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Recommended Citation

Brief of Appellee, *Jim Hunsaker, Maurine F. Hunsaker, Betty Sudweeks, Matt Hunsaker, Nicholas Hunsaker, Dana Hunsaker, Jim and Maurine F. Hunsaker v. State of Utah, Gary Deland, The Utah State Department of Corrections, The Utah State Board of Pardons and Parole, Myron March, Ray Wall, Kent Jones, Joe Smout, John Shepard, Utah State Department of Adult Probation and Parole, Ralph Leroy Menzies, Gas-A-Mat Oil Corp. of Colorado, John Does I-V*, No. 910366.00 (Utah Supreme Court, 1991).
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BRIEF

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IN THE SUPREME COURT, STATE OF UTAH

JIM HUNSAKER, individually and on behalf of the deceased MAURINE F. HUNSAKER, and BETTY SUDWEEKS on behalf of MATT HUNSAKER, NICHOLAS HUNSAKER, and DANA HUNSAKER, minor children of JIM and MAURINE F. HUNSAKER, Plaintiff/Appellants, vs. STATE OF UTAH, a body politic, GARY DELAND as director of the Utah State Department of Corrections, THE UTAH STATE DEPARTMENT OF CORRECTIONS, THE UTAH STATE BOARD OF PARDONS AND PAROLE, MYRON MARCH as the director of the Utah State Department of Adult Probation and Parole, RAY WALL as the Regional Supervisor, Region III of Utah State Department of Adult Probation and Parole, KENT JONES and JOE SMOUT, as Supervisors of John Shepherd of the Utah State Department of Adult Probation and Parole, JOHN SHEPHERD, in his capacity as parole officer, UTAH STATE DEPARTMENT OF ADULT PROBATION AND PAROLE, RALPH LEROY MENZIES, GAS-A-MAT OIL CORP. OF COLORADO, a Colorado corporation and JOHN DOES I-V, Defendants/Appellees.	**APPELLATE COURT NO. 910366** Priority No. 16

BRIEF OF APPELLEE GAS-A-MAT OIL CORP. OF COLORADO

Appeal from an Order of the Third District Court Judge Richard H. Moffat, Granting Gas-A-Mat's Motion to Dismiss

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UTAH

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PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings in the lower Court are set forth in the caption of the case on appeal.

JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) as amended.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Gas-A-Mat Oil Corp. of Colorado.

On the basis of the record before it, did the trial court, in granting Gas-A-Mat's Motion to Dismiss, correctly determine that the "dual capacity doctrine" did not apply to the allegations in plaintiff's Complaint?

B. State Defendants/Appellees:

Gas-A-Mat adopts appellants' Statement of the Issues with respect to the State defendants/appellees.

STANDARD OF REVIEW

Because the propriety of a Rule 12(b)(6) dismissal is a question of law, this Honorable Court gives the trial court's ruling no deference and reviews it under a correctness standard. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194,

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196 (Utah 1991). A Rule 12(b)(6) Motion to Dismiss admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts. *Id.*

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

1. Utah Code Ann. § 35-1-60 (1953):

35-1-60. **Exclusive remedy against employer, or officer, agent or employee--Occupational disease accepted.**

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next-of-kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. . . .

2. Utah Code Ann. § 35-1-62 (1953):

35-1-62. **Injuries or death caused by wrongful acts of persons other than employer,**

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officer, agent, or employee of said employer -- Rights of employer or insurance carrier in cause of action -- Maintenance of action -- Notice of intention to proceed against third party -- Right to maintain action not involving employee-employer relationship -- Disbursement of proceeds of recovery.

When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said employer, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission. Before proceeding against the third party, the injured employee, or, in case of death, his heirs, shall give written notice of such intention to the carrier or other person obligated for the compensation payments, in order to give such person a reasonable opportunity to enter an appearance in the proceeding.

For the purposes of this section and notwithstanding the provisions of Section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer

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relationship with the injured or deceased employee at the time of his injury or death.

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. Any such fee chargeable to the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in Subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings as Concerns Defendant Gas-A-Mat Corp.

This is a wrongful death action arising out of the kidnapping and murder of Maurine Hunsaker. Mrs. Hunsaker was kidnapped while on duty from her place of employment, a Gas-A-Mat service station located at 3995 West 4700 South, Salt Lake

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County, Utah. Mrs. Hunsaker was employed by Gas-A-Mat as a cashier, and her duties consisted primarily of monitoring the customers and receiving payment from them for the products purchased at the service station. It was undisputed in the trial court below that after the death of Mrs. Hunsaker, the plaintiffs in this case filed for workers compensation benefits under the Utah Workers Compensation Act and received those benefits. Notwithstanding plaintiff's invocation of the benefits afforded under the Utah Workmen's Compensation Act, plaintiffs filed a complaint in which they named as a defendant, Mrs. Hunsaker's employer, Gas-A-Mat Corp.

Plaintiffs specifically allege that in regard to Mrs. Hunsaker's employment, Gas-A-Mat was acting in a "dual capacity." Plaintiffs assert that Gas-A-Mat was acting as both gasoline retailer and as a provider of security for the individual Gas-A-Mat stations.

Gas-A-Mat filed a Motion to Dismiss plaintiff's claims asserting that the Utah Workmen's Compensation Act provides the exclusive remedy for the death of an employee and that the "dual capacity" doctrine does not provide an exception to the exclusive remedy provisions of the Act under Utah law. It is Gas-A-Mat's position that Utah Code Ann. §§ 35-1-60 and 35-1-62, when read together, clearly indicate that the Utah legislature intended

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employer's immunity from common-law liability to be coterminous with their liability under the Utah Act. To the extent an employer is held liable as a result of the obligations mandated by the Utah Act, then the employer is entitled to immunity from common-law liability as provided in the Utah Act.

Disposition in the Court Below

By an Order of Dismissal dated January 28, 1988 and entered by the clerk on February 1, 1988, the Honorable Richard Moffat granted Gas-A-Mat's Motion to Dismiss. (R. 127-29, Order of Dismissal.) No memorandum decision was issued by the Court.

Relief Sought on Appeal

Gas-A-Mat requests this Court to affirm the decision of the trial court.

STATEMENT OF FACTS

Gas-A-Mat acknowledges that this Court, when determining whether a trial court properly granted a Rule 12(6) Motion to Dismiss, will accept the factual allegations in the Complaint as true. However, only the well-pled facts of this plaintiff's Complaint, as distinguished from mere conclusory

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allegations, must be accepted as true. *Bailey v. Kirk*, 777 F.2d 567, 579 (10th Cir. 1985); *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976).

Paragraphs 35 and 36 of plaintiffs' Complaint allege that at the time Maurine Hunsaker was kidnapped, she was employed by Gas-A-Mat as a cashier, and that her duties consisted primarily of monitoring the customers and receiving payments from them for the products purchased at the service station. There is no dispute that at the time of the regrettable incidents that led to Mrs. Hunsaker's death, she was in the course and scope of her employment. There was no dispute at the trial court below that the plaintiffs in this case had filed for workers compensation benefits under the Utah Workmen's Compensation Act and had received those benefits. (See Findings of Fact, Conclusions of Law and Order of the Industrial Commission of Utah, Appellees' Addendum, p. 1-3.) (R. 96-98.)

Plaintiffs allege that in regard to Mrs. Hunsaker's employment, Gas-A-Mat was acting in "two capacities." (Plaintiffs' Complaint, ¶ 37.) Plaintiffs assert that Gas-A-Mat was acting as both gasoline retailer and as a provider of security for the individual Gas-A-Mat stations. (Plaintiffs' Complaint, ¶¶ 39 & 42.) Plaintiffs further allege that in respect to its action as a provider of security, Gas-A-Mat was

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negligent in failing to provide certain additional security and surveillance procedures at the various stations. (Plaintiffs' Complaint, ¶¶ 48-50.)

Plaintiffs' Complaint does not allege that "Gas-A-Mat security," as opposed to "Gas-A-Mat sales," was a separate and distinct corporate entity. Plaintiffs do not support the conclusory and speculative allegation about "Gas-A-Mat security" with any factual allegation concerning separate corporate form or identity.

SUMMARY OF ARGUMENTS

Utah Code Ann. § 35-1-60 makes it clear that the Utah Workmen's Compensation Act (hereinafter the "Act") is the exclusive vehicle for recovery of compensation for injury or death, against the employer and other employees to the exclusion of "any and all other civil liability whatsoever, at common law or otherwise. . . ." Utah Code Ann. § 35-1-62, which permits suits for damages only against persons other than the employer, must be read in conjunction with the exclusivity provisions of § 35-1-60. When the two sections are read together, it becomes clear that the Utah legislature intended the scope of employer's immunity from common-law liability to correspond to their responsibilities under the Act.

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It is undisputed that in Utah, an employer is liable under the Act for a broad range of foreseeable events set in motion by an on-the-job injury. This broad obligation under the Act, however, also carries with it a broad grant of immunity. If the employer is held liable as a result of the obligations mandated by the Act, then the employer, to the same extent, is entitled to immunity from common-law liability as provided by § 35-1-60.

Adoption of the dual capacity doctrine as advocated by plaintiffs undermines the policies sought to be achieved by the Act. There are an endless number of situations in which employers engage in a course of conduct which could be construed as relating to workplace security. It would be an exercise in sophistry to attempt to draw any principled line of distinction between those situations in which employees could sue an employer and those in which the employee could not sue the employer.

Application of the dual capacity doctrine to the facts of this case would gut the exclusive remedy provision for tens of thousands of Utah employees and their employers and the end result would be the undoing of Utah's workmen's compensation system.

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ARGUMENT

POINT I

UTAH WORKERS COMPENSATION ACT PROVIDES EXCLUSIVE REMEDY FOR DEATH OF EMPLOYEE AND "DUAL CAPACITY" DOCTRINE DOES NOT PROVIDE AN EXCEPTION TO THE EXCLUSIVE REMEDY PROVISION OF THE ACT

Under the Utah Act, the right to recover worker's compensation is the employee's exclusive remedy against the employer and the employer's officers, agents, and employees for work-related injuries, including death. Utah Code Ann. § 35-1-60. Once compensated, the employee has no other legal remedies against the employer.[1] The statutory scheme is a

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[1] *Morrill v. J&M Constr. Co., Inc.*, 635 P.2d 88 (Utah 1981). In *Morrill*, a mother brought a wrongful death action against her son's employer after her son was killed during the course of his employment in a cave-in incident. In rejecting a constitutional attack on the exclusive remedy provision and in affirming the granting of summary judgment by the trial court, this court stated:

> Article XVI, Sec. 5 of our Constitution clearly accepts the exclusive Workmens Compensation Act remedy from any previous constitutional interdiction that the right of action in injury cases and damages therefore shall not be abrogated. We reaffirm our previous pronouncements and reaffirm the principle of exclusivity of right and remedy in the Workmens Compensation Act, under the facts of this case. A reading of Title 35-1-60, U.C.A. 1953, makes it clear that the Act is the *exclusive* vehicle for recovery of compensation for injury or death, *against the*

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legislative bargain in which the employer is held liable without fault for the work-related injuries of employees and the employee is limited to workers compensation as his exclusive remedy.[2]

A. <u>Utah Does Not Recognize Dual Capacity Doctrine</u>.

Utah does not recognize the dual capacity doctrine. Indeed, this Court refused to adopt the dual capacity doctrine in deciding the case of *Bingham v. Lagoon Corp.*, 707 P.2d 678 (Utah 1985). This Court also refused to adopt the dual capacity doctrine in *Stewart v. CMI Corp.*, 740 P.2d 1340 (Utah 1987).

In *CMI Corp.*, the personal representative of a deceased worker brought a wrongful death action against his employer and a third-party manufacturer on the theory of strict products liability. The plaintiff urged this Court to adopt the "dual capacity" exception to the workmen's compensation law. This Court reviewed its holding in *Lagoon Corp.* and held:

> *employer and other employees* to the exclusion of "*any and all other civil liability whatsoever*, at common law or otherwise," and that it *bars* all *next-of-kin* or *dependents, or anyone else*, from using any other means of recovery against employers and others named in and covered by the Act, then the Act itself.

635 P.2d at 89 (emphasis in original).

[2]*See* Development, *Utah Worker's Compensation and Occupational Disease Laws*, 1983 Utah L. Rev. 573, 573-77.

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> In that case [*Lagoon Corp.*], the plaintiff asserted that her employer wore two hats: The first being that of an amusement park operator; the second, the hard hat of a contractor which was constructing the "Colossus" ride at the amusement park. We there rejected the argument that an employer occupies a separate capacity and owes separate duties to his employees as an owner of the premises than he does generally as an employer and declined to adopt the dual capacity doctrine under those circumstances. We similarly see no clear distinction in this case between the duties owed by an employer to furnish safe equipment for its employees when it purchases those tools, and the duties owed to its employees to furnish safe equipment when it has manufactured the tools itself. The dual capacity doctrine does not apply in this situation because the employer has not assumed a separate and distinct obligation toward his employee other than as employer.

740 P.2d at 1341-42.

This Court's rejection of the argument that an employer occupies a separate capacity and owes separate duties to its employees as an owner of premises (other than it would generally as an employer) is consistent with other case law and scholarly commentary. Professor Larson in his treatise 2 *Larson's Workman's Compensation Law*, § 72.81 (Desk Ed. 1990), states:

> It is held with virtual unanimity that an employer cannot be sued as an owner or occupier of land, whether the cause of action is based on common-law obligations of landowners or on statutes such as safe place statutes or structural work acts.

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> Apart from the basic argument that mere ownership of land does not endow a person with a second legal persona or entity, there is an obvious practical reason requiring this result. An employer, as part of his business, will almost always own or occupy a premises, and maintain them as an integral part of conducting his business. If every action and function connected with maintaining the premises could ground a tort suit, the concept of exclusiveness of remedy would be reduced to a shambles.

B. **Dual Capacity Doctrine Has Been Rejected Across the United States.**

As Professor Larson notes in his treatise, the dual capacity doctrine really "flourished in only two states, Ohio and California, and even there for only a few years, from 1977 to 1983." *Larson, supra*, at § 72.81(c). The California legislature abolished the dual capacity doctrine and the Ohio Supreme Court laid the dual capacity doctrine to rest in *Schump v. Firestone Tire & Rubber Co.*, 44 Ohio St. 3d 148, 541 N.E.2d 1040 (1989).[3]

Adoption of the dual capacity doctrine is inconsistent with the intent of the Utah legislature as evidenced in Utah Code Ann. §§ 35-1-60 & 62. The public policy considerations that underlie

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[3]The majority of federal courts have also rejected the dual capacity doctrine as incompatible with the Federal Employees Compensation Act, 5 U.S.C. § 8101, et seq. See *Votteler v. United States*, 904 F.2d 128, 130 (2nd Cir. 1990); *Wilder v. United States*, 873 F.2d 285, 288-89 (11th Cir. 1989); *Schmidt v. United States*, 826 F.2d 227, 229-30 (3rd Cir. 1987); *Gallo v. Foreign Serv. Grievance Bd.*, 776 F. Supp. 1478, 1482 (D. Colo. 1991).

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rejection of the dual capacity doctrine are set forth in *State of Alaska v. Purdy*, 601 P.2d 258 (Alaska 1979). In *Purdy*, the claimant received benefits under the state's Workmans Compensation Act, and then filed suit alleging the State, her employer, had failed to maintain properly the highway on which the injury occurred. The Alaska Supreme Court stated:

> Whatever frail vitality the dual capacity doctrine has in other jurisdictions, we do not think that it warrants adoption here. To do so might undermine extensively the policies sought to be achieved by the Workmans Compensation Act. There are endlessly imaginable situations in which an employer might owe duties to the general public, or to non-employees, the breach of which would be asserted to avoid the exclusive liability provision in our statute. It would be an enormous, and perhaps illusory task to draw a principled line of distinction between those situations in which the employee could sue and those in which he could not. The exclusive liability provision would, in any event, lose much of its effectiveness, and the workmans compensation system, as a whole, might be destablized.

601 P.2d at 260. *See also, Estate of Coates v. Pacific Eng'g*, 791 P.2d 1257, 1259-60 (Hawaii 1990) (rejecting dual capacity doctrine as incompatible with the exclusive remedy provision).

Plaintiffs argue that Gas-A-Mat Corp. had a separate relationship to plaintiff's decedent when the corporation posted security signs, installed cashiers' booths, or otherwise took action as the owner and occupier of the retail gasoline station.

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This relationship, however, is a relationship that hundreds, if not thousands of retail businesses in the State of Utah have with each of their employees.

The dual capacity doctrine has proved historically to be the subject of misapplication and abuse and has been rejected across the United States.[4] The common law is a series of experiments, some of which succeed and some of which fail. The dual capacity doctrine is a failed experiment.

The adoption by this Court of plaintiffs' arguments would result in the modification of the exclusive remedy provision by judicial fiat. This court should reject the plaintiffs' request to interfere with such a comprehensive legislative scheme. Such changes are best left to legislative, not judicial action. *Franke v. Durkee*, 141 Wis.2d 172, 413

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[4]*See Coello v. Tug Mfg. Corp.*, 756 F. Supp. 1258, 1266 (W.D. Mo. 1991) (dual capacity doctrine not recognized in Missouri); *Porter v. Bloit Corp.*, 391 S.E.2d 430, 432 (Ga. App. 1990); *Barrett v. Rogers*, 408 Mass. 614, 562 N.E.2d 480, 482-83 (Mass. 1990) (any change in exclusive remedy provision is a public policy decision for the Legislature); *Kaess v. Armstrong Cork Co.*, 403 N.W.2d 643, 645-46 (Minn. 1987); *Millard v. Hyplains Dressed Beef, Inc.*, 237 Neb. 907, 468 N.W.2d 124, 128-29 (Neb. 1991); *McNeal v. Bil-Mar Foods of Ohio, Inc.*, 66 Ohio App. 3d 588, 585 N.E.2d 892, 896-97 (Ohio App. 1990); *Heimbach v. Heimbach*, 584 A.2d 1008, 1009-11 (Pa. Super. 1991) ("we are aware that our holding today totally abrogates the doctrine of 'dual capacity.' Nonetheless, our supreme court's construction of 77 P.S. § 483 as requiring compensation to be the exclusive liability of the employer for a compensable inquiry can logically lead to no other conclusion").

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N.W.2d 667, 670 (1987) (creation of exceptions to the exclusive remedy provisions of the workers' compensation statute is a matter of general policy and so lies within the province of the legislatures, not the courts).

POINT II

DUAL CAPACITY DOCTRINE SHOULD NOT APPLY TO THE FACTS OF THIS CASE.

In the early morning of July 5, 1982, Shelly Taynton was at work in a Uni-Marts convenience store as a retail clerk in Williamsport, Pennsylvania. She was shot and killed by David L. Sohmer. Her father filed an action and named as defendants Sohmer, Uni-Marts, and the store where Sohmer purchased the gun used in the shooting. Taynton's claim against Uni-Marts was based on the dual capacity doctrine. *Taynton v. Dersham*, 516 A.2d 1241, 1242 (Penn. Super. 1986).

The court noted that Uni-Marts was Ms. Taynton's employer and that she was on her employer's premises acting in the furtherance of her employer's business at the time of her death. "There is no allegation that she was killed by Sohmer for reasons personal to her. It was simply her misfortune to be minding the store at the time Sohmer entered." 516 A.2d at 1244. The court concluded under those facts that the exclusive remedy

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provisions of the Pennsylvania Workers Compensation Act should apply.

The court then turned to the issue of whether the dual capacity doctrine could be invoked so as to remove the exclusive remedy shield from the employer. After examining earlier Pennsylvania precedent, and assuming, *arguendo*, that Pennsylvania law had recognized the dual capacity doctrine, the court found that it did not apply to the facts of the case before it. *Id.* at 1246. In rejecting the application of the dual capacity doctrine, the courts noted that Ms. Taynton's death resulted from her presence at the store as an employee at the time Sohmer entered it. "Her injuries resulted from the fact she was on the job performing her duties as a retail clerk. These are precisely the type of injuries which the legislature intended to include within the exclusive remedy provisions of the Act." *Id.*

Plaintiffs attempt to apply the dual capacity doctrine to a situation where an employer posts a security notice or installs cashier's booths stretches even this discredited doctrine beyond recognition. It is plaintiffs' argument that anytime an employer performs any act that purports to relate to the security of the workplace, then the employer steps out of its employment shoes and creates a separate and distinct relationship with its employees, that is, "provider of security." In that

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situation, according to plaintiffs, the employer then has waived the protections of the exclusive remedy provision and is subject to suit by its employees.

Under plaintiffs' theory, the owner of every convenience store, or other retail shop, that posts a sign that states that the employees do not carry any bills larger than $5.00 bills in the cash register after a certain time in the evening is creating a separate "security relationship" with its employees and is subject to direct suit by the employees under the dual capacity doctrine. If that is indeed the law in the State of Utah, no employer will be able to afford to lift a finger to engage in any type of conduct that will make the workplace safer. The application of the dual capacity doctrine to a factual situation such as this achieves the wrong result and is bad public policy. *See Thomas v. General Elec. Co.*, 494 S.W.2d 493 (Tenn. 1973) (fact that employer had built fence around parking lot and hired security guards did not waive exclusivity remedy under Compensation Act).

This is a case in which plaintiffs attempt to pursue two theories of recovery rather than plaintiffs asserting claims against two distinct legal entities. Posting notices, putting up security lights, or even fencing parking lots, ought to be and

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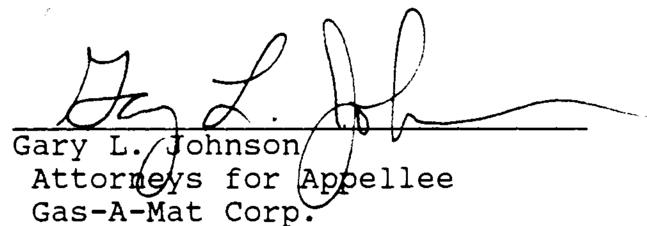
are part and parcel of the employer's role as employer. The dual capacity doctrine is inapplicable to the facts of this case.

CONCLUSION

Based upon the foregoing, Gas-A-Mat Corp. respectfully request that this Court affirm the trial court's decision granting Gas-A-Mat's Motion to Dismiss on the merits and with prejudice.

DATED this 3d day of June, 1992.

RICHARDS, BRANDT, MILLER & NELSON



Gary L. Johnson
Attorneys for Appellee
Gas-A-Mat Corp.

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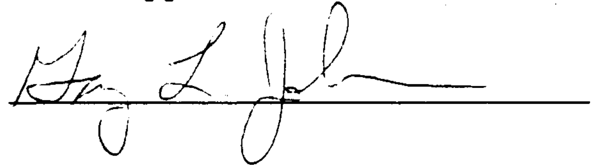
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this ___ day of June, 1992, to the following counsel of record:

P. Gary Ferrero
716 W. Bullion
P.O. Box 572476
Salt Lake City, Utah 84157-2476
Attorney for Appellants

Debra Moore
Assistant Attorney General
R. Paul Van Dam
Utah State Attorney General
236 State Capitol Building
Salt Lake City, Utah 84101
Attorneys for State Appellees



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ADDENDUM

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INDUSTRIAL COMMISSION OF UTAH

MICHAEL JIM HUNSAKER, surviving spouse of, and MATT HUNSAKER, NICHOLAS HUNSAKER and DANA HUNSAKER, minor dependent children of MAURINE FORSCHEN HUNSAKER, deceased, Applicants, vs. GASAMAT OIL COMPANY and/or NATIONAL UNION FIRE INSURANCE, Defendants.	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT:

On or about May 9, 1986, the carrier in this matter, National Union Fire Insurance, caused a form 151 to be filed with the Industrial Commission accepting liability for the industrial injury resulting in the death of Maurine F. Hunsaker on February 23, 1986, this accident having occurred during the course or scope of her employment with the defendant, Gasamat Oil Company. The defendants indicated that the Applicant was earning $3.50 per hour working seventeen hours per week, and that the decedent was married with three minor dependent children. Pursuant to Section 68 of the Workers' Compensation Act, the dependents of the deceased are entitled to two-thirds of her average weekly wage plus $5.00 for each dependent, not to exceed the average weekly wage of the deceased, which will entitle the dependents to compensation benefits of $59.50 per week payable for 312 weeks or a total of $18,564.00.

Following the expiration of the benefits awarded herein, the Applicants may be entitled to continued benefits from the carrier, National Union Fire Insurance. Whether the dependents are entitled to additional benefits will depend on the amount of Social Security death benefits they are receiving at that time. Section 107 of the Act, provides that following the initial six year period of benefits, the carrier's continuing liability for benefits is subject to a credit of 50% of any Social Security death benefits received by the dependents. Therefore, should the Applicants receive more than $515.00 per month in Social Security benefits, then the Applicants would be entitled to no further compensation benefits, and pursuant to Section 107 of the Act, the carrier would be liable for the difference between $30,000.00 and the $18,564.00 awarded to the dependents herein, or the sum of $11,436.00

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which would then be payable to the Default Indemnity Fund as provided in Section 107.

CONCLUSIONS OF LAW:

The dependents of Maurine Forschen Hunsaker are entitled to workers' compensation benefits as the result of her death of February 23, 1986, which occurred during the course or scope of her employment with the defendant, Gasamat Oil Company.

ORDER:

IT IS THEREFORE ORDERED that Gasamat Oil Company and/or National Union Fire Insurance pay to Michael Jim Hunsaker for the use and benefit of himself and the minor dependents of the deceased, compensation at the rate of $59.50 per week for 312 weeks or a total of $18,564.00, which compensation shall commence effective February 24, 1986, with accrued amounts due and owing in a lump sum.

IT IS FURTHER ORDERED that National Union Fire Insurance shall pay the Applicants interest of 8% per annum on the benefits accrued between February 24, 1986 and the date they make their first payment of the benefits.

IT IS FURTHER ORDERED that defendants, Gasamat Oil Company and/or National Union Fire Insurance, pay Richard C. Hutchison, attorney for the Applicants, the sum of $160.00, for services rendered in this matter, the same to be deducted from the aforesaid award to the Applicants and remitted directly to his office.

IT IS FURTHER ORDERED that defendants, Gasamat Oil Company and/or National Union Fire Insurance, pay the statutory funeral allowance of $1,800.00 to Michael J. Hunsaker, the same to be paid in a lump sum.

IT IS FURTHER ORDERED that any Motion for review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

Timothy C. Allen
Administrative Law Judge

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 21 day of May, 1986
ATTEST:

/s/ Linda J. Strasburg

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CERTIFICATE OF MAILING

I certify that on May 21, 1986 a copy of the attached Findings of Fact, Conclusions of Law and Order was mailed to the following persons at the following addresses, postage paid:

Michael J. Hunsaker, 4887 South 4900 West, Kearns, Utah 84118

Richard C. Hutchison, Attorney, 7050 Union Park Avenue, Suite 570, Midvale, Utah 84047

National Union Fire Insurance, % American International Adjusting, P.O. Box 6159, Salt Lake City, Utah 84106 Attn: Diane Barnett

Suzan Pixton, Administrator, Default Indemnity Fund

INDUSTRIAL COMMISSION OF UTAH

By Barbara

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