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John T. Curnutte v. Utah Gas Service Co. et al : Brief of Appellant

Utah Supreme Court

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Arthur H. Nielsen; Elias L. Day; Elliott Lee Pratt; Attorneys for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN T. CURNUTTE,

Plaintiff and Respondent,

— Vs. —

UTAH GAS SERVICE COMPANY,
a corporation,

Defendant,

ERMA RANDELL, doing business
as THE LARIAT CAFE,

Defendant and Appellant.

JUNE CURNETTE,

Plaintiff and Respondent,

— Vs. —

UTAH GAS SERVICE COMPANY,
a corporation,

Defendant,

ERMA RANDELL, doing business
as THE LARIAT CAFE,

Defendant and Appellant.

FILED
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Clerk, Supreme Court, Utah

Case
No. 8971

BRIEF OF APPELLANT

ARTHUR H. NIELSEN

ELIAS L. DAY

ELLIOTT LEE PRATT

Attorneys for Appellant

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
FACTS	4
STATEMENT OF POINTS.....	7
ARGUMENT	7
POINT I.	
THE ALLEGED NEGLIGENCE OF THE DEFEND- ANT UTAH GAS SERVICE COMPANY CANNOT BE IMPUTED TO APPELLANT ERMA RANDELL AS A MATTER OF LAW.....	7
POINT II.	
UNDER THE PLEADINGS OF THIS CASE, APPEL- LANT HAS THE RIGHT TO A TRIAL BY JURY ON THE ISSUE OF LIABILITY.....	26
POINT III.	
THE COURT ERRED IN REFUSING TO ALLOW APPELLANT TO FILE A CLARIFYING AMEND- MENT TO HER ANSWER	28
CONCLUSION	31

Authorities Cited

Cases

Callahan v. Salt Lake City, 41 Utah 300, 125 P. 863.....	24
Chiago Economic Fuel Gas Company v. Meyers, 168 Ill. 111, 139, 49 N. E. 66.....	19
De Weese v. J. C. Penney Company, 5 Utah 2nd 116, 297 P. 2d 898, (1956).....	15
General Investment Co. v. Interborough Rapid Transit Co., 235 N. Y. 133, 139 N. E. 216.....	27
Gleason v. Salt Lake City, 94 U. 1, 74 P. 2d 1225.....	16, 24
Johnson v. Cudahy Packing Company, 107 Utah 114, 152 P. 2d 98	14
King v. Mason (La. 95 So. 2nd 705).....	24
Leonard v. Enterprise Realty Company (Ky. 1920), 219 S. W. 1066, 10 A. L. R. 238.....	13
Lindsay v. Eccles Hotel Company, 3 Utah 2nd 365, 284 P. 2d 477 (1955).....	15
Lundberg v. Backman, 9 Ut. 2d 58, 337 P. 2d 433.....	28
Morley v. Rodberg, 7 Utah 2d 299, 323 P. 2d 717.....	11
Murray v. Miller, 1 U. 2d 43, 261 P. 2d 950.....	29
Pennock v. Newhouse Realty Co., 97 Utah 408, 93 P. 2d 482 (1939).....	16
Schermerhorn v. Metropolitan Gaslight Co., (N. Y.), 5 Daly 144, 25 A. L. R. Page 281.....	24, 25

TABLE OF CONTENTS — (Continued)

Statutes and Rules

Utah Rules of Civil Procedure	Page
Rule 15 (a)	28
Rule 38 (a)	26
Rule 56 (c)	7
U. C. A., 1953, Section 78-21-1.....	26

Miscellaneous

18 Am. Jur., "Electricity," Sec. 58.....	25
38 Am. Jur. "Negligence," Sec. 96.....	12
38 Am. Jur. "Negligence," Sec. 97.....	13
10 A. L. R. 238.....	14
57 C. J. S., Master and Servant, Sec. 590, p. 362.....	18
Article I., Sec. 10, Constitution of Utah.....	26
Moore's on Federal Practice, 2nd Ed. Vol. 6, p. 2055.....	29
Moore's on Federal Practice, Vol. 6, p. 2057.....	8
Moore's on Federal Practice, Vol. 6, p. 2123-2126.....	8
Prosser on Torts (2nd Ed.), Chapter 5, Sec. 32.....	11
Prosser on Torts (2nd Ed.), Chapter 15, Sec. 78.....	11
Prosser on Torts (2nd Ed.), p. 357.....	22
Prosser on Torts (2nd Ed.), pp. 361, 362.....	22
Restatement of the Law of Tort, Sec. 415, p. 1125.....	20, 21

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Defendant and Appellant.

Case
No. 8971

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This matter is before the Supreme Court by way of an intermediate appeal granted by the Court to the Appellant, Erma Ransdell, in 18 separate cases. Since the appeal has been docketed, 16 of the 18 cases have been

disposed of and the appeals dismissed upon stipulation. The two remaining cases to be considered involve the claims of John T. Curnutte and June Curnutte, his wife. As stated in Appellant's Petition for an intermediate appeal, the cases involve actions to recover damages alleged to have resulted from an explosion which occurred at The Lariat Cafe in Monticello, Utah, on August 13, 1956. Service of Summons was not obtained upon Erma Ransdell until after the issue of liability in respect to the Defendant Utah Gas Service Company had been determined. On December 21, 1957, a jury returned a verdict in favor of the several Plaintiffs and against the Defendant Utah Gas Service Company to the effect that said Defendant was negligent, proximately causing damages and injuries to the several Plaintiffs. The extent of the damages of the Plaintiffs has never been tried or determined by the Court.

The acts of negligence complained of by the Plaintiffs in each of the actions now before the Court are the same as those contained in the Sallie Sullivan Case, as follows:

“V. That Defendant Utah Gas Service Company negligently installed its gas pipes and negligently connected the propane gas lines at the said Lariat Cafe.

“VI. That Defendants Erma Ransdell and Harold Ransdell, doing business as the Lariat Cafe, negligently invited the public into their place of business and negligently allowed gas to escape in their places of business.

“VII. That the foregoing negligence of the defendants proximately caused the death of Theodore Smith.” (Tr. 2)

In her answer filed February 6, 1958, Appellant admitted the allegations of Paragraph V, but denied the allegations contained in Paragraph VI. Likewise, the Defendant denied the allegations of Paragraph VII and answered as follows:

“7. Defendant admits that the negligence of the Defendant Utah Gas Service Company proximately caused the death of Theodore Smith, but otherwise denies the allegations of paragraph numbered VII.” (Tr. 4)

Thereafter Plaintiffs Curnutte filed Motions for Summary Judgment “on the issue of liability against the Defendant Erma Ransdell.” At the hearing on the Motion for Summary Judgment, Plaintiffs for the first time asserted that the negligence of the Utah Gas Service Company was imputed to the Defendant Erma Ransdell, and that by reason of the admission contained in her Answer as above set forth, Appellant had in law admitted her liability to the Plaintiffs. This argument was made notwithstanding the complaint contains no claim that Appellant was liable by reason of the negligent conduct of the Defendant Utah Gas Service Company.

In answer to the foregoing argument Appellant pointed out to the lower court that her Answer had denied the allegations of the Complaint with respect to the claim that she was negligent in any manner, and that, therefore, such a denial presented an issue of fact to be determined by the jury. However, for the purpose of avoiding any confusion on the matter or misunderstanding as to her position, Appellant moved to amend her Answer, as follows:

“IV. Answering Paragraph numbered IV, [V]Defendant admits that the Utah Gas Service Company negligently installed its gas pipes leading to Defendant’s place of business, but otherwise denies the allegations of said paragraph. Defendant further specifically denies that the said Utah Gas Service Company was negligent in any manner or in respect to any acts or conduct which the law might impute to Defendant Erma Ransdell or for which she might be held liable.” (Tr. 15)

The Motion for Summary Judgment was taken under advisement by the District Court as was Defendant’s Motion to amend her Answer. Thereafter, the Court rendered its judgment determining that “the Plaintiff do have and recover against the defendant Erma Ransdell, doing business as the Lariat Cafe, all damages suffered by her as a proximate result of the explosion at the Lariat Cafe in Monticello, Utah, August 13, 1956.” (Tr. 17) At the same time the Court denied Defendant’s motion to amend her Answer. (Tr. 19) This Court thereafter granted an Interlocutory Appeal from the order granting a Summary Judgment entered by the District Court.” (Tr. 20)

FACTS

Before proceeding to an analysis of the legal issues involved, we would like to give to the Court a brief statement of the facts giving rise to this litigation as contained in the depositions on file in the case and designated for transmittal to this court by the Respondents. The Defendant Utah Gas Service Company is a public utility operating under the direction and supervision of the

Public Service Commission of the State of Utah. Pursuant to authority granted by the Public Service Commission, Utah Gas Service Company proposed to serve the inhabitants of Monticello, Utah, with natural gas from the company's transmission lines. Sometime prior to August 13, 1956, a representative of the Gas Company approached Appellant Erma Ramsdell, who owned and operated the Lariat Cafe in Monticello, Utah, and asked her if she would like to convert over to natural gas. At that time Appellant was using propane gas for operating certain appliances in the cafe. Mrs. Ramsdell agreed to accept the natural gas service from the Utah Gas Service Company, and it was agreed that the company "would have their man come down and put the rough-in pipe and then they would connect the appliances for us on the day we were closed which was Sunday." Nothing was said about what would be done, if anything, with the propane lines leading into the cafe. (Ransdell deposition, p. 23, 24.)

The Gas Company sent its workmen down to rough in the piping which was completed on Saturday, August 11, 1956, and the final installation was done the following day while the cafe was closed. The only thing Mrs. Ramsdell was requested to do was to leave the door of the cafe unlocked so that the workmen could have access to the premises. (Ransdell deposition, p. 26, 27.) At the time of closing the safe on Saturday evening, the appliances which were being operated by propane were left in the same condition they were normally left on Saturday night, with just the pilot light burning under the coffee urn. (p. 28)

On Sunday, August 12, Mrs. Ransdell noticed the workmen engaged in the work of connecting the natural gas to the cafe and observed them going in and out, but otherwise knew nothing about what was going on. As testified by her, "I didn't know anything about the pipe work." (p. 29) Late on the evening of August 12, she made a final check of the cafe to see that everything was in readiness for the following day. She observed that the flame under the coffee was not burning high enough to keep the water at the temperature desired so she called and left word for the workmen to come in and check it the next morning. The next day someone did come and check the appliances but she had difficulty with the coffee urn keeping the water hot even after the check was made. (pp. 30-32) There was some difficulty experienced in obtaining sufficient hot water from the hot water heater and the cook called to have someone come down to check it, which was done. (p. 33)

Mrs. Ransdell was at the cafe all day Monday except for approximately 15 or 20 minutes. During the day no employee or customer made any complaint that there was any odor of gas; nor did Mrs. Ransdell observe any even though several trips were made to the basement area in the course of delivery of groceries. (p. 34, 35)

In response to a leading question by counsel for Respondents, Appellant confirmed that: "There was nothing there to cause you any alarm or to give you any indication whatsoever that there might be any kind of leak or any means by which gas might be escaping in your building." (Ransdell deposition, p. 35, 36)

Appellant was working in the cafe at the time of the explosion, which occurred during the height of the evening rush hour. She herself was very seriously injured and filed suit against the Gas Company claiming negligence of the company in installing its gas lines and disconnecting the propane lines at the cafe. The action by Appellant was thereafter compromised and settled by the Gas Company.

STATEMENT OF POINTS

The points which are raised by Appellant in each of the cases before this Court are as follows :

1. The alleged negligence of the Defendant Utah Gas Service Company cannot be imputed to Appellant Erma Ransdell as a matter of law.

2. Under the pleadings of this case, Appellant has the right to a trial by jury on the issue of liability.

3. The Court erred in refusing to allow Appellant to file a clarifying amendment to her Answer.

ARGUMENT

POINT I.

THE ALLEGED NEGLIGENCE OF THE DEFENDANT UTAH GAS SERVICE COMPANY CANNOT BE IMPUTED TO APPELLANT ERMA RANDELL AS A MATTER OF LAW.

In discussing the above issue we must keep in mind that the lower Court's decision was made on a motion for summary judgment. Under *Rule 56, U. R. C. P., subdivision (c)* of this Rule provides in part as follows :

“The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.”

In discussing the role of a motion for summary judgment, Professor Moore in his work on *Federal Practice*, Vol. 6, p. 2057, has this to say:

“A summary judgment is a judgment in bar that results from an application of substantive law to facts that are established beyond reasonable controversy. The purpose of the hearing on the motion for such a judgment is not to resolve factual issues. It is to determine whether there is any genuine issue of material fact in dispute; and, if not, to rendered judgment in accordance with the law as applied to the established facts, otherwise to deny the motion for summary judgment and allow the action to proceed to a trial of the disputed facts. The party moving for summary judgment has the burden of establishing that the material facts are not in dispute; and the function of his motion is analogous to the motion for directed verdict.”

In considering such a motion, the court must resolve any question against the moving party. As further stated by *Professor Moore*, (Ibid, p. 2123-2126):

“The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to

judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. And the papers supporting movant's position are closely scrutinized, while the opposing papers are indulgently treated, in determining whether the movant has satisfied his burden."

The only negligence alleged by Respondents in their Complaints against the Utah Gas Service Company was that the company "negligently installed its gas lines and negligently disconnected the propane gas lines at the said Lariat Cafe." As to such negligence there has been no determination made in this case as to what specific acts on the part of the Utah Gas Service Company were negligent in respect to the installation of its gas line and disconnecting the propane gas lines. The negligence might very well consist of any one of a number of acts with respect to the over-all operation of connecting the service line to the gas company's main line by reason of which the gas was allowed to seep along the service line and into the cafe. Or it could consist of improperly testing the lines which resulted in gas escaping from any one of the connections along the main line of the gas company or the service line leading from the main line into the Cafe where the attachment was made to the appliances.

Respondents have not contended that the appliances in the Cafe were improperly adjusted or connected or that they were dangerous or defective so as to allow gas to escape from such appliances and cause the explosion. On the contrary, the negligence complained of is the negligence of the gas company in connecting its gas pipes and disconnection of the propane gas lines at the Cafe.

Respondents claim that because Appellant admits the negligence of the Utah Gas Service Company in disconnecting the propane line and in connecting its gas pipes, she has also admitted her negligence because, Respondents urge, the negligence of the Utah Gas Service Company is imputed to Erma Ransdell as a matter of law. The fact that a jury has heretofore found that the Defendant Utah Gas Service Company was negligent would in no way be binding upon the Defendant Erma Ransdell since she has not had her day in Court and would still be entitled to have the matter heard and determined by a jury both as to her own acts as well as to any acts of the Utah Gas Service Company which it might be claimed would be imputed to her. Nor can it be ascertained from the verdict of the jury heretofore rendered what acts of negligence the jury found that the Utah Gas Service Company had committed. Thus Defendant Erma Ransdell maintains that she is entitled to have the jury determine whether there were said acts of negligence on the part of the Utah Gas Service Company in this particular case as would be imputed to her.

Since the Respondents have at all times conceded that the Utah Gas Service Company was an independent

contractor with respect to the work which it performed in connecting its gas lines to the appliances at the Lariat Cafe, it is difficult to see why the Respondents urge that the acts of such independent contractor would be imputed to the owner of the premises.

With respect to the acts of an independent contractor, our Supreme Court has recently laid down the general rule of law applicable to the liability of the owner of property. In the case of *Morley v. Rodberg*, 7 Utah 2d 299, 323 P. 2d 717, the court held that the evidence sustained a finding that an automobile mechanic who was road testing a car with the owner present in the vehicle was an independent contractor so that the owner was not liable for the negligent acts of the mechanic in the operation of the automobile. This determination is in accord with the general principle announced by *Prosser on Torts, Second Edition*, Chapter 5, Section 32, that "In the ordinary case, one who employs an independent contractor to do work on his premises may leave all responsibility to him, and is not liable for his negligence."

The duty of the owner or occupier of premises toward a business invitee is well stated in *Prosser on Torts, Second Edition*, Chapter 15, Sec. 78, as follows:

"The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. He must not only warn the visitor of dangers of which he knows, but must also inspect the premises to discover possible defects. *There is no liability, however, for harm resulting from conditions from which no unreasonable risk was to be anticipated, or those which the occupier did not know and could not have*

discovered with reasonable care. The mere existence of a defect or danger is not enough to establish liability, unless it is shown to be of such a character or of such duration that the jury may reasonably conclude that due care would have discovered it." (Emphasis added)

In 38 Am. Jur. "Negligence," Sec. 96, the rule is similarly stated:

"The rule is that an owner or occupant of lands or building, who directly or impliedly invites others to enter for some purpose of interest or advantage to him, owes to such persons a duty to use ordinary care to have his premises in a reasonably safe condition for use in a manner consistent with the purpose of invitation, or at least not to lead them into a dangerous trap or to expose them to an unreasonable risk, but to give them adequate and timely notice and warning of latent or concealed perils which are known to him but not to them. Summarily stated, to the extent of the invitation given a property owner owes to an invitee the duty of prevision, preparation, and lookout. An owner in occupation of the premises violates his duty to an invitee when he negligently allows conditions to exist on the property which imperil the safety of persons upon the premises . . . If there are hidden dangers upon the premises, he must use ordinary care to give warning thereof. The liability of the proprietor of a hotel to his guests and of a storekeeper to his customers rests upon the foregoing principles.

"As hereinbefore stated, an owner or occupant of premises is not liable as an insurer of the safety of persons whom he has invited to enter. His liability to them for injuries which they may sustain while upon his premises must be predicated upon his negligence." (Emphasis added)

Section 97 goes on to state:

“The liability of an owner or occupant to an invitee for negligence in failing to render the premises reasonably safe for the invitee, or in failing to warn him of dangers thereon, must be predicated upon a superior knowledge concerning the dangers of the premises to persons going thereon. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted. . . . Thus, a property owner is not liable for injury to one whom he permits to inspect the premises, with a view to leasing them, by an explosion of gas escaping from a pipe which an outgoing tenant had disconnected without shutting off the flow of gas, without the knowledge of the property owner or reasonable opportunity on his part to discover the fact.”

The case referred to in the above quotations is *Leonard v. Enterprise Realty Company* (Ky. 1920) 219 S. W. 1066, 10 A. L. R. 238.

In the Leonard case, Plaintiff was passing an apartment house when he observed that a tenant was moving out. He obtained a key to the apartment from one of the people who were engaged in the moving operation. He then went to the general office of the Defendant and asked for permission to inspect the vacant apartment, which permission was given. Upon entering the apartment, he struck a match to find his way. An explosion occurred. Subsequent inspection revealed that the gas cock had been left on when the gas stove had been disconnected from the line. In an action by Plaintiff against Defendant for damages, judgment of no cause of action was rendered.

On appeal, this judgment was affirmed, the court held that one who expressly or by implication invites another to come upon his premises for business is not an insurer, but owes to such invitee the duty of being reasonably sure that such invitee will not be subjected to danger and the owner must exercise ordinary care to keep said premises reasonably safe. Where the Plaintiff had permission from the Defendant to inspect the premises when the Plaintiff had not had a reasonable opportunity to ascertain or determine that the gas had not been properly disconnected by someone in the employ of the Defendant, the Defendant could not be held liable for damages resulting.

In the annotation on this case, 10 A. L. R. 238, appears the comment that the Leonard Case is in accord with the general rule laid down by the authorities to the effect that an owner or occupant of property owes invitees a duty to exercise reasonable care to have his premises in a reasonably safe condition, and to give warning of any latent or concealed perils.

Our own Supreme Court has laid down a similar principle with respect to the duty of an occupier of premises to an invitee in several cases. In *Johnson v. Cudahy Packing Company*, 107 Utah 114, 152 P. 2d 98, appears the following quotation:

“The best statement of the liability of the occupier of premises toward an invitee which has come to our attention may be found in Bohlen, “Studies in the Law of Torts,” p. 183. The rule is there stated as follows:

“ ‘The position of the “business guest” is somewhat better than that of the “bare licensee.” While the owner is bound to disclose to both any defect of which he knows and which he should recognize as creating a risk of injury to either, he may assume that the bare licensee, knowing that the owner has no interest in his visit and, therefore, cannot be expected to have made special preparations for his coming, will be on the alert to discover for himself the true condition of the premises; while a business guest, being entitled to expect to find the premises put in order for his visit, is not to be expected to discover defects unusual in a properly prepared business premises. And the owner having an interest in the “business invitee’s” visit, must by inspection ascertain the actual condition of the premises, so that ignorance due to a failure in inspection will not excuse his failure to give warning, while he owes no such duty to a bare licensee, it being immaterial that it would cost the owner a very slight effort to make an effective inspection and that it would be impossible for the licensee to make such an inspection in the course of his very temporary use of the premises.’ ”

See also *De Weese v. J. C. Penney Company*, 5 Utah 2nd 116, 297 P. 2d 898 (1956). In that case, the court held that a store owner is not an insurer of the safety of its patrons. The only basis upon which liability can be predicated is negligence; and the standard upon which such negligence is gauged is that of ordinary reasonable care under the circumstances. The Court went on to say that it is particularly fitting that the jury determine whether such standard of care has been complied with.

See also *Lindsay v. Eccles Hotel Company*, 3 Utah 2nd 365, 284 P. 2d 477 (1955), where the court held, that

the owner of a coffee shop was not liable to a patron who was injured when he slipped on water on the floor in the absence of showing how or when the water got there, or that the owner had knowledge of its presence.

In the case of *Pennock v. Newhouse Realty Co.*, 97 Utah 408, 93 P. 2d 482 (1939), a judgment for the Plaintiff who was burned by hot grease when he slipped on the floor in Defendant's kitchen was reversed on appeal by the Supreme Court stating:

“The mere possession of such grease does not impose upon the one in possession the duty of affording others protection against injury from contact with it. If this were not so, the possession of that grease in the center of a ten acre pasture would call for protective equipment for the protection of a passerby outside the pasture. There must be some circumstances coupled with the possession that brings the passerby in proximity to a dangerous situation.”

This court has heretofore set forth the principle with respect to the liability of the owner of premises where actions are performed by an independent contract in the case of *Gleason v. Salt Lake City*, 94 U. 1, 74 P. 2d 1225. In that case a suit was filed against Auerbach Company and others claiming damages for injuries sustained by the plaintiff in tripping over a fire hose lying across the sidewalk on 3rd South Street in front of the Auerbach Department Store. The Auerbach Company had an elevator in its store in the pit of which water had accumulated by leakage of the hydraulic lift and from the surrounding ground. Its superintendent telephoned the fire

department of Salt Lake City and requested that the water be pumped from the shaft. In the process of doing so, the fire department placed its hose across the sidewalk in front of the store over which the plaintiff tripped and fell. The plaintiff claimed that even though the actions of the fire department be classed as an independent contractor, "yet Auerbach Company cannot escape liability because the duty of exercising due care to guard against injuries to pedestrians using the sidewalk is a nondelegable duty."

In discussing the general principle relating to a non-delegable duty, the Court stated:

"The general rule that the employer of an independent contractor is not liable for an injury resulting to a third person from a tortious act committed by himself or his servant is subject to three exceptions:

"(1) where the injury was the direct result of the stipulated work; (2) where that work was intrinsically dangerous, and the injury was a consequence of the failure of the contractor to take appropriate precautions; (3) where the injury was caused by the the nonperformance of an absolute duty owed by the employer to the complainant, individually or to the class of persons to which he belongs.

"It follows that, in any of these situations the servants of the independent contractor are in effect the servants of the principal employer.' "

- Labatt's Master & Servant, 2d Ed., 127.

In determining that the defendant Auerbach Company could not be held liable for the actions of the fire department, the court went on to state:

“We are convinced the facts of this case cannot bring it under either exception of the rule of the immunity of an employer where an independent contractor does the work. The company did not stipulate the doing of the work in the manner which caused injury. The request to pump water from the elevator shaft did not require any action with respect to running a hose, negligently or otherwise, from the curb across the sidewalk. In the absence of a showing to the contrary, we cannot assume that the company knew or anticipated that such use of the hose for the purpose of priming the pump was a necessary part of the procedure.

“The job of pumping water out of the elevator shaft is not such work as in the ordinary course of events injurious consequences to pedestrians on a sidewalk 200 or 300 feet distant may be expected or reasonably anticipated, unless means were adopted by which such consequences may be prevented.”

Of course, Respondents would have us believe that the work in which the Defendant Utah Gas Service Company was engaged was inherently dangerous. The difficulty with this position is that Respondents beg the question. They assume because an accident happened that the work of changing or connecting gas pipes is inherently dangerous. The fact is that at the time the work was being done there was no gas in the pipes; and there was no more danger involved than in the performance of ordinary plumbing service. Nor did the explosion occur during the performance of such work, which is further evidence of the fact that it was not inherently dangerous. In 57 C. J. S., *Master and Servant*, Sec. 590, p. 362, we find a list of activities which have been held

inherently dangerous, as follows :

“Work held inherently dangerous, within the exception, includes : Building of a brick wall abutting on a highway ; depositing an insecticide, consisting of a poisonous dust or spray, on a field ; erection of awnings as appurtenant to a building on a much frequented street in a populous city ; fumigation of an apartment by gas ; installation of doors on an elevator shaft where the elevator was kept running for the benefit of tenants ; propelling of gas through mains before the mains were thoroughly cemented together ; removing a decayed oil derrick ; and setting off fireworks.”

The one case involving use of gas is *Chicago Economic Fuel Gas Company v. Meyers*, 168 Ill. 111, 139, 49 N. E. 66, where the gas company attempted to run gas through its mains before the lines had been properly tested. In the instant matter, the testimony of the witnesses as contained in the depositions is conclusive that all proper tests were made before the service lines were connected to the main line and the gas turned on.

Too, since the decision of the Meyers case, the use of gas in all forms has become widespread and common. Today the use of natural gas in commercial buildings, as well as residences, is well nigh universal where natural gas is available. Gasoline is a product which has highly explosive qualities but nevertheless is in common use by everyone ; and the handling of gasoline is not considered as involving an inherently dangerous commodity such as the handling of dynamite or other explosives. Of course, the handling of almost any common commodity may result in creating a dangerous con-

dition by reason of the manner in which it is handled; but such conduct does not render the activity inherently dangerous.

No claim has been made by Respondents that Appellant did not exercise reasonable care to secure the service of a competent and experienced independent contractor. As heretofore pointed out, Defendant Utah Gas Service Company is a public utility supervised and directed by the Public Service Commission of the State of Utah. Appellant could not have engaged anyone to connect the gas to the premises except this Utility and therefore cannot be held to be responsible if in the course of such public utility work the Gas Company failed to exercise reasonable care.

The *Restatement of the Law of Torts* sets forth the principle of liability in a situation such as this in Section 415 as follows:

“A possessor of land who in the course of his business holds it open to members of the public, is subject to liability for bodily harm caused to them, on a part of the land retained in his possession or upon a part thereof leased to a concessionnaire, by his failure to exercise reasonable care to secure the use of reasonably safe equipment and methods by an

(a) independent contractor employed to do work upon the land while it is held open to the public, or

(b) independent contractor or concessionnaire employed or permitted to carry on upon the land an activity in furtherance of the possessor's business use thereof.”

The comment appearing on Page 1125 states the basis of the rule as follows:

“The liability stated in this Section is based upon the failure of the possessor of the land in question to exercise reasonable care to supervise the equipment or methods of his tenant or concessionnaire who carries on an activity which is intended to attract the public to the possessor’s land. *In order that the liability shall exist, it is, therefore, necessary that the possessor shall have a reasonable opportunity to ascertain the improper equipment or method of his concessionnaire or contractor and to secure the substitution of safe equipment and methods.* So, too, a shopkeeper who employs a contractor to do work in dangerous proximity to a part of his shop held open to his customers, is not subject to liability under the rule stated in this Section for bodily harm suffered by his customers unless the harm is caused by the shopkeeper’s failure to exercise reasonable care to discover and correct dangerous methods of work adopted by his contractor. Therefore, the rule stated in this Section does not impose liability upon the possessor or shopkeeper for harm which results from a merely casual act of negligence which is not sufficiently persistent to give the possessor the opportunity to prevent it by the exercise of reasonable care.” (Italics added)

The Restatement gives as an illustration of the rule, the situation where A street railway company operates an amusement park in which it plans to give a demonstration of fireworks — the fireworks to be under the direction of B, an independent contractor. The audience is required to maintain a safe distance from the display, but a rocket is discharged in a careless and negligent manner by an employee of B, thereby injuring C. A street rail-

way company is not liable.

Since there is no question but that Appellant exercised reasonable care to see that the independent contractor used reasonable safe equipment and methods, she cannot be held liable for the acts of the independent contractor.

Respondents have heretofore placed considerable emphasis on the principle of law enunciated in *Prosser on Torts* (2d Ed.) p. 357 as follows:

“The employer of an independent contractor may be liable for any negligence of his own in connection with the work to be done. But the common law ‘rule’ has been that he is not liable vicariously for the ‘torts’ of the contractor. To this rule certain ‘exceptions’ have been developed, which indicate a tendency to place the contractor upon the same footing as a servant. The more important exceptions are:

“a. Where the employer is under a duty to the plaintiff which the law considers that he is not free to delegate to the contractor.

“b. Where the work to be done is inherently dangerous to others, or will be dangerous unless particular precautions are taken.

“Even under these exceptions, it is commonly held that the employer will be liable only for risks inherent in the work itself, and not for ‘collateral’ negligences of the contractor.”

However, Respondents fail to recognize the distinction between acts which are inherently dangerous and acts which are merely collateral to the risk created. This is thoroughly discussed by *Prosser* at pp. 361, 362, as follows:

“Another distinction, as yet not very exactly defined, is the rule generally accepted, that the employer is liable only for risks inherent in the work itself, and not for ‘collateral’ or ‘casual’ negligence on the part of the contractor. This doctrine, apparently originated in some dicta in an English case where, in violation of statutory provision, the construction of a bridge was permitted to delay traffic on a river for more than three days. It is very closely connected with the doctrine of inherent danger, and seems in reality to represent something like a negative statement of it . . . The suggestion has been made, therefore, that the test of ‘collateral’ negligence is not its character as a minor incident or operative detail of the work to be done, but rather its dissociation from any inherent risk created by the work itself. *The employer is not liable because the negligence is ‘collateral’ to the risk created — which is to say, that the performance of the work contracted for in the normal manner contemplated by the contract would involve no recognizable risk of such harm to the plaintiff, and it is the abnormal departure from usual methods by the contractor’s servants which has created the danger.* Where the particular risk is involved in the work to be done itself, as where the sign is to be painted over the sidewalk, the fact that the harm materializes through the incidental negligence of the servant in dropping the paint bucket will not relieve the employer of liability. The distinction is thus one between risks inherent in the normal performance of the work and those which arise from the abnormal and unusual misconduct of the workmen; and it is the latter only which are to be regarded as ‘collateral,’ and for which the employer will not be held responsible.” (Italics added)

In the present case, there was nothing hazardous about the laying of pipes for the transmission of gas. If someone had been injured by the negligent manipulation of the pipes, there would be no serious claim that Defendant Erma Ransdell would be liable for such action.

Utah is listed by Prosser as one of the states which relieve the owner of premises from liability in situations involving collateral negligence. See *Callahan v. Salt Lake City*, 41 Utah 300, 125 P. 863. In the Callahan case, the city let a street paving contract to an independent contractor. The Supreme Court held that where the city did not have a right to interfere with the methods of the contractor employed to do the work, it was not liable for injuries to property of a third person caused by the negligence of the contractor. See, also, *Gleason v. Salt Lake City*, supra.

In the case of *King v. Mason* (La. 95 So. 2nd 705, the Plaintiff was injured while he was installing a commode in the house. The cause of the injury was gas escaping from a gas main which had been cut and not repaired by individuals under contract with the city to install sewer lines. The gas had seeped along the gas lines and entered the house and exploded, injuring Plaintiff. The court held the sewer contractor liable but not the town. The town was not liable to the Plaintiff since it was neither a party to nor had any notice or knowledge of the tort committed by the sewer contractor and his employees. Neither did the town's acceptance of the finished work render it liable.

In 25 A. L. R., Page 281, the case of *Schermerhorn v.*

Metropolitan Gaslight Co., (N. Y.) 5 Daly 144, is cited, in which case the court held:

“The loss and injury which the Plaintiff sustained were the result of the negligence of the gas fitter and the gas company, the one being the main cause of the explosion, and she was entitled to hold them both responsible for what occurred. It was the gas fitter’s negligence that cooperated with the negligence of the Defendant in producing the accident; for what the Plaintiff, or rather her husband did — the sending for a gas fitter when he found that gas was escaping — was not a negligent, but a prudent act.”

In 18 *Am. Jur.* “*ELECTRICITY*,” Section 58, appears the following discussion with respect to contracts involving the installation of electricity:

“In ascertaining the liability for injuries from electric wires or appliances, it is often important to determine whether the person whose negligence was responsible for the injury was an independent contractor, *the general rule being that an employer is not liable for the negligence of his independent contractor or the latter’s servants. Thus, an expert employed to test motors and an electric lighting company employed to install a transformer and to make iron pipe framework connections in a traction company’s substation have been held to be independent contractors.* There are, however, circumstances under which duties are imposed upon one which he cannot delegate to another. Where an absolute obligation is imposed upon a city to attend itself to the matter of wiring, responsibility for any defectiveness in the wiring rests upon the city although the practice had been to leave everything in that connection to an independent contractor; and an electric company by subcontracting the performance of its obligations,

may not escape responsibility for a nuisance created by the operation of its powerhouse.”
(Italics added)

In view of the foregoing, it becomes apparent that the lower court erred in granting a Motion for Summary Judgment on the issue of liability.

POINT II.

UNDER THE PLEADINGS OF THIS CASE, APPELLANT HAS THE RIGHT TO A TRIAL BY JURY ON THE ISSUE OF LIABILITY.

The right to trial by jury in this State is a fundamental right. *Article I, Sec. 10, Constitution of Utah.*

It is provided by *Utah Rules of Civil Procedure, Rule 38 (a)*:

“Right Preserved: The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties.”

Section 78-21-1, U. C. A., 1953, provides:

“In actions for the recovery of . . . damages . . . for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived. . . .”

Respondents urge that Appellant is not entitled to a jury trial on the issue of liability because she has admitted the liability of the Gas Company and thereby has admitted her own liability in the matter. However, there has never been a determination by the jury as to the specific acts of negligence of which the Gas Company was held responsible. Obviously, even under Respondents’ position in this matter, Appellant could not be held liable for every act of negligence which the Gas Company

may have been guilty of, particularly with respect to those which under the authorities heretofore cited are "collateral" to any duty owed by the owner of property to an invitee. The reason for this is obvious. Until there has been a determination that Appellant has breached a duty which she owes to the public, there can be no liability charged to her. In her Answer, Appellant specifically denied that she had breached any duty which she owed to the public and therefore she is entitled to have a jury determine whether in truth and in fact such a duty has been breached either by her own acts or by the acts of a third person for which she may be held liable. Until Respondents have established by a finding of the jury that the breach of duty or negligence of the Gas Company was such that the same would be imputed to Appellant in this case, there can be no determination by summary judgment that she was negligent.

A good statement of the principle involved is found in the case of *General Investment Co. v. Interborough Rapid Transit Co.*, 235 N. Y. 133, 139 N. E. 216, where the court of appeals of New York held:

"The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a bona fide issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or

proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant a summary judgment.”

While the court in that case held that the pleadings and affidavits of the plaintiffs did disclose that no defense existed to the cause of action, we are not in the same position in this case for the reason that the pleadings and depositions in this case do not show what specific acts of negligence Defendant Utah Gas Service Company was guilty of and therefore what acts, if any, the Defendant Erma Ransdell may be charged with being responsible for. See, also, *Lundberg v. Backman*, 9 Ut. 2d 58, 337 P. 2d 433.

POINT III.

THE COURT ERRED IN REFUSING TO ALLOW APPELLANT TO FILE A CLARIFYING AMENDMENT TO HER ANSWER.

Appellant timely applied to the trial court for permission to file a clarifying amendment to her Answer so as to set clearly before the court the facts as she understood them. *Rule 15 (a), Utah Rules of Civil Procedure*, provides as follows:

“(a) *Amendments*: A party may amend his pleading once as a matter of course any time before a responsive pleading is filed, or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it after 20 days after served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse parties; and *leave shall be freely given when justice so requires.*” (Italics added)

In the case of *Murray v. Miller*, 1 U. 2d 43, 261 P. 2d 950, this Court held:

“It is well recognized in this and other jurisdictions both under code pleadings and the new rules that a complaint may be amended in order to clarify the issues at trial at the discretion of the trial court. Rule 15, Utah Rules of Civil Procedure; *Keller v. Gerber*, 114 Utah 345, 199 P. 2d 562; *Saragent v. Union Fuel Co.*, 37 Utah 392, 108 P. 928; *Grover v. Cash*, 69 Utah 194, 253 P. 676.”

Again we refer the Court to Moore's Federal Practice, 2nd Ed., Vol. 6, p. 2055:

“Where leave of court is necessary for the amendment of a pleading, Rule 15 (a) states that ‘leave shall be freely given when justice so requires.’ And Rule 15 (b) provides liberally for amendments to conform to the evidence. Since a summary judgment is an adjudication on the merits and because of Rule 15, it is the duty of the trial court freely to allow amendments to the pleadings, unless the application to amend smacks of dilatory tactics or in some other respect fails to further justice. The general admonition has been stated by Judge Clark in *Rossiter v. Vogel*:

“ ‘where facts appear in affidavits upon motion for a summary judgment which would justify an amendment of the pleadings, such amendment should not be prevented by the entry of a final judgment.’ ”

“Indeed at times it will be feasible and desirable to treat the pleading as though it were amended to conform to the facts set forth in the affidavits. The court has the power to condition leave to amend upon a showing that the amendment has substantial merit.

“As illustrative of the rule generally pertaining to granting leave to amend, a complaint should not be summarily dismissed if there is reasonable ground for the belief that in the reframing of the complaint a good cause of action may be stated. And on a plaintiff's motion for summary judgment made after the defendant had answered, if defenses are raised in affidavits which raise triable issues and would prevent the plaintiff from recovering, the court should not succumb to the argument that they have been waived by failure to plead them, but should at least allow the answer to be amended. Similar principles should govern to permit a defendant to move for summary judgment on the basis of a defense not pleaded in his answer.”

It is clear from a reading of the pleadings in the cases now before this Court that Appellant Ransdell did not admit she was negligent merely because she admitted that Utah Gas Service Company was negligent. In fact, as the record now discloses, she brought an action against the Utah Gas Service Company for the injuries which she received upon the theory that the Utah Gas Service Company was liable to her for its negligence. The allegations of negligence on the part of the Utah Gas Service Company in the complaint which Appellant Erma Ransdell filed in the Federal District Court are the same allegations of negligence on the part of the Utah Gas Service Company which she admitted in her answer in the instant cases. Obviously she referred to, and the facts will show, acts of negligence on the part of the Utah Gas Service Company which as a matter of law could not be imputed to her. Indeed, it may be asserted that the acts complained of did not relate to any matter with respect

to which Appellant owed a duty to the public which was violated.

Until that matter has been resolved by the jury against Erma Ransdell, Respondents are not entitled to recover in this case. If there is any doubt as to the intention of Appellant in respect to her Answer filed herein, then the proposed amendment should be allowed in order to clarify her position.

CONCLUSION

Appellant respectfully submits that the negligence alleged on the part of the Defendant Utah Gas Service Company by Respondents in their respective complaints, should not as a matter of law be imputed to Appellant; that unless and until a jury has found that Appellant was negligent either in fact or by law from a finding of specific acts of negligence on the part of Utah Gas Service Company which would be imputed to her, she should not be held to respond for damages to the Respondents.

Should there be any doubt in the mind of the court regarding the sufficiency of the pleadings, then and in that event Appellant should be permitted to file her amendment to her Answer so that her position will be clearly and fairly stated before the trial of the matter and the issue of liability presented squarely to the trial of the fact.

Respectfully submitted,

ARTHUR H. NIELSEN

ELIAS L. DAY

ELLIOTT LEE PRATT

Attorneys for Appellant