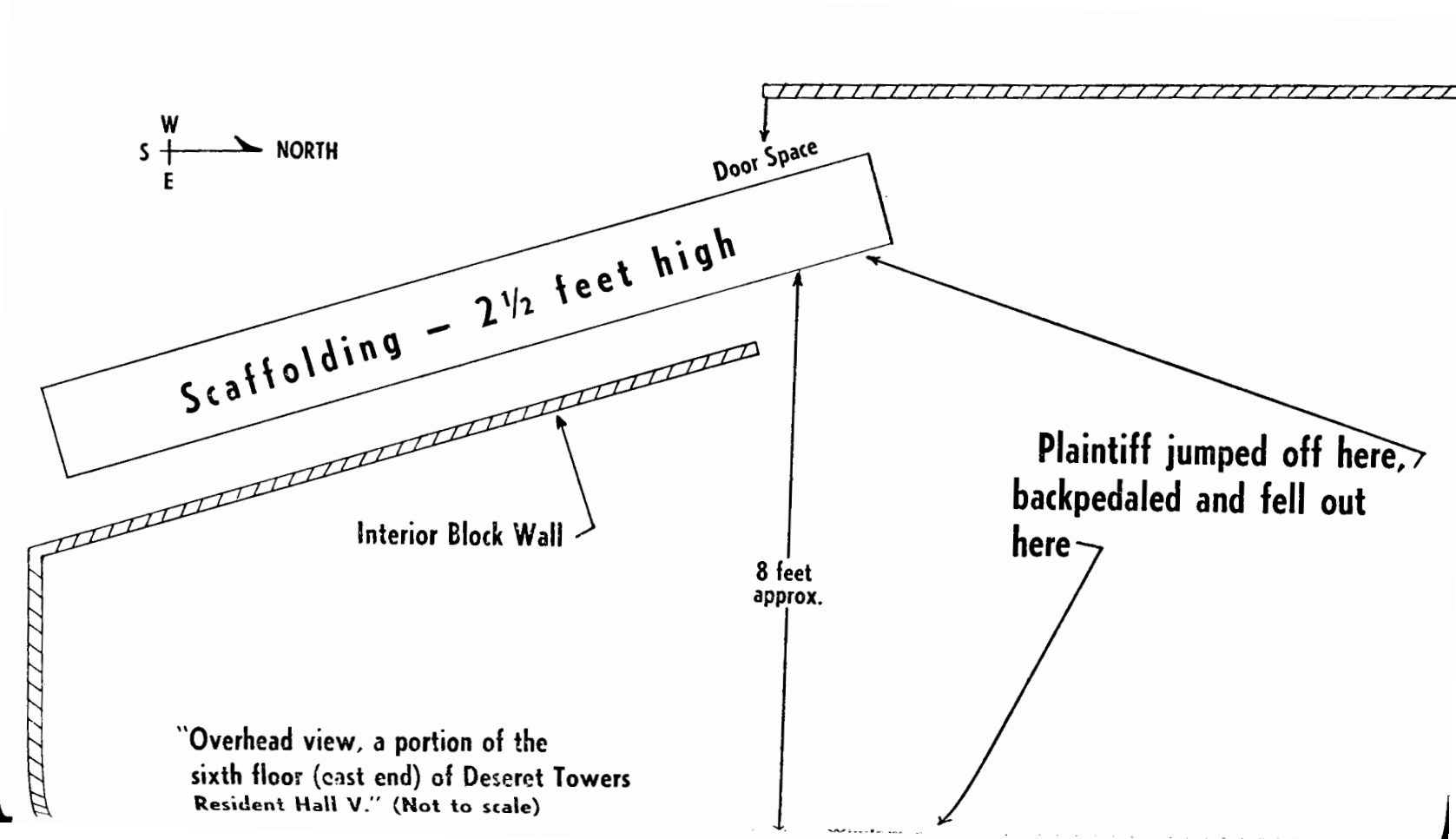
In an effort to regain his balance he backpedaled some 8 to 10 feet and fell out the window to the ground approximately 60 feet below. *Id.* at 39.

The plaintiff, starting at line 23, page 29, of his deposition, described the accident:

"Q. You got the wall clear up to the ceiling when the accident happened?

A. Yes.

Q. You had laid the last block then?



"Overhead view, a portion of the sixth floor (east end) of Deseret Towers Resident Hall V." (Not to scale)

A. I had laid the last block. The last block you lay, we had to split. We had to split it with a saw and lay it in two pieces because of a conduit that goes into the ceiling. We had no way of getting the last block in without splitting the block. I had stepped down once off the scaffold and I had looked up and seen that the block, the last block that I laid, was not in the proper position. So I stepped back onto the scaffold and reset the block, and then I stepped off the scaffold. I was going to restrike, refinish the east side of the wall. I had just stepped off the scaffold and stepped on something that rolled with me. That is when I went backpeddling out of the window.

Q. You stepped off the scaffold? Did you step off an end or did you step off on the side?

A. I stepped off at the end through the door.

Q. Stepped off the north end of it?

A. The north end through the doorway.

Q. As you stepped off, did you step off backward or forward?

A. Backward.

Q. I gather you weren't looking at the floor as you stepped off?

A. I was not looking at the floor.

Q. You were looking up to see if the block that you split was in the proper alignment at the time you stepped off?

A. Not at the time I stepped off.

Q. I see.

A. No, I was just stepping off. I was stepping off preparatory to strike the east — restriking the east side of the wall.

Q. How far down did you have to step now from the scaffold to the floor?

A. Approximately two and a half feet.

Q. And you say you stepped on something that rolled? Which foot hit this object? The left or your right?

A. That would be — I couldn't answer that question.

Q. And you say when you stepped on this you started to kind of backpeddling?

A. I backpeddled.

Q. Did you fall down in anyway before you went through the window, or do you know?

A. No, I did not fall down. I was trying to catch myself.

Q. How far was it from the point where you stepped down in feet to where this window opening was?

A. Approximately eight feet.

Q. Was this window open here the same as on the floors below?

A. The same thing.

Q. Had you requested at any time from your employer that there be any barricade on the windows prior to working on these interior walls?

A. No.

Q. You had observed on the second floor that there was no barricade on the window when you put that one up?

A. There was no barricade on any window on any floor.

Q. And you made no complaint about the absence of a barricade at any time?

A. I had made no complaint. I didn't think that was my job.

Q. Well, you had observed the window, [through], the aperture there at the time you were working, had you not?

A. I was aware of the openings. I am not denying that."

On page 42, line 8, Mr. Smith further describes how the accident occurred.

" Q. Now this round object that you were backpeddling on before you went out of the window, did you ever find that?

A. I never looked for it.

Q. What is your judgment as to what type of a piece of material this was?

A. It could have been a piece of two by four. It could have been a fragment of block. It could have been a fragment of brick. It could have been a piece of conduit.

Q. As far as you know it's just as possible one as the other?

A. That is right.

Q. Before working in this area you didn't ask your employer to have the floor swept or cleaned by any of the hod carriers?

A. The floors were pretty well cleaned.

Q. From the time you started work until the time you fell you were the only person working right in this spot?

A. That is true."

The defendant moved for summary judgment upon the ground there was no genuine issue of fact (R. 64). In oral argument and in a written memorandum to the lower court defendant argued that summary judgment should be granted because the plaintiff was guilty of contributory negligence as a matter of law which proximately caused the injuries of which he complained. The lower court and plaintiff's counsel were told all reasonable men would argue plaintiff was guilty of contributory negligence because he was aware of the window opening when he jumped backward off the scaffold, he knew the window opening was only 8 feet to his rear and he admitted stepping backward from the height of 2 1/2 feet, almost half his own height, without looking at the floor knowing there was debris upon it (Deposition at 14, 29).

After the first hearing on September 25, 1970, the lower court took the motion under advisement, asked counsel to submit briefs, and told counsel that if it was inclined to grant the defendant's motion for summary judgment it would set the case for further oral argument (R. 81). The lower court in accordance with this statement, on January 8, 1971, set the matter for further argument on the issues of causation and workmen's compensation (R. 75, 76).

Summary judgment was thereafter entered in favor of the defendant on January 19, 1971 (R. 78).

ARGUMENT

POINT I. AS A MATTER OF LAW PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

If there is no genuine issue of fact and all reasonable men would agree the plaintiff was guilty of contributory negligence, the plaintiff cannot recover as a matter of law.

Since the plaintiff knew of the window opening behind him, knew it was 2 1/2 feet from his scaffold to the floor and knew there was some debris in the area beneath his scaffold, and was confronted with no situation preventing his looking before jumping or jumping forward, the defendant submits that in jumping off the scaffold with his back to the window opening without at least first looking at the floor the plaintiff was negligent as a matter of law.

The case of *Whitman v. W. T. Grant Co.,* 60 Utah 2d 81, 395 P.2d 918 (1964) is right on point. In *Whitman* the plaintiff, a truck driver, made a delivery of merchandise to the upper floor of the defendant's store and was then directed to the downstairs and out the door. Without looking he walked through a set of double doors and stepped backwards into an elevator shaft. In affirming summary judgment for the defendant this court set forth the principles governing such cases:

> "The plaintiff is confronted with a basic proposition that *when there is a hazard which is plainly visible, ordinarily one is charged with the duty of seeing and avoiding it.* And if he fails to do so, it is concluded that he was negligent either in failing to look, or in failing to heed what he saw." 395 P.2d at 920

The court also explained upon what conditions a jury question will be found to exist in such cases:

> "In order to justify holding that a jury question as to negligence exists, where injury has resulted from an observable hazard, it is essential that there be something which could be regarded as tending to distract the plaintiff's attention or to prevent him from seeing the danger, thus providing some reasonable basis for a finding that even though he exercised due care he could be excused from seeing and avoiding it." *Id.*

In *Knox v. Snow,* 119 Utah 522, 229 P.2d 874 (1951), a customer went to a garage and fell into a grease pit while he was looking up at some tires. He sought to excuse his failure to observe the danger by stating he was not looking. In affirming a directed verdict for the defendant this court said:

> "Plaintiff seeks to justify his failure to observe the danger which was clearly visible because his sole interest was in the tire on the rack; that he didn't see the ladder or the pit because he wasn't looking at the floor or wasn't watching where he was stepping because his interest was centered solely on the tire rack; and that if he was looking he would probably have seen the protruding ladder and pit. It thus becomes apparent that this is not a case where plaintiff used reasonable care for his own safety. *A reasonable person makes some observations along the path he chooses to follow.* In this instance plaintiff was so intent on observing the articles on the rack that he neglected to use the care required of a prudent man traversing a shop having hazards readily discernible, even to one with impaired vision." 229 P.2d at 877

In *Wood v. Wood,* 8 Utah 2d 279, 333 P.2d 630 (1959), the plaintiff entered a dark garage and proceeded along the right side of a car where she could not see. She then turned and fell down a darkened stairwell. She knew about the stairwell but stated that she had temporarily forgotten about it because she was preoccupied with her granddaughter's wedding plans. In affirming the lower court's directed verdict for the defendant this court restated the finding that the plaintiff was negligent as a matter of law for entering "heedlessly into the darkness in an unknown area." 333 P.2d at 632

In *Scoffield v. Sprouse-Reitz Co.,* 1 Utah 2d 218, 205 P.2d 396 (1953), the plaintiff, a candy salesman, called upon the manager of the defendant's store in Elko, Nevada. The manager's officer was located on a platform in the rear of the office. After having a conversation with the manager plaintiff decided to go to his car and get his samples. Without looking, he reached for a nonexistent bannister, lost his balance, and fell over the side of the stairway. In affirming a directed verdict for the defendant this court said:

> "The present case presents an even more obvious situation for contributory negligence than in the *Knox* case, for it does not require that we attribute to plaintiff knowledge of the particular type of place. *He had ample opportunity to observe and, as a reasonably prudent man, should have looked to locate the handrail before he attempted to put his weight on it.* The light was sufficient, he knew that he was on a platform, and although he may have been preoccupied with try-

> ing to make a sale, *he must be held to take the simple precaution of a quick glance to assure himself of safety as would a reasonably prudent man.*" 265 P.2d at 398.

See also *Morris v. Farnsworth Motel,* 123 Utah 289, 259 P.2d 297 (1953); *Henry v. Washiki Club, Inc.,* 11 Utah 2d 138, 355 P.2d 973 (1960); *Tempest v. Richardson,* 5 Utah 2d 174, 299 P.2d 124 (1956).

By plaintiff's own admissions he was well aware of the window opening on the sixth floor. He had worked on all six floors and had often worked at heights presenting an element of danger. He admitted jumping backward off a scaffold almost half his height without first taking even a precautionary glance to the floor to see if it was safe to jump. Nothing necessitated he jump before looking much less jump backwards. Indeed he chose to jump from the scaffold in the only place where a potential danger of which he was well aware existed.

POINT II. THE CONDUCT OF LEON C. SMITH WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT.

Plaintiff's complaint alleges defendant was negligent in only one particular: "defendant negligently and carelessly failed to cover a wall opening where the plaintiff was working . . . (R. 3, paragraph 4)."

Even assuming, for the sake of argument, that defendant was negligent in the manner alleged, plaintiff's conduct was still the sole proximate cause of his injuries.

This court has many times explained the importance in distinguishing the stage from the actors. Probably the leading case in this state on sole proximate cause is *Hillyard v. Utah By-Products Co.*, 1 Utah 2d 143, 263 P.2d 287 (1953):

> "In applying the test of foreseeability to situations where a negligently created pre-existing condition combines with a later act of negligence causing an injury, the courts have drawn a clear-cut distinction between two classes of cases. The first situation is where one has negligently created a dangerous condition . . . and a later actor observed, or circumstances are such that he could not fail to observe, but negligently failed to avoid it.
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> * * *
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> "In regard to the first situation it is held as a matter of law that the later intervening act does interrupt the natural sequence of events and cut off the legal effect of the negligence of the initial actor." 263 P.2d at 292.

In a later case, *Velasquez v. Greyhound Lines, Inc.*, 12 Utah 2d 379, 366 P.2d 989 (1961) this court applied the *Hillyard* rules and held a bus driver who had observed a negligently parked truck ahead of him to be the sole proximate cause of a subsequent collision with the truck.

The court restated the test of proximate cause:

> "[T]his is the test to be applied: did the wrongful act, in a natural and continuous sequence of events which might reasonably be expected to follow, produce the injury. If so, it can be said to be a concurring proximate cause of the injury even though the later negligent act of another . . . co-

> operated to cause it. On the other hand, if the latter's act of negligence in causing the collision was of such character as not reasonably to be expected to happen in the natural sequence of events, then such later act of negligence is the independent, intervening cause and therefore the sole proximate cause of the injury." 366 P.2d at 992

In *Toma v. Utah Power & Light Co.,* 12 Utah 2d 278, 365 P.2d 788 (1961), the court held the negligence of a construction company employer in continuing work in the vicinity of high tension wires without taking steps to have them de-energized was the sole proximate cause of the deceased's death from electrocution when a crane came into contact with a wire. The evidence showed that the construction company knew of the hazard four days prior to the accident. This court said, after examining the facts, that because the construction company knew of the hot wire involved, its later negligence was an independent intervening act of negligence and the sole proximate cause of the accident in question.

This same principle of the foregoing cases has been applied in more recent decisions of this court. See for example, *Anderson v. Parson Red-E-Mix Co.,* 24 Utah 2d 128, 467 P.2d 45 (1970) involving a collision between a car and a cement truck chute, and *Skollingsberg v. Brookover,* 484 P.2d 1177 (Utah 1971), where plaintiff was not allowed to recover for injuries to his leg in a second fall subsequent to defendant's negligence which caused the initial leg injury.

Applying the foregoing principles to this situation it is very clear that plaintiff's conduct was the sole proximate cause of his injuries:

Mr. Smith knew the window was to his rear; he knew that certain debris was always on the floor at construction sites, yet he still jumped backwards off a 2 1/2 foot scaffold in the direction of the window opening without making any advance check on his footing below.

There was nothing natural or continuous about the absence of a covering over the window space that produced Mr. Smith's injury.

POINT III. WORKMEN'S COMPENSATION IS PLAINTIFF'S EXCLUSIVE REMEDY AGAINST THIS DEFENDANT.

The Workmen's Compensation Act encompasses two main objectives. The first is to assure that injured employees will have necessary medical and hospital care and modest but certain compensation for their injuries with resulting benefits to themselves and their families. The second objective is to afford employees protection against possible disastrous claims for injuries which otherwise they may not be able to bear.

The definition of employer in the Utah Workmen's Compensation Act is broad. It is designed to provide workmen's compensation coverage to persons besides those regularly on an employer's payroll. The definition

of employer is found in Utah Code Ann. § 35-1-42 (1953). As far as the section is material it reads:

> "Where any employer procures any work to be done wholly or in part for him by a contractor *over whose work he retains supervision 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, employees of such original employer.* 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 section. The term "independent contractor," as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another, who, while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design."

Paragraph 7 of plaintiff's complaint (R. 4) alleges:

> "At the time of the plaintiff's injury, the defendant had exclusive control and management of the facilities where the plaintiff was working."

The subcontract agreement between defendant and Ashton Construction Company required the latter to provide workmen's compensation insurance with the cost of such insurance to be included in the $102,600 subcontract.

Utah Code Ann. § 35-1-60 (1953) provides that workmen's compensation is an employee's exclusive remedy.

In this situation the defendant and Ashton Construction Company were cooperating on a single project.

Allowing the plaintiff to recover against this defendant in effect requires the defendant to pay twice for the same injury: once under the workmen's compensation coverage for which he has paid and the second time in a civil action. As such, an employee injured under the circumstances secures the full benefits of the Workmen's Compensation Act while not being bound by any of the provisions which would reduce his recovery. One of the major purposes of the Act therefore — to protect an employer from distrastrous claims — is thwarted.

In the recent case of *Gallegos v. Stringham,* 21 Utah 2d 139, 442 P.2d 31 (1968), Gibbons and Reed Company had on its payroll as a truck driver, the plaintiff. The company also hired the defendant Stringham and his truck at a rate of $10 per hour. Stringham paid all the expenses on his truck and was not listed on Gibbons and Reed's payroll. Stringham took orders from Gibbons and Reed's foreman as to when to speed his trips and when to haul back up to the traxcavator and when to drive away. He was not free to haul dirt in any manner other than as he was told. On those facts this court held as a matter of law Stringham was in the same employment as Gallegos even though not on the payroll and workmen's compensation thus was held to be plaintiff's exclusive remedy.

In *Whitaker v. Douglas,* 179 Kan. 64, 292 P.2d 688 (1956), an action was brought by a subcontractor's employee against a general contractor for injuries sustained

when the employee was delivering a truckload of ready mixed concrete. A ramp constructed by the general contractor collapsed causing the truck to upset. The Kansas Workmen's Compensation Act is similar to Utah's and provided where the work subcontracted was part of the contractor's trade and business that workmen's compensation was the exclusive remedy. The court, in pointing out to the plaintiff that workmen's compensation was his exclusive remedy, stated that the transporting of the cement for the construction of the building was part of the trade and business of the general contractor and that, although the wages for the driver were paid by Victory Sand & Gravel Company, he was helping in construction of work to the same extent as if he had been on the direct payroll of a general contractor.

CONCLUSION

The judgment of the lower court should be affirmed.

Plaintiff is 5 feet 7 inches tall. In jumping backwards off the scaffolding (almost half his height) without taking even the slightest glance at his footing below he was negligent as a matter of law.

The window opening through which plaintiff fell was a condition of which plaintiff was well aware. His negligence in intentionally jumping backwards towards that opening was the sole proximate cause of his injuries. If there was any negligence on the part of defendant in not covering that opening it constituted a condition and not a cause of plaintiff's injuries.

Plaintiff is further barred by the workmen's compensation law from suing this defendant. This defendant has already paid for the workmen's compensation coverage providing benefits for plaintiff's accident. Allowing an additional suit would require this defendant to pay twice for the same injury in contravention to the expressed public policy of the workmen's compensation laws.

Respectfully submitted,

Raymond M. Berry of
WORSLEY, SNOW &
CHRISTENSEN
7th Floor Continental Bank
Building
Salt Lake City, Utah 84101
Attorneys for Respondent

MAILING NOTICE

I hereby certify I mailed two copies of the foregoing brief, postage prepaid, to Jackson Howard of Howard and Lewis, 120 East 200 North, Provo, Utah 84601, this ..... day of June, 1971.
