

1990

Gourdin v. Scera : Unknown

Utah Supreme Court

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May 1, 1992

Geoffrey J. Butler, Court Clerk
Supreme Court of Utah
332 State Capitol
Salt Lake City, UT 84114

FILED

MAY 1 1992

CLERK SUPREME COURT
UTAH

Re: Gourdin v. SCERA
Appellate No. 900523

Dear Mr. Butler:

Pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure and for the Court's ease in reviewing this matter defendant wishes to supplement its brief to include portions of the transcript in this case encompassing counsel's arguments and the Court's directed verdict.

Thank you for your assistance.

Very truly yours,

HANSON, EPPERSON & SMITH



Jaryl L. Rencher

JLR:bg
Enclosures
cc: Brent D. Young

GOURDIN\Butler.lt3\86-521D

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1 you'd let me --

2 THE COURT: All right, ladies and gentle-
3 men, counsel wants to make some motions, legal arguments to
4 the Court. We'll ask that you step out while that's being
5 done. Again, while we are not assembled, please do not dis-
6 cuss the case among yourselves, permit anyone to discuss the
7 case with you or in any way attempt to enhance your infor-
8 mation concerning this matter except as it has come to you in
9 the courtroom. So if the jury will step down, we'll call you
10 back as soon as we can.

11 (WHEREUPON, the Jury exited the courtroom at 9:45
12 o'clock a.m.)

13 THE COURT: All right, Mr. Glauser.

14 MR GLAUSER: Your Honor, at this time the
15 defense would move for a summary judgment on several grounds.

16 The first ground being that this action is barred
17 by the Exclusive Remedies Provisions of the Workers Compen-
18 sation statute, Utah Code Section 35-1-60. It's our position,
19 your Honor, that 11 of the elements have been met, if in fact
20 Scott Gourdin is found to be any type of staff member or
21 authorized worker at Scera. And based on that, we believe
22 we are entitled to judgment as a matter of law.

23 The other alternative to that is that Scott was not
24 acting in any authorized capacity. And if that is the truth,
25 it would be our position that we owed no duty as a matter of

1 law to Scott Gourdin; that respondeat superior cannot be
2 applicable, and we would be entitled to judgment as a matter
3 of law in that regard.

4 I would also move for summary judgment based on
5 the ground that there is no duty owed to a volunteer worker
6 except to refrain from intentionally injuring him, and in
7 the case of volunteer workers, respondeat superior does not
8 apply.

9 Finally, I would move, if in fact Scott is not
10 within the authorized authority of Scera, he would be in
11 effect a trespasser to the lawnmower, and as such there would
12 be no duty except to refrain from intentionally and willfully
13 injuring him.

14 I have several cases that are on point with regard
15 to the duty that's owed to a volunteer. If you'd like me
16 to, I'd be happy to refer to those, your Honor.

17 THE COURT: You may do what you wish.

18 MR. GLAUSER: First of all, there's a
19 case of Hall vs. Atcheson, Topeka & Santa Fe Railroad, in
20 349 F.Supp 326. That's a case out of the District Court of
21 Kansas in 1972. And there they found that a trucking company
22 had rules prohibiting passengers from riding with the drivers.
23 The driver ignored that rule and allowed a passenger to ride
24 along. And they held there is no duty as far as the trucking
25 company except to refrain from intentionally and willfully

1 injuring the rider.

2 I would also refer to the case of Pratt vs. Common-
3 wealth Edison Company. That's a case out of Illinois in 1985.
4 The cite on that is 211 NE 2.d 720. That case also found
5 the rule that there can be no duty on the part of an owner
6 except to refrain from intentionally and willfully injuring
7 the person.

8 I'd also refer the Court to 53 Am Jur 2.d, Section
9 179, which recognizes the rule that with regard to voluntary
10 workers there is no duty at all except to refrain from inten-
11 tionally and willfully harming them.

12 There are several other cases. I would cite the
13 Court to Henry Wamwald Lumber and Perse Manufacturing Company;
14 Ambersant Manufacturing Company vs. Hayes, decision reported
15 at 291 SW 982, which also stands for the same proposition.
16 The case of in Chicago vs. Enarge, 82 Illinois Appeals, 367.

17 MR. YOUNG: 367?

18 MR. GLAUSER: Yes. And also the case
19 which held specifically, in that case they held specifically
20 respondeat superior does not apply in situations like this.
21 There are several others. Barber vs. Rich, 90 SE 2.d 666.
22 Bogart vs. Hester, 347 P.2d 327. Higgins vs. D&F Electric
23 Company, 140 SE 2.d 99. There are many many more. I won't
24 take the time to go through all of them. But that's my under-
25 standing of the law.

1 With regard to workers compensation, I think the
2 courts have recognized that there are four prongs that must
3 be met before the Workers Compensation Exclusive Remedies
4 Provision is in effect.

5 The first one is that there must be an exercise of
6 control over the employee. That's clearly been established
7 by the testimony of Paul Gourdin. There is no evidence to
8 the contrary.

9 Second of all, there must be a right, not neces-
10 sarily exercised, a right to hire and fire. If in fact he
11 was acting within his scope, which we deny, certainly he had
12 that right.

13 Third. There must be some compensation. And the
14 courts have held that it does not necessarily have to be pay-
15 ment of money, but it can be other sources of compensation.
16 And I think there's ample evidence that if in fact he was a
17 staff member, which we deny, he would have received certain
18 considerations such as the use of the pool, et cetera, those
19 kinds of things.

20 Finally, the fourth prong is that there be some
21 furnishment of equipment in cases such as this. And certainly
22 if he was within the scope, the equipment was furnished.

23 Second of all, besides the summary judgment motion
24 in favor of Scera, we would move for summary judgment on our
25 claim for comparative negligence. We think there is ample

1 evidence in the record. There is no contrary evidence in
2 the record to indicate that Scott was trained and taught and
3 did not comply with the training and teaching that he had.
4 There's testimony in the record that his capacity was some-
5 where between nine and ten years of age.

6 Also we would move for summary judgment on any wage
7 loss for future, I don't know that they are claiming a wage
8 loss, but any future loss of earnings, there simply just isn't
9 any evidence in the record to support any of that. It would
10 be based solely on speculation, if there were any award.

11 And finally, we'd move for summary judgment against
12 on the issue of negligence of Toro and Cutler's. Cutler's
13 under the theory of warranty of fitness for a particular pur-
14 pose, which I think the evidence is clearly established. And
15 Toro for not putting safety features on commercial lawnmowers
16 in 1985.

17 Thank you, your Honor.

18 THE COURT: Do you wish to be heard, Mr.
19 Young?

20 MR. YOUNG: Does the court wish to hear
21 me?

22 THE COURT: What do you have to say about
23 Workmens Compensation Statute.

24 MR. YOUNG: Judge, there's a Utah case on
25 that, and I have been trying to find it, and I've read it.

1 And I can't, I'm not putting my hand on it. And it is not
2 a -- It's not indexed where I should have it in my file,
3 and I'm not finding it, judge. But I'm not concerned about
4 it. I think it involves a board of education in one of the
5 Salt Lake School Districts. And I can't find it right now.

6 MR. GLAUSER: Your Honor, I think the
7 case counsel is looking for is Board of Education of Alpine
8 School District vs. Olson, which is reported at 684 P.2d 49,
9 1984 case.

10 MR. YOUNG: That sounds right, and I've
11 got it marked, and I had something I wanted to point out to
12 the Court, but I don't, I'm not putting my finger on it.
13 That's 684?

14 MR. GLAUSER: Yes, 684 P.2d. I'd be happy
15 to let you look at mine, counsel.

16 MR. YOUNG: I'm not finding mine. I've
17 got mine all marked out, too. Thank you.

18 Your Honor, in this case, if I can find it, judge,
19 I'd like to find my notes on that, and I can't find the thing
20 that I'm looking for. I'm embarrassed, but that's, I'm not,
21 I'm not putting the my finger on what I want. If the Court
22 would really like to hear from me on that, I'd like to be
23 heard, and I'd like to be able to spend a minute or two and
24 go through my file.

25 THE COURT: Well, I'll give you a few

1 minutes to look for them. I'm concerned about it, Mr. Young.

2 MR. YOUNG: Thanks.

3 THE COURT: Your theory is that he's an
4 employee.

5 MR. YOUNG: Pardon me?

6 THE COURT: Isn't your theory that he is
7 an employee or in that category?

8 MR. YOUNG: Well, as we discussed yester-
9 day, he's not a paid employee, and yet he's not really a
10 strictly volunteer. He is a, in the traditonal sense, he's
11 someone that comes and does work that isn't compensated and
12 paid for it, but yet there are certain benefits like going to
13 the movies or going swimming and using the facilities. So he
14 really doesn't come under either category, in the traditional
15 sense.

16 THE COURT: Well, you find me something
17 that says that, Mr. Young, if you've got something. We'll
18 take a short recess, and see what you can find.

19 (WHEREUPON, the Court recessed. and reconvened
20 again shortly thereafter, continuing outside the presence of
21 the Jury, as follows:)

22 THE COURT: Please be seated, ladies and
23 gentlemen. We'll continue with Gourdin vs. Scera.

24 Mr. Young?

25 MR. YOUNG: Thank you, your Honor. Your

1 Honor, I don't have an extra copy of this case for the Court,
2 but I understand counsel does have an extra copy.

3 THE COURT: Well, I've read it.

4 MR. YOUNG: Okay.

5 THE COURT: I assume you are talking about
6 the Board of Education case.

7 MR. YOUNG: Yes. Then let me just, if
8 the Court has had an opportunity to read it, then just let
9 me summarize it as I understand it. It was an appeal from
10 the Industrial Commission on a given set of facts which
11 weren't disputed. And there was a fellow by the name of
12 Olson who was a carpenter and a contractor and had his own
13 residential construction business. And in 1980 and '81, he
14 enrolled in a wood shop class at Mountainview. He asked the
15 shop teacher if he could come during school hours and use the
16 equipment. The shop teacher agreed. Later on in '81 as, he
17 continued to work on his personal project. And then he began
18 participating in a retired senior volunteer program, which was
19 a county-sponsored program. And the school district had a
20 relationship with the, that program, and but when Olson was
21 interviewed by the officials of Mountainview, it was pretty
22 clear that at the interview that he would be acting as a
23 volunteer in the wood shop class. and he did not have an
24 express writing or oral contract with for employment with the
25 district, and he didn't receive any wage or monetary remunera-

1 tion for his services, and he didn't have any expectation of
2 being paid for the assistance of classroom. Later on he ended
3 spending the day as a substitute teacher, for which he was
4 paid.

5 Now, the issue before the Court in that case was
6 whether the claimant Olson was a volunteer or an employee for
7 the purposes of Workmens Compensation benefits. An adminis-
8 trative law judge found that he was a volunteer and said he
9 was entitled to benefits, and he reasons by analogies from a
10 firemans statute. And the Supreme Court said that his ruling
11 was, I think they used was "patently incorrect." Yes, right
12 in the middle of the page, on page 5, the Workmens Compensa-
13 tion. And then the Court went on to say, and I quote: "Work-
14 mens compensation," saying "workmens compensation is a purely
15 statutory creation. This Court cannot expand the statutes
16 subjects not included in the provisions." Cites some cases.
17 And then says, it does not include volunteers. And then it
18 tells that a volunteer, such as Olson, is not eligible for
19 workmens compensation under Utah law.

20 Our case is a little different. Going to page 50,
21 Olson testified that it was clear at the interview that he would
22 be acting as a volunteer in a workshop class. What we have
23 here is a young man who is cutting lawns for Scera, and in
24 exchange for cutting lawns and doing other things he gets
25 to go into the movie theater and gets to go swimming, gets to

1 use the facility. Not quite the same. Olson did not have an
2 express written or oral contract of employment with the
3 school or the district.

4 Well, Scott didn't have an express written contract,
5 but then neither did Paul Carter, who was working there and
6 apparently -- Olson did not receive any wage or monetary
7 remuneration for his services. In a pure sense, Scott didn't
8 either. He received the opportunity to go and use the facil-
9 ity, as I've mentioned. So I don't think that under the
10 Workmens Compensation Act that workmens compensation is his
11 exclusive remedy. Because he wouldn't qualify for that
12 remedy under the act.

13 THE COURT: Well, either he's an employee
14 or in that status or he's not, Mr. Young. Isn't that correct?
15 You say he's a hybrid. He's not. He's a volunteer, and has
16 no business being there and not acting within the scope.
17 Talking about the master's business. What business does he
18 have to be there?

19 MR. YOUNG: The evidence is that Scera
20 used volunteers to mow lawns. Paul Carter was a volunteer.
21 He mowed lawns. And Scera benefitted from that. And appar-
22 ently that was their practice. There is evidence that that
23 was their practice. You've heard firsthand from people who
24 were involved in that practice.

25 THE COURT: Well, Section 35-1-43, where

1 in the finding, "An employee under the Workmen's Compensation
2 Law," says: "An employee is each person in the service of any
3 employer." And that's defined in Section 35, Section 1-24,
4 and that defines an employer. Doesn't appear to the Court
5 that there is any question but what the Scera qualify as an
6 employer. "Who employes one or more workers or operatives
7 regularly in the same business or in or about the same estab-
8 lishment, oral or written, under any contract of hire, express
9 or implied, oral or written, including aliens and minors,
10 whether legally or illegally working for hire, but not inclu-
11 ding any person whose employment is casual and whose employ-
12 ment -- whose employment is casual and not in the usual course
13 of the trade , business or occupation of his employer."

14 Why doesn't, if your position is so, that he is not
15 a, why doesn't your, why doesn't Scott qualify as an employee
16 under that definition?

17 MR. YOUNG: He's not paid.

18 THE COURT: Well, there's no question
19 but what he gets remuneration. Supposing if he got the movie
20 ticket, in those days, I don't know what they are now, they
21 are rather high, maybe \$5.00; say they are \$2.00 and that he
22 would go to the movie: wouldn't that be compensation? What's
23 the difference between that and being admitted to the movie
24 without charge?

25 MR. YOUNG: The difference is, is that he

1 wouldn't qualify to make a claim against the Industrial Com-
2 mission. That's not the type of --

3 THE COURT: Why wouldn't he. I think
4 the part of the decision in the Board of Education case you've
5 cited was that, first of all, that the compensation for the
6 meal ticket wasn't paid by the school district, it was paid
7 by, is paid by the RSCV, or whatever it is.

8 MR. YOUNG: Correct.

9 THE COURT: So this is a distinguishing
10 feature. Secondly, under the Board of Education case, the
11 School District had no right to determine his hours. They
12 had no supervision over him. And he was operating there under
13 his own considerably, for his own individual purposes of his
14 business. And none of those aspects apply here. You agree
15 that, if I understand your testimony that's come in, that the
16 agent of the employer, Scera, Paul Gourdin had certainly the
17 power and the authority and did exercise determination of
18 hours, when he worked.

19 MR. YOUNG: That's true.

20 THE COURT: Directed his work, told them
21 what to do, when to do it. Seems to me that that Board of
22 Education case is substantially different from the one that
23 we have before us now. Your allegation is that the, that
24 Paul Gourdin, acting with the course and scope of his employ-
25 ment, hired or employed, permitted, Scott to work; directed

1 his activities, told him when to work, certainly carries all
2 of the characteristics of an employee except as the question
3 of compensation of whether or not the right to go swimming
4 and the right to go to a movie constitutes compensation
5 within the meaning of the Act.

6 And the Board of Education case doesn't really deal
7 with that except to say that there wasn't any compensation at
8 all of any kind, because the meal ticket that the individual
9 in the Board of Education case, the meal ticket was provided
10 for him that permitted him to eat at the school cafeteria was
11 not provided by the Board of Education but was provided by
12 the other entity, the RSVP, what is it, is that what it's
13 called?

14 MR. YOUNG: Right.

15 THE COURT: So that clearly in that case
16 they distinguish it and say there wasn't any compensation of
17 any kind.

18 MR. YOUNG: Well, I don't think this is
19 the kind of compensation that the Industrial Commission would
20 recognize.

21 THE COURT: Supposing that he is covered
22 by Workmen's Compensation, Mr. Glauser, how would that be
23 determined for the purposes of awarding compensation thereto,
24 responsibilities under the Workmens Compensation Act?

25 MR. GLAUSER: As I understand it, your

1 Honor, the Workmens Compensation laws provide for specific
2 compensation based on specific impairment. They also provide
3 for payment of medical bills. What that means is, if this
4 claim had probably been submitted to the Workmens Compensation
5 Commission, and perhaps it still can; Scott's still a minor,
6 and I don't know if the statute would be tolled, it's obvious-
7 ly run, unless it is tolled. But his claim, if submitted to
8 the Workmens Compensation Commission minds, I think: No. 1.
9 They would pay his medical bills. No. 2, based on impairment
10 for specific amputations, he would be awarded a certain lump
11 sum, as set by the statute.

12 There are no, with regard to lost wages, I don't
13 know how they would handle that, your Honor. I suppose --

14 THE COURT: Well, describes, "Average
15 weekly earnings shall mean the average weekly earnings arrived
16 at by the rules provided in Section 35-1-75." Suppose the
17 average weekly earnings are whatever the value of the right
18 to be admitted to the movie and to the swimming pool.

19 What's that case you had that indicated that? You
20 cited one, as I recall, in reference to compensation.

21 MR. GLAUSER: To about what the compensa-
22 tion has to be, your Honor?

23 THE COURT: Yes.

24 MR. GLAUSER: I would refer the Court to
25 a couple --

1 THE COURT: Well, have you got a copy of
2 one?

3 MR. GLAUSER: I don't, your Honor. And
4 I think, to be honest with you, I don't know that there's a
5 holding directly on point in Utah. I think what I was refer-
6 ring to was dicta. Let me find that for you. I would just
7 mention to the Court that --

8 THE COURT: Why don't you move over to
9 the other podium.

10 MR. GLAUSER: That the Workmens Compens-
11 ation Statute has always been interpreted broadly. There are
12 many cases saying that if there's a question, it generally
13 cuts in favor of the worker being entitled to some type of
14 compensation.

15 Specifically, the case of Ortega vs. Salt Lake Wet-
16 Wash, which is reported, 156 P.2d 885.

17 THE COURT: Well, I understand that con-
18 cept.

19 MR. YOUNG: Would the Court be inclined
20 to take this under advisement and let me take a look at a
21 couple of other issues in the interim?

22 MR. GLAUSER: By the way, your Honor,
23 apparently you are not concerned with this, but there was
24 some question as to an agreement, in the case of Bambra vs.
25 Bethers, which is found in 552 P.2d 1286. The court said that

1 the Workmens Compensation Act does not expressly require con-
2 sent on employer's part to establish requisite employer-
3 employee relationship, nor is written contract required for-
4 mality for Workmens Compensation purposes.

5 THE COURT: Well, I don't have any ques-
6 tion about that either oral or written, express or implied.

7 What points do you think you can address, Mr. Young?

8 MR. YOUNG: I want to be satisfied in my
9 mind, your Honor, that there isn't a, and I understand that
10 there is and I don't want to represent to the Court, it runs
11 in my mind that there's a very, a more recent case which
12 discussed assertions or immunities, and I'd like to have that
13 opportunity to take a look at that, which I could do during
14 the noon hours. I know that Mr. Glauser has a bunch of wit-
15 nesses out in the hall.

16 MR. GLAUSER: Your Honor, I don't believe
17 that that, other than the dicta that you found that you read,
18 had the Board of Education talking about the meal ticket, and
19 I think and I know there's a dicta case where they use the
20 word "wage or other consideration or compensation," or some-
21 thing like that, but I'm having trouble putting my fingers
22 on it. But I'll be honest with you, I don't think that lang-
23 uage was germane to the holding of the case.

24 But, your Honor, as I see this it's a, yes, it's a
25 win-win situation. If workmens Compensation is applicable,

1 they are barred. If it's not applicable, it's because he was
2 not recognized as an employee. And as such, Scera owed no
3 duty to him except to refrain from willfully and intentionally
4 injuring him, under the cases.

5 The duty to refrain from injuring employees arises
6 at law from the employment relationship. If that relationship
7 isn't there, Scera is not entitled to the benefits of that
8 relationship, they certainly can't be held to the obligations
9 and responsibilities of it. Whether he's within or whether
10 he's without, either way, as a matter of law, I believe Scera
11 is entitled to judgment.

12 THE COURT: Well, I think your motion is
13 not properly identified. It isn't a motion for summary judg-
14 ment, probably more properly a motion for a directed verdict.

15 MR. GLAUSER: That's correct, your Honor.

16 THE COURT: I don't think it's, a summary
17 judgment is appropriate at this point. I think the plaintiff
18 has rested his case. So that, but I don't know that the
19 characterization of the motion is critical, since it's obvious
20 that's what your intent is.

21 MR. GLAUSER: I'd be happy to amend it,
22 your Honor, to clarify that that's what it meant.

23 THE COURT: Well, Mr. Young, I'm, I sup-
24 pose I've got to rule on this matter before we proceed. There
25 is one question.

1 There isn't any evidence in the record, Mr. Glauser,
2 that Scera in fact carried Workmens Compensation. If in fact
3 they did not, and then even if he were an employee, they'd
4 have a direct right of action against the, against Scera, so
5 that there's that deficiency in the record, as to whether or
6 not there's any Workmens Compensation coverage, or whether
7 it was maintained prior by Scera.

8 Well, I'm going to take the matter under advisement.
9 We'll proceed from this point to the noon hour, will not per-
10 mit you to do that.

11 I do feel that in any event, Mr. Young, that there
12 is a complete failure of proof as to any future loss of earn-
13 ings, and I think that the defendant is entitled to a directed
14 verdict as to that issue

15 As to the comparative negligence issue, if we get
16 to that point, it isn't handled on some other basis, it appears
17 to the Court that is a jury question. I don't think the Court
18 can decide that.

19 MR. YOUNG: When you say that the, you
20 are going to direct a verdict on those future lost earnings,
21 do I understand that you are going to instruct the jury that
22 there will be no loss, future lost earnings? Or do I under-
23 stand your ruling to be that I will not be able to argue that
24 he will have --

25 THE COURT: Well, there isn't any proof,

1 there isn't anything in the record of future lost earnings
2 that's been admitted into evidence.

3 MR. YOUNG: That's true.

4 THE COURT: So that as to that, it's
5 got to fail. Pain and suffering, those are still viable.

6 MR. YOUNG: Loss of opportunity, loss
7 of access to the job market?

8 THE COURT: There isn't any, to end up
9 with a monetary equivalent, there's nothing on which the jury
10 could base any decision or finding as to that. So I think
11 that that's a viable issue.

12 MR. YOUNG: Well, so I don't get in
13 trouble, let me press the Court on the matter, so I don't
14 get in trouble before the jury. But there is abundant testi-
15 mony that he will be impaired in certain occupations, and
16 that he may have difficulty competing with his peers in
17 certain occupations.

18 THE COURT: But there isn't any evidence
19 as to what that means monetarily, Mr. Young. The only way
20 you could get at it is to speculate. it would be absolute
21 speculation on the part of the jury.

22 MR. YOUNG: Are you precluding me from
23 arguing that he will have that problem?

24 THE COURT: To the extent that you are
25 claiming anything for future lost earnings or ability to earn,

1 there isn't anything in the record to support it; and to
2 answer your question, yes. Seems to me you are limited in
3 your case to the pain and suffering that he's undergone, what
4 he might experience in the future by way of pain and suffer-
5 ing, and the medical expenses that are incurred in connection
6 with these, with the injury.

7 MR. YOUNG: Why can't I refer to Mrs.
8 Farnsworth's testimony to the effect that there are many
9 jobs in the market which will not be available to him, with-
10 out referring to a dollar value?

11 THE COURT: What would be the purpose
12 of that, then, Mr. Young?

13 MR. YOUNG: The purpose of that would be
14 to show that he is limited in his access to certain jobs.

15 THE COURT: Let's admit for the sake of
16 argument that he is. Then what's the jury going to do about
17 it?

18 MR. YOUNG: Well, that's a fact question
19 for the jury.

20 THE COURT: But what, on what could they
21 base any kind of an award? What evidence is there in the
22 record to support any award of any amount? So that, let's
23 admit for the sake of argument that he's going to be, have
24 difficulty in certain jobs, that he may not be able to perform
25 one or more of them as efficiently as he might otherwise do.

1 MR. YOUNG: Or he might not be able to
2 compete with another person on an equal footing to get that
3 job.

4 THE COURT: May not. But, again, on what
5 basis then is there evidence in the record for the jury to do
6 anything except speculate as to what that means in a monetary
7 sense? They can't distort things -- award compensation, all
8 they can do is award him compensation. But there's got to be
9 some basis upon which the jury can do that.

10 MR. YOUNG: Well, I understand.

11 THE COURT: And in the absence of any
12 evidence as to a monetary loss or consideration, there's no-
13 thing that the jury can even talk about except to speculate
14 and say, well, he's going to be --

15 MR. YOUNG: Well, I understand. And
16 that's why we had Mrs. Farnsworth here. And I understand the
17 Court's ruling with respect to her testimony and the Court,
18 a preclusion of me from having her offer her opinion as to
19 what those dollar values would be. And of course when I
20 couldn't get that in, lay the foundation there, then of course
21 there was no point in calling Dr. Randle, the only thing to
22 do is to send him home.

23 THE COURT: I understand that, Mr. Young.
24 I told you, I'm concerned about the matter, I made my judg-
25 ment, that is the ruling that the law required me to make.

1 MR. YOUNG: Well, I'll not argue with the
2 Court on that.

3 THE COURT: But having made that, and
4 that being now the status of the case, it doesn't appear to
5 me that there is any reason for you to argue that he will
6 not be able to compete in the job market in the future, that
7 he will not be able to keep up with his peers in certain
8 respects. And, admitting for the sake of argument that all
9 of that is true and established, again, what does it mean?
10 The only thing the jury could do is to award him compensation
11 for that figure. And the Court will instruct the jury that
12 damages cannot be based upon speculation, there has to be
13 some basis or evidence in the record to support whatever they
14 might do in that regard. And there isn't anything. They'd
15 have to be purely speculation on their part as to what that
16 means.

17 So to the extent that that, within that context
18 the Court, the Court would preclude you and expect you not
19 to argue those matters to the jury. Certainly, it's obvious
20 that you'd have the permanent injury, and there may be some
21 discomfort and pain that he's going to experience in the
22 future. They may consider that, and obviously that is some-
23 thing that, again, they just have to fix, since there isn't
24 any measure for that in any event. No testimony can tell,
25 no expert can get up and say how much it costs to be hurt

1 or how much it hurts, how much it's worth to have a finger
2 pain. But that was a little different matter than trying to
3 say that he's not going to be able to compete in the market
4 or he's going to lose job opportunities; those items which
5 can be reduced to a monetary figure and need to be based upon
6 some evidence in the record, of which there is none. So
7 the Court would preclude you from doing that.

8 But as to the other issue, let's proceed, bring
9 the jury back in. I'll deny, just take that motion under
10 advisement, deny it pro forma, then permit you to renew it
11 after the recess. I want to give Mr. Young the opportunity
12 to -- here.

13 And I'll tell you what I'm concerned about, Mr.
14 Young. Whether or not the emoluments that have been indicated
15 would constitute compensation within the meaning of the Act.
16 And since I think all of the other elements are present, if
17 in fact he was hired by his father on behalf of Scera, his
18 father had the right to exercise control, he had the right
19 to fire, he had the right to and did furnish equipment; the
20 only thing that's left is, was there any compensation. that's
21 what's bothering me.

22 Just bring the jury back in.

23 (WHEREUPON, the Jury returned into the courtroom
24 at 10:49 o'clock p.m.)

25 THE COURT: Let the record show that the

1 BY MR. GLAUSER:

2 Q Mr. Nielsen, would you tell the jury why that
3 application wasn't submitted? Do you remember who requested
4 that?

5 A I think, I think that matter was discussed at my
6 deposition, and the facts may be a little fuzzy right now,
7 but it's my recollection at this time that Paul Gourdin said
8 not to do it.

9 MR. GLAUSER: No more questions.

10 THE COURT: Anything further, Mr. Young?

11 MR. YOUNG: No, sir.

12 THE COURT: All right, step down.

13 MR. GLAUSER: Your Honor, I don't have
14 anything further at this time.

15 THE COURT: All right, Mr. Young, do you
16 have anything further at this moment?

17 MR. YOUNG: No, sir.

18 THE COURT: All right, let's be in recess,
19 let's, perhaps you can try to reconvene without the jury at
20 12:45, so that we don't need to keep the jury waiting any
21 longer than necessary. So, we'll be in recess.

22 (WHEREUPON, the Court recessed at approximately
23 11:40 o'clock a.m. and reconvened at 1:01 o'clock p.m., con-
24 tinuing outside the presence of the Jury, as follows:)

25 THE COURT: We'll continue with Gourdin

1 vs. Scera.

2 MR. YOUNG: Your Honor, may I move this?

3 THE COURT: Yes.

4 MR. YOUNG: Right dead in my way.

5 I want to thank the Court for the opportunity to
6 take a little time to look at this. And I think I can and
7 am in a position to enlighten the Court. And let me start
8 by just quickly reviewing the, I think what we have been
9 doing up until now is we have been examining this Workmens
10 Compensation issue. And by the way, your Honor, I have asked
11 Mr. Jeff Peatross, a member of our organization, to sit with
12 me here. He's had this issue many times before, and I may
13 turn and ask him a question, if the Court would permit him
14 to sit with me for a moment.

15 THE COURT: He may.

16 MR. YOUNG: But up until now we have
17 argued the question, seems to me we have taken it from this
18 point of view: Is Scott entitled to Workmens Compensation
19 benefit. We've looked at the Board of Education Alpine case,
20 and the assumption that we've made is that or the underlying
21 assumption that seems to be made is that if he's entitled to
22 benefits, then he could not bring an action because his
23 exclusive remedy would be under the Workmens Compensation
24 Act.

25 Now, I think that analysis, and I'm confident that

1 that analysis is misplaced. Now, that may have been true
2 for awhile and that may have been true until about 1975.
3 But at that time the Legislature enacted 35-1-62. Now, the
4 second paragraph of 35-1-62 provides, if you are with me on
5 that: "For the purpose of this Section, and notwithstanding
6 the provisions of Section 35-1-42, the injured employee or
7 his heirs or personal representatives may also bring an action
8 for damages against sub-contractors, general contractors,
9 independent contractors, property owners, or their lessees
10 or assigns, not occupying an employee-employer relationship
11 with the injured or deceased employee at the time of his
12 injury or death."

13 Now, the Utah State Supreme Court has addressed
14 this question. And I cite to the Court, and I furnished a
15 copy of the case to the Court, of Pate vs. Marathon Diesel
16 Company, found at 777 Pacific Reporter Second at page 428.
17 It's a June 6, 1989 case. I furnished a copy of it to coun-
18 sel. And I direct the Court's attention to the language on
19 page 431 where it provides, the phrase reading, quote: "Not
20 withstanding the provisions of Section 35-1-4 means in oppos-
21 ition to and not incompatibility with Section 35-1-42."

22 Now, the Court went on to say, quote: "We, there-
23 fore, conclude that the legislature has in clear and unmis-
24 takable language evidenced an intention to allow suit by an
25 injured worker against those persons who might be his or her

1 statutory employer as defined in Section 35-1-42. The immedi-
2 ate or common law employer who actually pays compensation,
3 and it's officers, agents and employees are shielded by the
4 exclusive remedy immunity covered by Section 35-1-60."

5 So I don't think we are in a position here of
6 saying is Scott entitled to Workmens Compensation benefits,
7 and if he is, then that is his exclusive remedy. Section
8 35-1-62 permits, and as cited, suits to be brought under
9 other circumstances.

10 Now I don't think, your Honor, that Scera could be
11 an actual employer of Scott Gourdin, for the reasons that
12 I've stated before, because the activity in which Scott was
13 involved was prescribed by the statute.

14 THE COURT: Well, who's employee was
15 he, if he was employed by anybody?

16 MR. YOUNG: Well, you know, I got to
17 thinking about. He is a worker, but he's not a volunteer in
18 the traditional sense. Were he a volunteer worker, then
19 Scera would have no duty to any of the volunteer workers that
20 they have invited to come. These volunteer workers that we
21 are talking about really aren't volunteers in the traditional
22 sense, to whom no duty is owed. These are invitees. They
23 are people that are asked to come and do volunteer work. So
24 that's quite different than Mr. Olson in that other case.

25 THE COURT: Well, what's their obligations

1 to an invitee?

2 MR. YOUNG: Well, I think they would owe
3 him a duty. I just received some help, your Honor, and which
4 I am grateful for. And I understand that an invitee you'd
5 owe the same duty of care as you would if you were a business
6 and invited someone on your premises.

7 THE COURT: Well, is that just an assump-
8 tion, or do you have some authority to support that?

9 MR. YOUNG: I can find authority to sup-
10 port that. I think that can be found in the re-statement.
11 Judge, I didn't bring that with me.

12 But, back to the point we were arguing, whether the
13 Court should grant their motion for a directed verdict, and
14 ask for -- would terminate our association here today. I
15 don't think that would be appropriate, given the law.

16 I've cited another couple of cases. The Bosh case,
17 found at 777 Pacific 2.d 431. And I refer to page 432. And
18 I've referred the Court a copy of that, too. And the Court
19 cites back to the Marathon case, and it says, as in Pate vs.
20 Marathon Steel Company: "The sole question for our determina-
21 tion is whether, assuming defendant is a statutory employer of
22 plaintiff under 35-1-422, can he sue for his purposes pursuant
23 to 35-1-62, or whether defendant enjoys immunity from such
24 suit under Section 35-1-60. In Pate vs. Marathon Steel
25 Company we held that a worker can sue a statutory employer who

1 has not been required to pay workmens compensation benefits,
2 and the latter does not partake of the immunity afforded by
3 Section 35-1-60."

4 Then it goes on to say that decision is wholly
5 dispositive of the identical issue raised by the court.

6 THE COURT: Well, I don't have any trouble
7 with that NSR concept, Mr. Young. I think you are mischar-
8 acterizing -- theory of statutory employee. There isn't any
9 other category that is excluded, in my view. They are not
10 subcontractor, general contractor, independent contractor
11 or lessees or assigns, not occupying an employer-employee
12 relationship with; if they occupy anyting, it, as an employee,
13 it's an employer-employee relationship.

14 I think this other section has reference to a third-
15 party employers and the -- who might under certain circum-
16 stances be on the job and have some obligation to be liable
17 for compensation. That's -- similar to an employee of another
18 contractor who negligently causes injury, something of that
19 kind. I don't see that this section cited has any applica-
20 tion to the question that is before us.

21 What I am concerned about is whether or not the
22 limited compensation by nature, the free admission to a
23 theater or free admission to a swimming pool, is sufficient
24 to create an employer-employee relationship. Do you have
25 anything on that point?

1 MR. YOUNG: Your Honor, may I call on
2 my associate, Mr. Peatross, to help me out on that question?

3 THE COURT: Yes, you may.

4 MR. PEATROSS: If I might back up a step,
5 your Honor, and address an earlier concern that you raised,
6 if I may. And it might not be helpful. However, the point
7 I think that the Pate vs. Marathon Steel case stands for is
8 the fact that there's a broad class of employer, and they use
9 the word, statutory employer to whom benefits are, they are
10 required to pay benefits to injured employees. That's a
11 broad category.

12 The category of those employers that enjoy immunity
13 is much narrower, to use the Court's term, and in the Pate
14 case it's a common law or, to coin my own phrase, a bona fide
15 or actual employer are the only persons that enjoy immunity.
16 The cases that I heard discussed earlier today, particularly,
17 the Alpine case was not a case of immunity. It was a case
18 of who's responsible for Workmens Compensation benefits under
19 benefits under the statute. And the very broad definition
20 of employer, the statutory employer definition to whom im-
21 munity is not automatically granted, is very broad. And you
22 can look to any indicia in order to get injured people Work-
23 mens Compensation benefits, but it's on the bona fide employees
24 that are entitled to immunity under the '75 Amendment to 1962.

25 Now, as to whether or not this young man is an

1 actual employee of Scera. First of all, a review of Chapter
2 23, from the way I understand, that the Court's been here to
3 hear them here in detail, that he has no employment relation-
4 ship, actually bona fide relationship with Scera, because
5 that relationship is per se illegal, he's too young, he's not
6 allowed to do those kind of things. For one reason. As to --

7 THE COURT: The trouble with that is that
8 the statute defines people who are entitled, legal or illegal;
9 employees, legal or illegal.

10 MR. PEATROSS: Your Honor, Your Honor's
11 referring to Section 35-1-43, which in return refers back to
12 Section 42, that's the Subsection (b), and I think you have
13 to take that in connection with the actual enumerated Statute,
14 1942, or, excuse me, not 1942, Section 42. Even though Sub-
15 section, the Subsection, second paragraph in 62 speaks, not-
16 withstanding Section 42, you have to include both those
17 sections. In other words, not, especially in light of the
18 explanation of the Supreme Court, what they are saying, what
19 that amendment says is, it doesn't matter if he's a statutory
20 employee or the statutory relationship between Scera and this
21 youngman that would require Workmen's Compensation benefits,
22 it's only an actual common law employer that enjoys immunity
23 granted in Section 60.

24 THE COURT: How would you characterize
25 Scera anything other than that?

1 MR. PEATROSS: Than as an employer?

2 THE COURT: Yes, a common law employer.
3 How can they be anything else?

4 MR. PEATROSS: I don't see how, your
5 Honor, they can be a common. They certainly have a relation-
6 ship, he's an invitee, is the way I understand the facts.
7 And had he said, hey, come out, help out, we'll give you a
8 ticket, whatever, I'm not sure of the details of that, but
9 they are not of at law employer or bona fide, in my mind, for
10 two reasons. 1. It's illegal under the Title, the Chapter
11 30 of Title 34, 23, excuse me, of Title 34. Because it can't
12 employ a little kid. They can't have a bona fide employer
13 and employee relationship with a seven-year-old. And, second,
14 there's salary consideration. That goes to the point Brent
15 originally asked me to address. I don't know how many tickets
16 he got, but I suppose that it certainly wasn't enough to meet
17 the minimum wages requirements, even a lowered one that
18 applies to teenagers or minors. I understand it's less than
19 \$3.25 an hour. But they are not compensating him at the
20 legal rate for actual employees that the law demands. So
21 he's not an employee.

22 THE COURT: Where is there evidence to
23 that?

24 MR. PEATROSS: Well, other than I'm assum-
25 ing that's the testimony that's been here today, I don't know

1 how many days or nor how many hours. That's a finding His
2 Honor would have to make. And I assume there's been testi-
3 mony to that. And, I'm sorry, I can't help you with that
4 because I wasn't here.

5 THE COURT: Well, you are not able to
6 help me with it.

7 Do you have anything further, Mr. Young?

8 MR. YOUNG: No, your Honor.

9 THE COURT: Let me hear -- Do you have
10 anything further, Mr. Glauser?

11 MR. GLAUSER: I do, your Honor, several
12 things. First of all, with regard to the arguments that were
13 just made with regard to illegality, the case of Bingham vs.
14 Lagoon Corporation, directly on point. That case came down
15 in 1985 from the Utah Supreme Court, 707 P.2d 674. And in
16 that case the court held specifically a minor employee injured
17 when struck by a moving train at employer's amusement park
18 was covered by the Workmens Compensation Act and, hence, was
19 precluded from voiding her employment contract and recovering
20 against her employer in tort, independent of compensation
21 remedy, regardless of whether the minor was illegally engaged
22 in hazardous employment when injured. That case came out
23 the very same year that this accident happened. It's direct-
24 ly on point. There was argument without merit.

25 You asked for some help with regard to the compens-

1 ation, and I do have some insights for that, if the Court
2 would like them.

3 THE COURT: Yes, I want to hear.

4 MR. GLAUSER: First of all, we are already
5 aware, the only thing I could find in use is what you are
6 already aware about. In the Olson decision, on page 52, they
7 specifically made mention that the lunch ticket was not pro-
8 vided by the school board, but had been provided RSVP, which
9 in itself implies that consideration be other than wages.

10 Second of all, I would cite the Court to the
11 California case of Laeng, and that's L-a-e-n-g, vs. a Work-
12 mens Compensation board. That case is reported at 494 P.2d,
13 page 1, 1972 case out of California, which held that the
14 Workmens Compensation law does not require that an applicant
15 for employment be receiving actual compensation for his
16 services in order to fall within the Workmens Compensation
17 scheme.

18 Second of all, I would cite the Court to the Oregon
19 decision of Buckener, B-u-c-k-e-n-e-r, vs. Kennedy, Kennedy's
20 Riding Academy. And that case is found at 526 P.2d 450, a
21 1974 case out of Oregon. And that case involved a lady that
22 was there apparently walking horses; she was injured when
23 she was stepped on by a horse; she was not being paid for her
24 services; she was taking the place of teenage girls who were
25 not available that day; although the court does state that

1 the day before she worked and did get \$2.00. And the court
2 specifically held that she would come under the Workmens
3 Compensation Act. There was not actual compensation, hourly
4 wage type things involved. She was there in the regular
5 course and providing a service, and that was sufficient.

6 I might also refer the Court, I think the statutory
7 employer references that were made are enlightening. They are
8 not enlightening for the reason that counsel suggested. In
9 other words, they don't, obviously don't apply here. No one
10 is complaining Scera is a statutory employer. But they are
11 enlightening to show that the statutory employers don't pay
12 compensation to the people that receive those benefits. If
13 actual dollar-per-dollar compensation was a requirement, they
14 wouldn't be able to recover under Workmen's Compensation.
15 And for that reason I think they are important.

16 Also, I think the distinction between a statutory
17 employer, your Honor, and a regular employer has been addres-
18 sed several times in several cases by the Utah Supreme Court.
19 They have consistently held that the thing that makes an
20 entity an actual employer rather than a common law employer
21 is the right to control, the right to control the actual
22 activities. There are several cases on point. I'd be happy
23 to give you the cites, if you feel that's important, your
24 Honor.

25 Finally, your Honor, if I could, I would proffer

1 to the Court: Mr. Nielsen is here and he would be available
2 to testify and to authenticate this document, opposing counsel
3 has it, the document entitled Scera And You, and it was
4 approved by the Board of Directors in January of 1983. And
5 in this document they talk about the compensation that's
6 received by volunteers. And I think it's important that
7 exactly what that program is be spelled out.

8 With your permission, I would call Mr. Nielsen or
9 proffer this into evidence, not for the jury, but for the
10 Court's guidance in what was being done for volunteers.

11 THE COURT: Any objection, Mr. Young?

12 What is the publishing date on that document? May
13 I see it?

14 MR. GLAUSER: Yes. I have one of these
15 all ready. It was approved by the Board in January of '83.
16 And I think that's an exhibit to Mr. Nielsen's deposition, but
17 I could be wrong. But I know it was produced pursuant to
18 discovery.

19 MR. YOUNG: I've not seen it before. And
20 there isn't a publishing date on it. If they've got the
21 minutes of the board approval, I won't object.

22 MR. GLAUSER: Well, Mr. Nielsen would be
23 able to testify to that, your Honor.

24 THE COURT: Give me that 707 Pacific,
25 would you?

1 THE COURT: Well, a motion has been made
2 for a directed verdict on the basis that under the facts pre-
3 sented, that Scott Gourdin was an employee of Scera, whether
4 you characterize them as volunteers or otherwise or as an
5 employee, and that as such the remedies through which the
6 plaintiff is entitled are limited by the Workmens Compensation
7 Statute.

8 The question of whether or not an employee arrange-
9 ment exists depends on several circumstances. And the allega-
10 tion is and the proof demonstrates that Scott Gourdin was
11 himself an employee of the, of Scera; that he did on behalf
12 of Scera exercise the right of control over Scott --

13 MR. YOUNG: Excuse me. You earlier said
14 Scott.

15 THE COURT: Paul. I'm sorry. That Paul
16 himself was a manager of the grounds that on behalf of, pur-
17 ported to exercise control over the time, place and circum-
18 stances of the work or services that were performed by Scott;
19 that Paul purported to exercise the right to hire and fire
20 employees or volunteers; that equipment was furnished by
21 Scera and was supervised and the use thereof determined by
22 Paul Gourdin.

23 And the evidence is without dispute that there was
24 some remuneration or compensation given to Scott as a conse-
25 quence of his relationship with Scera. Whether or not he

1 exercised that right, it appears that he did not, that he had
2 the same advantage as he would otherwise have had by reason
3 of his father's employment.

4 What I have been concerned about then is whether
5 or not the consideration is of significance. I found some
6 cases in 153 Am Jur 2d on Workmens Compensation. There are
7 cases that held where an employee or volunteer receives meals
8 at the hospital cafeteria, that was held not to be sufficient.
9 Another case where there was board and room furnished, that
10 that was not held to be sufficient. There are other cases
11 however as to the contrary, more recent ones, which seem to
12 say that board and room is adequate.

13 Then the case of Barrigan vs. Workmens Comp.,
14 California case, 1987, 240 California Reporter 811, states:
15 "It has long been a requirement of an employment contract
16 that it be supported by consideration. The counterpart to
17 this principle is the rule that a person providing purely
18 gratuitous voluntary service is not an employee and has not
19 entered into an employment relationship with the person
20 receiving the services for purposes of Workmens Compensation
21 Act. It also has been the rule, for the purposes of workmens
22 compensation and consideration for compensation for an em-
23 ployee contract, need not be in the strict form of wages or
24 money but may take many forms."

25 I have been referred to the case of Bingham vs.

1 Lagoon with respect to the question of whether or not employ-
2 ment contrary to law would relieve a plaintiff of the conse-
3 quences of the exclusive provisions under the Workmens Com-
4 pensation Act. And the Court therein stated: "Plaintiff
5 asserts that Shauna was illegally engaged in hazardous employ-
6 ments in violation of Section 34-23-2 and that she was there-
7 fore entitled to void her employment contract and sue the
8 employer in court." Section 34-23-2 prohibits employment
9 of persons under 18 years of age in any hazardous occupation.
10 While the issue of whether Shauna was engaged in hazardous
11 employment in violation of that section at the time of her
12 accident is a question of fact, a determination that she was
13 so engaged would not assist her. Plaintiff relies on two
14 cases where the court required, under Section 35-1-43, as
15 then worded, "a showing that a minor was the lawfully employ-
16 ed will have become or limitations were places on the minor's
17 rights or remedies in the law;" then cites various cases.

18 "If Section 35-1043 had not been amended subsequent
19 to those cases, both Ortega and Henry would control here and
20 Shauna could maintain this tort action. However, the legis-
21 lature amended that Section in 1945 to define employees, as
22 among other things, minors, whether legally or illegally
23 employed, legally working for hire. Thus, despite illegal
24 employment, a minor is covered by the Workmens Compensation
25 Act."

1 I think that disposes of the argument that this
2 young man, as employed, or the relationship with Scera, was
3 a violation of the statutes referred to. Ordinarily, the
4 question of these matters may be a question of fact, a mixed
5 question of fact and law. But where they are unrefuted and
6 undisputed as to these items, it appears to the Court that
7 it does become a matter and a question of law for the Court
8 to decide.

9 MR. YOUNG: Before the court rules, may
10 I call the Court's attention to one other additional argument?

11 THE COURT: You may.

12 MR. YOUNG: If Scott did not receive
13 tickets and if he had access to the theater or to the pool
14 and so forth by virtue of his father's employment, then where
15 is the consideration for the employment relationship?

16 THE COURT: It seems to the Court, whether
17 or not he exercised those in his own capacity, he would have
18 had those privileges. The fact that he may have had dual,
19 duplicate privileges doesn't seem to the Court to be determin-
20 ative. He had them of his own right, if in fact he was em-
21 ployed and if he was working on behalf of Scera, the fact
22 that he may have also had that benefit as a consequence of
23 his relationship with his father doesn't seem to the Court
24 to make any difference.

25 I'm concerned about this case. I've fretted about

1 it, worried about it, and realize that the consequences of
2 court taking it away from the jury is a serious thing. But
3 I do believe that under the circumstances and the proof that
4 is before this court, that the Court has no alternative.

5 So the Court is going to grant the motion for a
6 directed verdict, on the basis that the plaintiff is pre-
7 cluded under the Workmens Compensation Act; that he would
8 recover, that his exclusive remedy is as provided in Section
9 35-1-64; and that the Scera has no liability beyond providing
10 Workmens Compensation benefits for this young man.

11 So that will be the Order of the Court.

12 You may bring the jury back in, and the Court will
13 indicate the fact that it has entered a directed verdict in
14 this matter.

15 (WHEREUPON, the Jury returned into the courtroom,
16 at 1:50 o'clock p.m.)

17 THE COURT: The record should now show
18 that the jury has returned to the box and is presently there-
19 in.

20 Anything further at this time, counsel?

21 MR. YOUNG: No, sir.

22 MR. GLAUSER: No, your Honor.

23 THE COURT: Ladies and Gentlemen of the
24 Jury, the Court has been involved with counsel in considering
25 legal matters and legal arguments and motions. And a conse-

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

SCOTT GOURDIN, a minor, by and)	
through his Guardian ad Litem,)	DIRECTED VERDICT
WAYNE C. CLOSE,)	
)	
Plaintiff,)	
)	
vs.)	
)	
SHARON'S CULTURAL EDUCATIONAL)	
RECREATIONAL ASSOCIATION)	
(SCERA), the Toro corporation,)	
and CUTLER'S CYCLE & MOWER,)	Civil No. CV86-1772
)	
Defendants.)	Judge Cullen Y. Christensen
)	

The above-entitled matter came on regularly for trial before the above-entitled Court on August 6th, 7th, and 8th, 1990. A jury was impaneled, counsel gave opening statements, and Plaintiff presented his case and rested on August 8, 1990. At the conclusion of Plaintiff's evidence, Defendant, Sharon's Cultural Educational Recreational Association (SCERA) made a Motion for Directed Verdict. The Court took the matter under

advisement while SCERA started the presentation of its evidence in defense.

After giving all counsel of records further opportunity to argue the matter and present additional research and evidence to the Court, the Court granted SCERA's Motion for Directed Verdict.

Pursuant to Rule 52(a) of the Utah Rules of Civil Procedure, the Court herein sets forth a brief written statement of the grounds for its decision. The Court finds that under the facts presented, Scott Gourdin was an employee of SCERA, whether characterized as a volunteer or otherwise as an employee, and that as such, the remedies through which he is entitled to recover are limited by the Workmen's Compensation Statute.


The question of whether or not an employee arrangement exists depends on several circumstances. The allegations and the proof demonstrate that Paul Gourdin was himself an employee of SCERA and that he was acting as the maintenance manager for the theater grounds. On behalf of SCERA, he purported to exercise control over the time, place and circumstances of the work or services that were performed by Scott Gourdin. Paul Gourdin purported to exercise the right to hire and fire employees and volunteers. Equipment was furnished by SCERA and supervision over the use of the equipment was provided by Paul Gourdin.

The evidence is without dispute that there was some remuneration or compensation given to Scott as a consequence of his relationship with SCERA. It appears to the Court that Scott's right in his own capacity to exercise privileges afforded to volunteer workers at SCERA was sufficient to constitute compensation under the Workmen's Compensation Act. Based on the foregoing, it is hereby;

ORDERED AND DECREED that a directed verdict is hereby entered in favor of the Defendant, Sharon's Cultural Educational Recreational Association (SCERA). Pursuant to Rule 54(d)(1) of the Utah Rules of Civil Procedure, costs are hereby awarded to SCERA as the prevailing party in an amount to be determined hereafter.

DATED this 12 day of Oct, 1990.

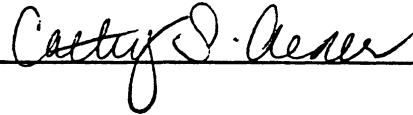
BY THE COURT:


HONORABLE CULLEN Y. CHRISTENSEN
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, on the 22nd day of August, 1990, a true and correct copy of the foregoing, to the following:

Brent D. Young
Attorney for the Plaintiff
48 North University Avenue
P.O. Box 672
Provo, UT 84603



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UTAH SUPREME COURT

BRIEF

RONALD E. GRIFFIN

ATTORNEY AT LAW

TEL: (801) 322-1500
FAX: (801) 322-1525



October 31, 1991

THE VALLEY TOWER, 50 WEST 300 SOUTH, SUITE 900, SALT LAKE CITY, UTAH 84101

Geoffrey J. Butler
Clerk, Utah Supreme Court
332 State Capitol Building
Salt Lake City, Utah 84114

FILED

OCT 31 1991

CLERK SUPREME COURT
UTAH

Re: Heslop v. Bank of Utah, Civil No. 900532
U.R.A.P. 24 (j) Letter

Dear Mr. Butler:

I am writing, pursuant to Rule 24 (j) of the Utah Rules of Appellate Procedure, to inform the Court of a pertinent and significant case that came to my attention after Mr. Heslop's Brief was filed. The case is Johnson v. Morton Thiokol, Inc., 168 Utah Adv. Rep. 13, _____ P.2d _____ (Utah 1991) [Filed September 5, 1991].

The reason for this supplemental citation is that the Bank of Utah's Reply Brief states at page 14:

Thus, Brehany suggests evidence of course of conduct and oral representations are not relevant. Heslop bases his implied-in-fact contract claim almost exclusively on course of conduct and/or oral representations.

In Johnson v. Morton Thiokol, Inc., however, the Utah Supreme Court clarifies that employee manuals and bulletins are not the only sources for an implied-in-fact contract. The Majority opinion in Johnson stated:

Specifically, we have held that employee manuals and bulletins containing policies for employee termination are legitimate sources for determining the apparent intentions of the parties and for fixing the terms of the employment relationship. However, we have not seen fit to limit the evidence concerning the parties' intent to such situations.

Id. at 15 (emphasis added). The Concurring opinion of Justices Stewart and Durham said, "Implied contract terms may arise from statements in an employee manual or from an employer's course of conduct." Id. at 18 (emphasis added).

I have enclosed nine (9) copies with this original letter and ask that you provide a copy for each Justice to review. Thank you.

Very truly yours,

A handwritten signature in cursive script that reads "Ronald E. Griffin". The signature is written in black ink and is positioned above the printed name.

Ronald E. Griffin
Attorney for Ivan J. Heslop

REG/sn

Enclosures

cc: Glenn C. Hanni, Esq. &
Stuart H. Schultz, Esq.