

1991

# Jodie Dahl v. Kerbs Construction Corp. and Epstein Construction, Inc. : Reply Brief

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JODIE DAHL,

Plaintiff/Appellee

vs.

KERBS CONSTRUCTION CORP. and  
EPSTEIN CONSTRUCTION, INC.,

Defendants/Appellants.

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Case No. 910372

Priority No. 11

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APPELLANT EPSTEIN CONSTRUCTION'S REPLY BRIEF

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Review of an Interlocutory Ruling  
of the District Court

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CLERK SUPREME COURT  
UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JODIE DAHL,	:	
	:	
Plaintiff/Appellee	:	
	:	
vs.	:	
	:	
KERBS CONSTRUCTION CORP. and	:	
EPSTEIN CONSTRUCTION, INC.,	:	Case No. 910372
	:	
Defendants/Appellants.	:	Priority No. 11

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APPELLANT EPSTEIN CONSTRUCTION'S REPLY BRIEF

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Review of an Interlocutory Ruling  
of the District Court

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Defendant/Appellant Epstein Construction, Inc. respectfully submits its Reply Brief in these appeal proceedings.

ARGUMENT

POINT I

UTAH'S COMPARATIVE NEGLIGENCE STATUTES DO NOT  
PRECLUDE A NON-PARTY FROM BEING INCLUDED ON  
THE SPECIAL VERDICT FORM FOR PURPOSES OF  
APPORTIONING FAULT.

By focusing almost exclusively on the special verdict provisions of Utah's comparative negligence scheme, Jodie Dahl contends that only the comparative fault of Defendants may be determined by the trier-of-fact. In doing so, she excludes from

consideration more substantive provisions of the comparative negligence statutes and the clear and explicit wording of UTAH CODE ANN. § 78-27-37, as well.

As pointed out in Appellant Epstein's opening brief, the above-cited section extends beyond apportioning each Defendant's fault to "each person seeking recovery". This key phrase is defined in § 78-27-37(3) to be those "seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative." (Emphasis added.) Due to both its subrogation rights and ability to maintain an independent action against other tortfeasors and also as "trustee of the cause of action against the third party", an employer is indeed a "person seeking recovery", under § 78-37-39, who should be included on the special verdict form. See, UTAH CODE ANN. § 35-1-62, under Utah's Worker's Compensation Act. Appellee Dahl's brief totally ignores this other portion of the special verdict statute and Worker's Compensation Act provisions. And if the Legislature had expressly intended to limit apportionment to "plaintiffs" and "defendants" or ever "parties", it could have so stated. Instead the term "person seeking recovery" was adopted implying that the negligence of others could be allocated.

Furthermore, the restrictive construction of § 78-27-39 relied upon by Plaintiff has been rejected by at least one appellate

court, construing an identically worded statute. As also noted by Epstein in its opening brief, the Idaho Supreme Court, in Pocatello Industrial Park Co. v. Steel West, Inc., 621 P.2d 399, 403 (Idaho 1980), stated, "While the statute requires the parties be included in the special verdict, it does not state that only parties shall be included." For a more extensive discussion of the Pocatello Industrial Park opinion, please see Appellant Epstein's opening brief at Page 10.

By looking exclusively at the special verdict statute, Ms. Dahl also ignores the more substantive provisions of the comparative negligence scheme, which expressly limit a defendant's liability to its proportionate degree of fault. See, UTAH CODE ANN. § 78-27-38 and 40. These sections state, respectively, "No Defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant" and "the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant". If this Court were to reject Appellant's construction of 78-27-39, urged above, there would be a conflict between various sections of the comparative negligence act and parties such as Epstein Construction

would be subjected to liability far in excess of that which comparative negligence was designed to permit.

Not only are the statutes themselves contrary to Appellee's position, most of Ms. Dahl's cited cases offer scant support for the view that an employer's negligence should not be apportioned by the jury.

For instance, in Mills v. Brown, 735 P.2d 603 (Oregon 1987) (Dahl's brief, Page 10) and Warmbrandt v. Blanchard, 692 P.2d 1282 (Nevada 1984) (Dahl's brief, Page 8), the subject special verdict statutes limited apportionment to parties to the proceedings. The Utah special verdict statute includes all "persons seeking recovery", a defined term which is sufficiently broad to include employers, when one considers the overall effect of the Worker's Compensation Act.

Other cases relied upon by Ms. Dahl involve third-party tortfeasors seeking contribution or indemnity from the employer.<sup>1</sup> But this confuses the principles of contribution and indemnity with merely apportioning the employer's negligence. It is without serious dispute that contribution and implied indemnity by an employer of a third-party tortfeasor are prohibited in Utah as

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<sup>1</sup>Correia v. Firestone Tire and Rubber Co., 446 N.E.2d 1033 (1983); Cordier v. Stetson-Ross, Inc., 704 P.2d 86 (Mont. 1979) and cases collected at Page 17 of Dahl's brief.

being offensive to immunity granted by the Worker's Compensation Act. See, generally, Freund v. Utah Power & Light Co., 793 P.2d 362 (Utah 1990). What Defendants/Appellants here seek is something far different than contribution and indemnity, which represent an actual recovery against the employer. Rather, Epstein only seeks this relief so it will only be held accountable for its percentage of fault, and not that of another tortfeasor, Ms. Dahl's employer.

It is thus no surprise that many courts which formerly rejected contribution and indemnity against an employer have now embraced apportionment of its fault under comparative negligence statutes. Among those many jurisdictions doing so are Washington, Clark v. Pacificorp, 822 P.2d 162 (Wash. 1991); Colorado, Williams v. White Mountain Construction Co., 749 P.2d 423 (Colo. 1988); and California, Mills v. MMM Carpets, Inc., 1 Cal Rptr. 2d 813 (Cal. App. 6th 1991). Thus, a ruling in favor of Appellants would not run afoul of prior rulings of the Utah Supreme Court on employer contribution and indemnity.

Appellee Dahl is, admittedly, able to direct the Court's attention to one or two opinions which support the proposition that an employer should not be included on the special verdict form for purposes of apportioning its negligence. But contrary to Ms. Dahl's brief, these cases neither represent the majority view, nor the recent trend of well-reasoned authority.

Appellants have cited no less than five cases decided since 1985, where appellate courts permitted the inclusion of otherwise immune parties or employers on a special verdict form.<sup>2</sup>

The trend towards permitting apportionment of the employer's negligence appears particularly pronounced in the western states. By contrast, and almost without exception, cases relied upon by Plaintiff originate from the northeast, although no reasonable explanation for this dichotomy between regions of the country exists.

## POINT II

### **APPORTIONMENT OF AN EMPLOYER'S FAULT NEITHER OFFENDS IMMUNITY FROM LIABILITY OR OTHER PURPOSES BEHIND UTAH'S WORKERS' COMPENSATION STATUTES.**

Appellee Dahl also claims that adoption of Appellants' position on apportionment somehow impairs Albertson's immunity from liability, as granted by UTAH CODE ANN. § 35-1-60, contained within the Worker's Compensation Act. As discussed above, however, Appellee Dahl's argument is fatally flawed by confusing immunity from suit with apportionment of fault. See, Dahl's brief, Page 15.

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<sup>2</sup>Clark v. Pacificorp, supra; Williams v. White Mountain Construction, supra; Mills v. MMM Carpets, Inc., supra; Dietz v. General Electric Co., 821 P.2d 166 (Ariz. 1991); and, Bode v. Clark Equipment Co., 719 P.2d 824 (Okla. 1986).



It is thus not surprising that opinions cited by Appellee at Point II of her brief are instances where a defendant tortfeasor sought contribution from the employer-tortfeasor. Not a single case involves comparative fault principles, likely because immunity has absolutely nothing to do with putting an employer on a special verdict form with no intent to obtain actual recovery. By the same token, apportioning an employer's fault does not offend other policies expressed in the Workers' Compensation Act.

Ms. Dahl primarily argues that if apportionment is allowed, an employee would be denied general damages for pain and suffering and other losses not fully compensated for by workers' compensation benefits. Further, Ms. Dahl claims the employee must still reimburse the employer to satisfy subrogation claims. Each point is fallacious. First, it must be noted how the employee still receives the principal benefits and policies offered by workers' compensation, to wit: a speedy recovery without the need to engage in protracted litigation and prove employer fault. Apportioning the employer's fault only serves to reduce not eliminate the employee's recovery against a third-party tortfeasor by that of proportion of fault attributable to this other tortfeasor. This seems only fair.

Secondly, there is no reason, either based upon the statutory language or common law principles why the employer's subrogation

rights should not be reduced by that percentage of fault assessed by the jury. As persuasively argued by Appellant Kerbs Construction at pages 22 through 24 of its opening brief, UTAH CODE ANN. § 35-1-62 provides for a system of credits in favor of the injured employee against the employer's subrogation lien. There is nothing contained within the Worker's Compensation Act which precludes one of these credits from being that proportion of fault assessed against a negligent employer.

It is also helpful to keep in mind that subrogation is a legal theory founded upon equitable principles. As Larson describes, it is "an odd spectacle to see a negligent employer reimbursing himself at the expense of a third party; and several courts have barred the employer's recovery on these facts" when an employer's own contributory negligence is at issue. A. LARSON, WORKMAN'S COMPENSATION, § 75.23, 14-133 (1990). See also, Rowe v. Workman's Compensation Appeals Board, 528 P.2d 771 (Cal. 1974). Efforts in this regard accomplish the important purpose of balancing the interests of a third-party tortfeasor with those of the negligent employer as mandated by comparative negligence.

Finally, Appellee Dahl's policy arguments under the Worker's Compensation Act overlook the equally important policy concerns expressed by the Utah's comparative negligence statutes. The equitable solution proposed by Appellants to reduce the employer's

subrogation recovery by that percentage of negligence attributed to it by the jury effectively harmonizes the Worker's Compensation Act with the comparative negligence statutes. Specifically, a defendant is only liable for its proportionate degree of fault, the employer's immunity remains inviolate and the injured employee still recovers for her injuries, including general damages, any reduction being offset by the benefits received through Worker's Compensation payments. In order to effectuate Appellants' proposal, Albertson's, Jodie Dahl's employer, must be placed on the special verdict form for an apportionment of its fault.

One final public policy concern which is fostered by placing an employer on the special verdict form is that of deterring negligent conduct. If an employer is not held accountable for its degree of fault but need only make his worker's compensation payments in order to recover full subrogation, there is little if any reason for parties such as Albertson's to take reasonable precautions to protect employees. Our facts present a classic example of exposing workers to dangerous conditions in their place of employment. Perhaps if Albertson's knew subrogation would be limited by its own negligence, reasonable precautions would have been taken to avoid employee injuries. This would of course benefit employees and employers, but the worker's compensation system as well.

### CONCLUSION

In her brief, Jodie Dahl has failed to show why her employer, Albertson's, should not be placed on the special verdict form for purposes of determining its proportionate degree of fault. Neither the statutes in question nor other authority support her position. Policy concerns also favor reducing a recovery against Appellants by that degree of negligence attributable to the employer tortfeasor coupled with a protanto reduction in its subrogation claim.

Based on the above, this Court should reverse the ruling of the district court excluding plaintiff's employer from the special verdict form and remand for a trial in accord therewith.

DATED this 22<sup>nd</sup> day of April, 1992.

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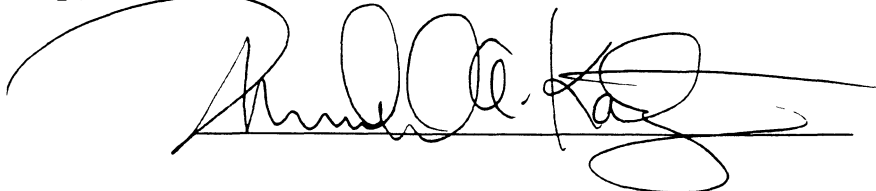
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CERTIFICATE OF SERVICE

I hereby certify that on the 23<sup>rd</sup> day of April, 1992, I caused four true and correct copies of the foregoing APPELLANT EPSTEIN CONSTRUCTION'S REPLY BRIEF to be served upon the following by placing copies thereof in the United States mails, postage prepaid, addressed as follows:

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