

1991

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

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

910372

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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 BRIEF

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Review of an Interlocutory Ruling  
of the District Court

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JODIE DAHL,	:	
	:	
Plaintiff/Appellee	:	
	:	
vs.	:	
	:	
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LISTING OF ALL PARTIES TO THE  
PROCEEDINGS IN THE DISTRICT COURT

PLAINTIFF/APPELLEE

JODIE DAHL

DEFENDANTS/APPELLANTS

KERBS CONSTRUCTION CORPORATION  
EPSTEIN CONSTRUCTION, INC.

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### **JURISDICTION OF THIS COURT**

Jurisdiction to hear this appeal is conferred upon the Supreme Court under Article VII, Section 3, of the Utah Constitution; UTAH CODE ANN. § 78-2-2(3)(i); and Rule 5, Utah Rules of Appellate Procedure, this being a discretionary appeal from an interlocutory ruling of the District Court.

### **ISSUE PRESENTED FOR REVIEW**

Did the District Court err in failing to include Plaintiff's employer on the Special Jury Verdict Form for purposes of apportioning its fault with reference to the subject accident?

### **DETERMINATIVE STATUTES AND RULES**

The following statutes and rules are believed to be determinative of the issue presented above:

UTAH CODE ANN., § 35-1-60 (1990);

UTAH CODE ANN., §§ 78-27-37, *et. seq.* (1990);

Rule 49, Utah Rules of Civil Procedure.

The contents of the above-cited authorities are fully set forth in the Addendum to this brief, in accord with Rule 24(f), Utah Rules of Appellate Procedure.

### **STATEMENT OF THE CASE**

#### **Nature of the Case, Course of the Proceeding and Disposition in the Lower Court.**

Plaintiff, Jodie Dahl, commenced this action, seeking recovery for personal injuries allegedly sustained when tripping over a trench cut in the concrete floor at her place of employment, the Albertsons Distribution Center in North Salt Lake, Utah. Named as Defendants were Epstein Construction, Inc., the construction manager for the project, and Kerbs Construction Corp., a subcontractor who was directly responsible for cutting the subject trench. (Record 1-2).

In addition to denying specific allegations of the Complaint, the Defendants affirmatively alleged contributory negligence on Plaintiff's part and also comparative negligence on the part of her employer, Albertsons. (R.13-17). A Cross-Claim was also brought by Epstein against Kerbs, seeking indemnity and insurance coverage for any judgment rendered against it in Plaintiff's favor, pursuant to the terms of the construction contract between those parties. (R. 103-111).

Facts uncovered during the course of discovery supported the principle that Albertsons subjected its employees to hazards associated with the construction work by having them perform tasks in the area of on-going construction. As a result of this evidence of comparative negligence, Epstein filed a Motion to Include

Albertsons on the special verdict form. (R. 565). Shortly thereafter, Defendant Kerbs joined in such motion, which was initially granted by District Judge Cornaby. (R. 701). However, upon a review of the issue in the context of Plaintiff's Motion for Reconsideration, Judge Cornaby reversed his earlier determination and refused to permit the negligence of Albertsons to be assessed by the jury. (R. 749-750).

Following Judge Cornaby's refusal to certify the decision as a final judgment, pursuant to the provisions of Rule 54(b), Epstein and Kerbs sought review through a Petition for Interlocutory Appeal, which was granted by Order of the Supreme Court on November 12, 1991. Due to the importance of the issue to be resolved through this appeal, trial of the District Court case, originally set for December 12, 1991, has been stayed on motion of the Defendants. (R. 978-979 and 982-983).

#### **STATEMENT OF FACTS**

During the month of February, 1989, and periods prior thereto, Epstein Construction acted as a construction manager with respect to a remodelling project at Albertsons' North Salt Lake City Distribution Center. Among the remodelling work to be performed under the parties' contract was the installation of new banana storage rooms. (R. 265). Epstein let a subcontract to Kerbs Construction under which they saw-cut a trench in the concrete

floor of the Distribution Center for purposes of placing utility lines and the banana room walls. (R. 266).

While construction was being performed and after the trench had been cut, Albertsons continued to require employees to perform tasks in the area immediately adjacent to the construction vicinity. In the course of a day, employees would regularly traverse the floor slot. (R. 522). The decision to place workers in the potentially hazardous construction area was made by Frank Payan, Albertsons' warehouse manager. (R. 524). In fact, so as to allow employees to work in the construction area, Albertsons specifically precluded the contractors from taking protective measures, including to barricade the subject trench. (R. 588). Even workers' complaints as to the hazards associated with working in the area were ignored by the employer. Plaintiff testified that her supervisor responded to a complaint by stating "You guys quit your bitching and get your asses over there and get to work." (R. 883).

On February 14, 1989, Plaintiff fell backward over the trench, suffering the injuries complained of in these proceedings. Plaintiff alleges that as a result of the accident, she suffered a herniated disk and other physical complications. (R. 2). It is undisputed that Plaintiff received workers compensation benefits for her injuries. (R. 3).

### **SUMMARY OF ARGUMENTS**

The District Court found the legal position of the Plaintiff "appears more reasonable" and, hence, excluded Albertsons, her employer, from the special verdict form. Contrary to the Court's ruling, such is neither the majority rule nor better reasoned law. Rather, it is violative of the sound equitable principle of holding a defendant accountable for only its proportionate share of fault, particularly as expressed in Utah comparative negligence statutes. The District Judge's ruling was erroneous and Albertsons must be included on the special verdict form to reach a well-considered judgment in this action.

### **ARGUMENT**

#### **Introduction**

Undisputed evidence in our case indicates Albertsons knowingly exposed employees to a potentially dangerous condition, resulting from remodeling work being performed at its Distribution Warehouse and refused to permit the contractors to take preventive measures. Despite workers' complaints, Albertsons supervisors ordered Jodie Dahl to perform work tasks immediately adjacent to an uncovered cut in the concrete floor. Accepting the truth of Plaintiff's allegations, working in this area caused her to accidentally trip and fall over the slot, sustaining the complained of injuries. Hence, this is not an instance where the Defendants

are merely trying to cloud the issue of their negligence. Instead, there is substantial evidence of fault here on the employer's part making this an appropriate case to address the issue. Nonetheless, due to the Court's ruling on the motion to include Albertsons on the jury verdict form, Defendants/Appellants Epstein and Kerbs face possible liability for a judgment far in excess of their proportionate degree of fault. This is a result incompatible with Utah's comparative negligence scheme and sound policy considerations as well.

As a case of first impression in the appellate system, the Supreme Court should review this matter and find that an employer's negligence can be determined by the trier-of-fact when entering a judgment in proceedings such as these.

**A. Utah's Comparative Negligence  
Statute Mandates the Inclusion of  
An Employer on a Special Verdict Form**

There is little question that an employer owes employees a duty to provide a reasonably safe and hazard-free workplace. Godesky v. Provo City Corp., 690 P.2d 541 (Utah 1984). There is likewise little doubt that an employer may breach the aforementioned duty, and, hence, be held accountable for negligence. However, in order to strike a balance in favor of compensating employees for work-related injuries, the Legislature has granted employers immunity from negligence actions, so long as

the employer has complied with obligations imposed under the Utah Worker's Compensation Act, codified at UTAH CODE ANN. § 35-1-60.

Immunity granted under the Worker's Compensation Act has been extended to claims of contribution and implied indemnity in third-party actions brought by non-employer defendants when sued by the injured employee. See, generally, Freund v. Utah Power & Light Co., 793 P.2d 362 (Utah 1990). The important question raised by this appeal is whether the employers' immunity and consequential non-joinder as a party tort-feasor precludes an apportionment of their fault under Utah's comparative negligence scheme and special verdict provisions. It is respectfully urged that such apportionment is not contrary to the Worker's Compensation Act, but is mandated and entirely consistent with tort reform principles adopted in Utah.

The sound underlying principle of comparative negligence in Utah is announced in UTAH CODE ANN. § 78-27-40, which provides:

Subject to § 78-27-38, 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. No defendant is entitled to contribution from any other person.

Furthermore, § 78-27-38 states ". . . No defendant is liable to any person seeking recovery for any amount in excess of the proportionate of fault attributable to that defendant." In order

to determine a defendant's 'proportion of fault', the Act relies on the use of special verdicts which find "the percentage or proportion of fault attributable to each person seeking relief and to each defendant". § 78-27-39 (Emphasis added).

Based on the special verdict statute, Respondent argued successfully in the District Court that because Albertsons, the employer, cannot be made a party-defendant, it likewise cannot be placed on the special verdict form for purposes of determining its percentage of fault. This proposition is contrary to Utah law and a majority of other jurisdictions.

While not passing on the precise issue presented here, the Utah Supreme Court has, on a number of occasions, allowed the jury's consideration of a non-party's negligence. For instance, in Godesky v. Provo City Corp., *supra*, the court let stand, without express comment, the jury finding that the employer was negligent and proportionately responsible for causing the accident. Similarly, in Bishop v. Neilsen, 632 P.2d 864 (Utah 1981), the court permitted contribution against an arguably immune party, finding it a "joint tort-feasor". Also instructive is the case of Madsen v. Salt Lake City School Board, 645 P.2d 658, 663 (Utah 1982), where this court stated:

It is imperative that the issue of proportionate fault should be litigated between all joint tort-feasors in the same



action and resolved by the same trier of the issues of fact.

This was despite the fact the joint tort-feasor was an immune governmental entity.

The import of the foregoing authority is that regardless of possible immunity, defendants joined in the action are entitled to a determination of a joint tort-feasor's fault so that party-defendants are only liable for their percentage of negligence.<sup>1</sup> Although the Utah Supreme Court has not directly ruled on this issue in the context of an employer, the clear weight of authority from other jurisdictions has extended general comparative negligence principles to entities situated as Albertsons.

One of the first cases addressing the issue of apportioning an immune employer's negligence on a jury verdict form is Connar v. West Shore Equipment of Milwaukee, Inc., 227 N.W. 2d 660, 662 (Wisconsin 1975).

It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not

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<sup>1</sup>This is a position which has been adopted by the Utah Attorney General's office. In response to an inquiry from Federal Magistrate Calvin Gould, in the context of a case entitled Yantes v. Signode Corp., Civil No. 89 NC 0055-S, the Attorney General's office stated "the immunity of an employer is in no way impaired by being joined for the purposes of apportioning fault." See, Appendix B hereto. It is also the opinion adopted by numerous federal and state district court judges from Utah. See various orders and ruling gathered at Appendix B.

they be parties to the lawsuit and whether or not they can be liable to the Plaintiff or to the other tort-feasors, either by operation of law or because of a prior release.

Referring to this Wisconsin rule as being "clearly the prevalent practice among state courts", the Idaho Supreme Court, in Pocatello Industrial Park Co. v. Steel West, Inc., 621 P.2d 399, 403 (Idaho 1980), construed a comparative negligence special verdict statute almost identical to Utah's:

The court may, and when requested by any party, shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party . . . I.C. §6-802.

Acknowledging that the employer could not be made a "party" to the proceedings, the court, nonetheless, held its negligence should be apportioned by the jury.

While the statute requires the parties be included in the special verdict, it does not state that only parties shall be included. 661 P.2d. 403.<sup>2</sup>

Among other states which have allowed an apportionment of fault, in the context of comparative negligence of an otherwise immune entity or non-party are: Wyoming, Kirby Building Systems v. Mineral Explorations, 704 P.2d 1266, 1272 (Wyo. 1985) ("The

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<sup>2</sup>At least one commentator has noted that the Utah comparative negligence statute is almost identical to the Idaho Act construed in Pocatello Industrial Park. See, Thode, *Comparative Negligence, Contribution Among Tort-Feasors and the Effect of a Release - a Triple Play by the Utah Legislature*, 1973 UTAH L. REV. 406 (1973).

requirement that all participants' fault be ascertained means that the fault of non-party actors, as well as party tort-feasors, must be calculated by the fact finder."); Kansas, Brown v. Keill, 580 P.2d 867 (Kan. 1978); Indiana, Huber v. Henley, 656 F. Supp. 508 (S.D. Ind. 1987) (Immune governmental entities' fault must be apportioned by jury under Indiana's comparative negligence statutes); North Carolina, Leonard v. Johns-Manville Sales Corp., 305 S.E.2d 528 (N.C. 1983); Illinois, Hall v. Archer-Daniels-Midland Co., 491 N.E.2d 879 (Ill. App. 1986); and, New Mexico, Taylor v. Delgarno Transportation, Inc., 667 P.2d 445 (N.M. 1983).

The more recent trend of apportioning the negligence of an immune employer in a third-party action instituted by an employee was expressly adopted by California courts in Mills v. MMM Carpets, Inc., 1 Cal. Rptr. 2d 813 (Cal. App. 6th 1991). There, a bank employee sought recovery for personal injuries from a building manager and owner and a carpet installer. The court held apportionment of the employer's negligence did not run afoul of the employer's general immunity from tort liability. Id. at 818. In construing the statute (CAL. CIV. CODE § 1431.2 (A)) which read, quite like Utah's,

Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault.

the court held the equation "does not vary according to the presence or absence as parties of other tort-feasors in a given case . . . . It instead most readily suggests comparison with the fault of the entire field of tort-feasors." 1 Cal. Rptr. 2d at 816-817.

Although contribution against an employer was commonly rejected prior to passage of pure comparative negligence laws, most states still permit an allocation of the employer's fault. For instance, in the recent case of Williams v. White Mountain Construction Co., 749 P.2d 423, 429 (Colo. 1988), the Colorado Supreme Court disallowed contribution, yet held:

Tort-feasors sued by injured employees are now able to present evidence of employer liability at trial, so as to reduce whatever damages may be assessed against them to a level proportionate to their liability.

In Clark v. Pacificorp, 809 P.2d 176 (Wash. 1991), the appeal of a state court action and a question certified from the federal court were consolidated. At issue was RCW 4.22.070(1), which provided:

In all actions involving fault of more than entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, including the claimant . . . third-party defendants . . . [and] entities immune from liability.

In the primary case, Clark had filed a wrongful death action against Pacificorp, who had hired the decedent's employer to trim trees away from power lines. Under the Washington Worker's Compensation Act, the employer was immune from liability and could not be named as a party to the action. Pacificorp sought a determination of the employer's comparative negligence and corresponding reduction of damages. Under those circumstances, identical to ours, the court held:

A trier of fact shall apportion fault to all at-fault entities in accordance with RCW 4.22.070. This includes the injured worker or beneficiary, the employer and the third-party. Each party shall then pay his proportionate share of damages.

Id. at 179. (Emphasis added). Cf. Glass v. Stahl Specialty Co., 652 P.2d 948, 953 (Wash. 1982) (Contribution claim against employer barred prior to enactment of the comparative negligence statute "even though requiring one wrong-doer to shoulder all the damages when the other wrong-doer is an employer may be unfair . . . ").

The Utah special verdict statute can be construed to exclude consideration of an employer's negligence, arguably applying only to "each person seeking recovery and to each defendant". UTAH CODE ANN. § 78-27-39. But, as the Idaho court found in Pocatello Industrial Park, the statute "does not state that only parties shall be included". 621 P.2d 403. Furthermore, the key phrase

"person seeking recovery" in the special verdict statute is sufficiently broad to encompass employers.

Per UTAH CODE ANN. § 78-27-37(3), "persons seeking recovery" are those "seeking damages or reimbursement on its own behalf, or on behalf on another for whom it is authorized to act as legal representative". (Emphasis added.) Under the Utah Worker's Compensation Act, an employer is the "trustee of the cause of action against the third party" and may maintain an action on its own behalf or in the name of the injured employee. UTAH CODE ANN. § 35-1-62. The statute goes on to provide that the employer will be reimbursed for compensation payments even before an injured employee recovers. As such, the employer is a person seeking recovery under § 78-27-39, who should be included on the special verdict form.

**B. Considerations of Equity and  
Fairness Require an Employer's  
Negligence to Be Apportioned.**

One of the acknowledged purposes of comparative negligence is to ameliorate the harsh consequences of traditional contributory negligence and joint and several liability among defendants. See, generally, Jensen v. Intermountain Health Care, Inc., 679 P.2d 903 (Utah 1984). Appellants Epstein and Kerbs face a strong possibility that if Albertsons' degree of fault is not taken into account by the jury, they will be liable for a disproportionate

percentage of responsibility as joint tort-feasors. The appropriate means of remedying this unheralded result is to overrule Judge Cornaby's decision.

Recognition of the salutary purpose expressed above is essential in construing the special verdict statute. See, Mills v. MMM Carpets, supra. As in Mills, the result here sought by Plaintiff and "adopted by the trial court would re-write the statute to provide that the Defendants' percentage of fault was to be measured in relation to the fault of only other Defendants in the action. The statutory language does not invoke such a limited comparison." 1 Cal. Rptr. 2d 817.

In the Kansas case of Brown v. Keill, supra, the court addressed the argument that apportioning a non-parties' negligence would be unfair to a plaintiff. The argument was rejected, in part, realizing that by enacting comparative negligence statutes, legislatures had relieved plaintiffs of the potentially harsh all-or-nothing recovery notions which result from contributory negligence rules. In essence, the burden and potential unfairness of contesting a non-party's responsibility is offset by eliminating the risk of non-recovery existing under contributory negligence. The court went on to acknowledge "the law governing tort liability will never be a panacea." Id. at 874. With this in mind, the legislature's intent in adopting comparative negligence was to

relay duty to pay to the degree of fault. Jensen v. Intermountain Health Care, Inc., supra. The only means of fulfilling this purpose in our circumstances is to permit a jury to determine the employer's fault, through the special verdict, which will leave Appellants Epstein and Kerbs responsible for only their respective percentages of fault.

Even prior to adoption of pure comparative negligence principles, courts expressed concern and railed against the inequity of denying a defendant, such as Epstein, the right to plead or prove an employer's concurrent negligence in an action brought by an injured employee. In an effort to strike a compromise between the competing interests of employer immunity, compensating an injured employee and yet permitting defendants, such as Epstein, a sort of quasi-contribution, courts devised a number of mechanisms. For instance, in Baccile v. Halcyon Lines, 187 F.2d 403 (3rd Cir. 1951), reversed on other grounds, Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952), the court limited contribution against an employer to that sum which it had been liable to pay the employee through worker's compensation.

Another method a number of courts employed was that of reducing the injured employee's recovery by sums received through the worker's compensation claim. See, generally, Murray v. United



States, 405 F.2d 1361 (D.C. App. 1968). Pennsylvania, by contrast, limited the same to the amount of the employer's liability under the Workers Compensation Act. Elston v. Industrial Lift Truck Co., 216 A.2d 318 (Pa. 1966). The New York Court of Appeals in Dole v. Dow Chemical Co., 282 N.E.2d 288 (N.Y. 1972), allowed indemnity over against a negligent employer in an amount proportionate to its share of fault. This approach was similarly adopted in Skinner v. Reed-Prentice Package Machinery Co., 374 N.E.2d 437 (Ill. 1977).

Fortunately, Utah's comparative negligence statutes do away with the need to adopt a flawed result-oriented analysis to achieve a fair allocation of the various parties' responsibility for an employee's injuries. A trial judge may place the issue of an employer's fault before the jury on the special verdict form and, thereby, arrive at a recovery corresponding to each particular defendant's degree of fault. Interests of compensating the employee and maintaining the employer's immunity are preserved inviolate.

There is another sound policy consideration supporting apportionment of the employer's negligence, to wit: preventing a double recovery by the employee. Through a plaintiff's worker's compensation benefits, an employee is reimbursed for most if not all economic losses associated with the injury, for instance, lost wages and medical expenses. Without question in the employee's

third-party action, he may once again recover the same damages, subject only to an employer's or the insurance fund's rights of subrogation. Thus, there is a very real risk of a prohibited double recovery.

It may be argued, however, that by apportioning an employer's negligence, these subrogation rights are unfairly prejudiced. The proposition is fallacious, because as an elementary subrogation principle, a subrogee must not himself be at fault or contributing to the loss on which he sues. A. LARSON, WORKMEN'S COMPENSATION, § 75.23 (1990).

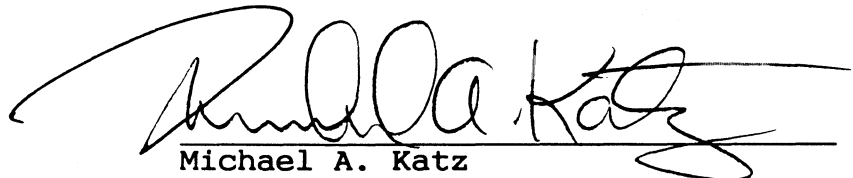
It is clear that allocating an employer's fault in a third-party suit brought by an injured employee is supported by the sound policy considerations behind Utah's comparative negligence scheme. Specifically, no single tort-feasor should be responsible for a disproportionate share of liability. Nor does apportionment unduly prejudice the Plaintiff or impair subrogation rights. Albertsons, Jodie Dahl's employer, should be included on the Special Jury Verdict Form in order to reach a just result in our case. The only means of doing so is to overrule District Judge Cornaby's ruling.

#### **CONCLUSION**

Based upon the foregoing, the district court erred in excluding Plaintiff's employer, Albertsons, from the special jury verdict form for purposes of apportioning its fault with respect to

the subject accident. Such is contrary to Utah's Comparative Negligence scheme and sound policy considerations as well.

Respectfully submitted this 23<sup>rd</sup> day of January, 1992.

A handwritten signature in black ink, appearing to read "Michael A. Katz", with a long horizontal flourish extending to the right.

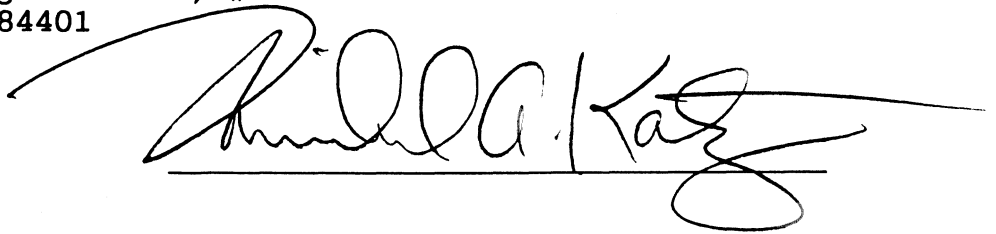
Michael A. Katz  
PURSER, OKAZAKI & BERRETT, P.C.  
39 Post Office Place, #300  
Salt Lake City, UT 84101-2104  
Attorneys for Appellant, Epstein  
Construction, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of January, 1992, I caused four true and correct copies of the foregoing APPELLANT EPSTEIN CONSTRUCTION'S BRIEF to be served upon the following by placing copies thereof in the United States mails, postage prepaid, addressed as follows:

Nelson L. Hayes  
George T. Naegle  
Richards, Brandt, Miller  
& Nelson  
P.O. Box 2465  
Salt Lake City, UT 84110-2465

James B. Hasenyager  
Marquardt, Hasenyager & Custen  
2661 Washington Blvd., #202  
Ogden, UT 84401

A handwritten signature in black ink, appearing to read "James B. Hasenyager", is written over a horizontal line. The signature is stylized with a large, sweeping initial "J" and a long, horizontal stroke extending to the right.

## **ADDENDUM**

## STATUTES

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

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. Nothing in this section, however, shall prevent an employee (or his dependents) from filing a claim with the industrial commission of Utah for compensation in those cases within the provisions of the Utah Occupational Disease Disability Act, as amended.

History: L. 1917, ch. 100, § 76; C.L. 1917, § 3132; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-57; L. 1949, ch. 52, § 1.

Cross-References. — Employment of children, § 34-23-1 et seq.

Utah Occupational Disease Disability Law, § 35-2-1 et seq.

Meaning of "this act". — See the note under the same catchline following § 35-1-46.

### **78-27-37. Definitions.**

As used in §§ 78-27-37 through 78-27-43:

(1) "Defendant" means any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery.

(2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

(3) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

History: C. 1953, 78-27-37, enacted by L. 1986, ch. 199, § 1.

Repeals and Reenactments. — Laws 1986, ch. 1989, § 1 repeals former § 78-27-37, as en-

acted by Laws 1973, ch. 209, § 1, relating to diminishment of damages and assumption of risk, and reenacts the above section.

### 78-27-38. Comparative negligence.

The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

**History:** C. 1953, 78-27-38, enacted by L. 1986, ch. 199, § 2.

**Repeals and Reenactments.** — Laws 1986, ch. 199, § 2 repeals former § 78-27-38, as enacted by Laws 1973, ch. 209, § 2, relating to special verdicts, and reenacts the above section.

**Cross-References.** — Product Liability Act, manufacturer or seller not liable if alteration or modification of product after sale is substantial contributing cause of injury, § 78-15-5.

Skiers not to make claim against or recover from ski area operator for injury resulting from any inherent risk of skiing, § 78-27-53.

### 78-27-39. Separate special verdicts on total damages and proportion of fault.

The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant.

**History:** C. 1953, 78-27-39, enacted by L. 1986, ch. 199, § 3.

**Repeals and Reenactments.** — Laws 1986, ch. 199, § 3 repeals former § 78-27-39, as en-

acted by Laws 1973, ch. 209, § 3, relating to contribution among joint tortfeasors, and reenacts the above section.

### 78-27-40. Amount of liability limited to proportion of fault — No contribution.

Subject to § 78-27-38, 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. No defendant is entitled to contribution from any other person.

**History:** C. 1953, 78-27-40, enacted by L. 1986, ch. 199, § 4.

**Repeals and Reenactments.** — Laws 1986, ch. 199, § 4 repeals former § 78-27-40, as enacted by Laws 1973, ch. 209, § 4, relating to

settlement by a joint tortfeasor, and reenacts the above section.

**Cross-References.** — Enforcement of contribution and reimbursement, Rules of Civil Procedure, Rule 69(h).

Joint obligations, § 15-4-1 et seq.

#### **78-27-41. Joinder of defendants.**

A person seeking recovery, or any defendant who is a party to the litigation, may join as parties any defendants who may have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective proportions of fault.

History: C. 1953, 78-27-41, enacted by L. 1986, ch. 199, § 5.

Repeals and Reenactments. — Laws 1986, ch. 199, § 5 repeals former § 78-27-41, as en-

acted by Laws 1973, ch. 209, § 5, relating to rights of contribution and indemnity, and reenacts the above section.

#### **78-27-42. Release to one defendant does not discharge other defendants.**

A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides.

History: C. 1953, 78-27-42, enacted by L. 1986, ch. 199, § 6.

Repeals and Reenactments. — Laws 1986, ch. 199, § 6 repeals former § 78-27-42, as en-

acted by Laws 1973, ch. 209, § 6, relating to release of joint tortfeasors and a reduction of claim, and reenacts the above section.

#### **78-27-43. Effect on immunity, exclusive remedy, indemnity, contribution.**

Nothing in §§ 78-27-37 through 78-27-42 affects or impairs any common law or statutory immunity from liability, including, but not limited to, governmental immunity as provided in Chapter 30, Title 63, and the exclusive remedy provisions of Chapter 1, Title 35. Nothing in §§ 78-27-37 through 78-27-42 affects or impairs any right to indemnity or contribution arising from statute, contract, or agreement.

History: C. 1953, 78-27-43, enacted by L. 1986, ch. 199, § 7.

Repeals and Reenactments. — Laws 1986, ch. 199, § 7 repeals former § 78-27-43, as enacted by Laws 1973, ch. 209, § 7, relating to release of joint tortfeasors and contribution, and reenacts the above section.

Severability Clauses. — Laws 1986, ch.

197, § 9 provided: "If any provision of §§ 78-27-37 through 78-27-43, or the application of any provisions of those sections to any person or circumstance, is held invalid, the remaining provisions of those sections shall be given effect without the invalid provision or application."



## RULES OF CIVIL PROCEDURE

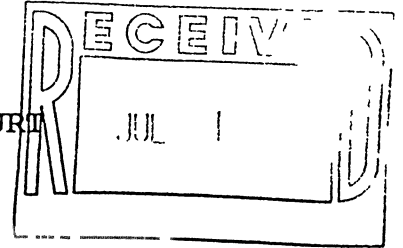
### **Rule 49. Special verdicts and interrogatories.**

(a) **Special verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written interrogatories susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring

the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) **General verdict accompanied by answer to interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58A. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58A in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

IN THE SECOND JUDICIAL DISTRICT COURT  
IN AND FOR THE  
COUNTY OF DAVIS, STATE OF UTAH



-----

JODIE DAHL,	)	
Plaintiff,	)	RULING ON MOTION
vs.	)	TO EXCLUDE ALBERTSONS
	)	Civil No. 900746945
KERBS CONSTRUCTION, et al.,	)	
Defendants.	)	

-----

The plaintiff has moved to exclude Albertsons from the special verdict form. The defendants oppose the motion.

On February 26, 1991, Epstein Construction moved the Court to include Albertsons on the special verdict form. On March 13, 1991, Kerbs Construction Company joined in that motion. On March 13, 1991, the Court received Epstein's notice to submit for decision. The motion was supported by a brief that was well reasoned and supported by law from both Idaho and Wisconsin. Since the plaintiff apparently was not objecting the Court granted the motion.

The rule of law involved has not been adjudicated in Utah. Albertsons is not a party to the action and cannot be made one because of the Workman's Compensation law. Apparently, the majority of jurisdictions would exclude Albertsons from the special verdict form because it is not a party and cannot be made a party. On the other hand, Idaho and Wisconsin rule that the fault of all persons contributing to an accident should be presented to the jury under comparative negligence law.

The plaintiff was not diligent in responding to defendants' motion to include Albertsons. Yet, the legal position of the plaintiff appears more reasonable to the Court. The defendants

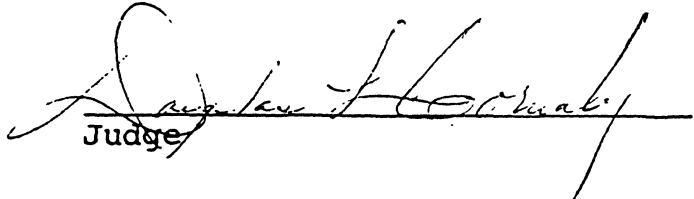
point out that there is no such thing as a motion for reconsideration in Utah. This rule works well when the Court has made factual findings, but not so well when, as here, no one is hurt by the application of the better reasoned law.

In spite of the Court's prior ruling, it now rules that Albertsons shall be excluded from the special jury verdict. Regardless of the outcome of the case, the plaintiff's attorney is responsible for defendants' attorney fees in conjunction with responding to the plaintiff's motion for reconsideration.

The plaintiff is directed to file a formal order with the Court.

Dated June 27, 1991.

BY THE COURT:

  
Judge

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to:

James R. Hasenyager  
2661 Washington Blvd., Suite 202  
Ogden, Utah 84401

J. Nick Crawford  
3rd Floor  
39 Post Office Place  
SLC, UT 84101-2104

Gary D. Stott  
George T. Naegle  
P. O. Box 2465  
SLC, UT 84110-2465

Dated this 28th day of June 1991.

  
Deputy Clerk



STATE OF UTAH

R. PAUL VAN DAM - Attorney General

200 S. 400 WEST - SALT LAKE CITY, UTAH 84101 - TELEPHONE 401-5400

JOSEPH E. TESCH  
CHIEF OF POLICE - SALT LAKE CITY

January 12, 1990

HAND DELIVERED

Honorable Calvin Gould  
United States Courthouse  
350 South Main Street  
Salt Lake City, Utah 84101

Re: Yantes v. Signode Corporation, et al., Civil No.  
89 NC-0055-S

Dear Magistrate Gould:

The question of constitutionality of the exclusive remedy provision of Utah Code Ann. § 35-1-60, and of the comparative negligence provision which preserves statutory immunities, Utah Code Ann. § 78-27-43, has been certified to the Utah Attorney General. The purpose of this letter is to respond to your December 20, 1989 inquiry to Assistant Attorney General Stephen Sorenson as to whether this office will take action in support of the statutes.

It appears that a constitutional challenge would arise only if the exclusive remedy provision prevented the joining of an employer for apportionment of fault.

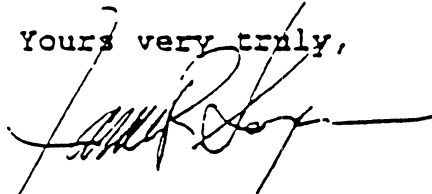
Since the exclusive remedy provision, Utah Code Ann. § 35-1-60, accomplishes its purpose by providing that "no action at law" (i.e., action for money damages) may be maintained against an employer, there is no conflict with joining an employer solely to apportion fault, a proceeding which cannot impose a money judgment on the employer. Therefore, there being no statutory language giving an employer immunity from suit but only immunity from money damages, the immunity of an employer is in no way impaired by being joined for the purpose of apportioning fault.

The foregoing statutes not being inconsistent on their face nor in their purpose or application, this office believes an issue as to their constitutionality will not be presented. No steps will therefore be taken by the Attorney General to intervene in this action at this time.

Honorable Calvin Gould  
January 12, 1990  
Page Two

Thank you for your courtesies in allowing us time to  
assess the need for formal participation by our office.

Yours very truly,



JAMES R. SOPER  
Assistant Attorney General  
Litigation Division

JRS/sh

cc: Robert S. Campbell, Esq.  
Steven G. Forsyth, Esq.  
George T. Waddoups, Esq.  
310 South Main Street, Suite 1200  
Salt Lake City, Utah 84101

Gary B. Ferguson, Esq.  
Gary L. Johnson, Esq.  
50 South Main, Suite 700  
Salt Lake City, Utah 84144

Philip S. Ferguson, Esq.  
175 South West Temple, Suite 510  
Salt Lake City, Utah 84101

W. Brent Wilcox, Esq.  
136 South Main Street  
500 Kearns Building  
Salt Lake City, Utah 84101

Roger F. Baron, Esq.  
45 North First East  
Brigham City, Utah 84302

Stephen J. Sorenson, Esq.  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH

JAN 31 1991

MARKUS B. ZIMMER, CLERK

BY

Deputy Clerk

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

\*\*\*\*\*

BETTY THOMPSON,

)

)

Plaintiff(s),

)

vs.

)

MEMORANDUM DECISION  
AND ORDER

THE CANTEEN, aka CANTEEN COR-  
PORATION, a Delaware corpora-  
tion,

)

)

Defendant(s).

)

Civil No. 90-NC-0068-S

\*\*\*\*\*

This matter is before the court on defendant's objection to the order of the magistrate denying the Canteen's Motion to Compare Fault of Thiokol Corporation. Defendant, the Canteen, operated a restaurant at the Thiokol facility at all times relevant to this lawsuit. Plaintiff, Betty Thompson, an employee of Thiokol, slipped and fell in the Canteen severely injuring her hip. She then sued the Canteen.

The Canteen has requested that this court allow a special verdict form which will require the jury to apportion fault, not only among the parties, but also the non-party Thiokol. The

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magistrate concluded that such apportionment is not permitted by Utah law and entered an Order to that effect.

The Canteen objected to both the order and its designation as an "Order" suggesting that it ought to have been styled a Report & Recommendation (R&R). This court cannot conduct a de novo review of an order, but is limited by the "clearly erroneous or contrary to law" standard of review. Fed. R. Civ. P. 72(a). An R&R, on the other hand, is subject to a de novo review when a party files an objection as provided by Rule 72.

This court concludes that the magistrate was correct in designating the decision an "Order." The rules provide that an R&R can only be entered on dispositive matters such as motions to dismiss or motions for summary judgment. 28 U.S.C. § 636(b)(1) (A) (1982). A motion to compare fault does not fall within that category of dispositive motions. Accordingly, this court has conducted the review permitted by the Federal Rules and finds the magistrate's order to be clearly erroneous and contrary to law.

The plaintiff, Ms. Thompson, argued to the magistrate that the fault of the employer Thiokol should not be apportioned based on the language of Utah Code Annotated section 78-27-39 which states:

The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special

verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant.

Ms. Thompson takes the position that the language permits apportionment only among defendants in the action. Ms. Thompson finds support for this position in Judge Winder's decision in Smith v. Denver and Rio Grande Western Railroad Co., No. C-88-497W (D. Utah June 2, 1989).

This court concludes that Ms. Thompson's position requires too restrictive a reading of the Utah statute. While the language of the statute expressly permits proportioning fault among the parties, nothing in the statute prohibits a jury from allocating a percentage of fault to a non-party. The magistrate's order also permits a result which runs contrary to Utah Code Annotated section 78-27-38 ("no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant") and Utah Code Annotated section 78-27-40 ("The maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion on the damages equivalent to the percentage or proportion of fault attributed to that defendant.").




Although the Utah Supreme Court has not directly resolved this issue, two lower courts have done so and it is this court's view that the decisions of those courts are indicative of the interpretation the Utah Supreme Court would give Utah Code Annotated section 78-27-39. In Fillmore v. Santa Fe Equipment Co., No. C87-6488, slip. op. at 2 (3rd Dist. Ct. Utah May 9, 1990), Judge Young granted defendant's motion to apportion fault. According to Judge Young, "the court finds that the Liability Reform Act was intended by the legislature to limit a tortfeasor's liability to his proportionate share of fault as found by the finder of fact and that the fault of all tortfeasors, including the employer's, must be apportioned to accomplish this result." Judge Draney of the Eighth District Court reached the same conclusion in Lindsey v. Voyles Transportation Co., No. 89 CV 134D (8th Dist. Ct. Utah April 11, 1990). See also Thompson v. Timpanogos Metals, No. 89-C-0492A (D. Utah May 10, 1990).

In light of the conclusions reached by Utah courts on issues identical to the one at bar, the court reconsiders the magistrate's order and grants the Canteen's motion to compare fault of Thiokol.

DATED this 31<sup>st</sup> day of January, 1991.

BY THE COURT:

  
\_\_\_\_\_  
DAVID SAM  
U.S. DISTRICT JUDGE

FEB 23 1990

IN THE EIGHTH JUDICIAL DISTRICT COURT OF ~~UTAH~~ COUNTY

STATE OF UTAH

PATRICIA SWAN, CLERK  
BY LA 77 DEPT

ELIAS VERDUZCO,

Plaintiff,

vs.

NATIONAL SUPPLY COMPANY, INC. )  
formerly a division of Armco )  
Steel Corporation, CHASE )  
DRILLING COMPANY, a subsidiary )  
of KOCH INDUSTRIES, and KOCH )  
EXPLORATION COMPANY, )

Defendants. )

R U L I N G

Civil No. 89-CV-117U

Based on the motion of Defendant National Supply Company, Inc. to add third-party defendant, and good cause appearing, it is hereby ordered that the trier of fact in this matter will be allowed to consider any alleged negligence of Plaintiff's employer in arriving at an apportionment of fault.

DATED this 23<sup>rd</sup> day of February, 1990.

BY THE COURT:

Dennis L. Draney

cc: Glenn C. Hanni  
Robert M. McRae  
Roger P. Christensen

RECEIVED  
MAY 8 1990  
FBI - SALT LAKE CITY

GARY B. FERGUSON [A1062]  
JOHN C. McKINLEY [A5516]  
RICHARDS, BRANDT, MILLER & NELSON  
Attorneys for Third-Party Defendant  
Gramoll Construction Company  
Key Bank Tower, Seventh Floor  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Telephone: (801) 531-1777

RECEIVED

MAY 8 1990

OFFICE OF THE CLERK  
ALDON J. ANDERSON

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

MICHAEL THOMPSON,

Plaintiff,

vs.

TIMPANOGOS METALS, a Utah  
Corporation; UNITED STATES  
OF AMERICA AND ITS AGENTS;  
UNITED STATES ARMY CORPS OF  
ENGINEERS, and DOES I-K,  
XVI CORPORATIONS I-K,

Defendants.

ORDER DISMISSING  
GRAMOLL CONSTRUCTION  
COMPANY

Civil No. 89-C-0492A

UNITED STATES OF AMERICA,

Third-Party Plaintiff,

vs.

GRAMOLL CONSTRUCTION COMPANY  
and TIMPANOGOS METALS, INC.,

Third-Party Defendants/

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The third-party defendant Gramoll Construction Company's Motion to Dismiss and the Court's review of the parties' attempt to dismiss by stipulation Gramoll Construction Company, came on for hearing pursuant to proper notice, before the Honorable Aldon J. Anderson, United States District Court Judge, on April 23, 1990 at the hour of 11:30 a.m. The plaintiff was represented by John Call; the third-party defendant Timpanogos Metals, Inc. was represented by Robert Henderson; the United States of America was represented by Stephen Sorenson; and Gramoll Construction Company was represented by Gary B. Ferguson and John C. McKinley.

After hearing oral argument, and reviewing the pleadings on file, the Court ordered as follows:

1. Gramoll Construction Company's Motion to Dismiss is granted, thereby dismissing it, with prejudice.

2. The finder of fact will be allowed to apportion the fault or negligence, if any, of Gramoll Construction Company which negligence or fault may have proximately caused the injuries sustained by the plaintiff and for which he is seeking damages in this action. Any fault or negligence apportioned to Gramoll Construction Company by the finder of fact will result in a prorata reduction of total damages equal to the

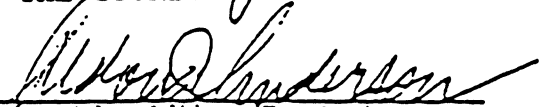
percentage of negligence or fault attributed to Gramoll Construction Company times the total damages awarded by the finder of fact against all defendants.

3. No costs are awarded Gramoll Construction Company.

Based upon the foregoing, it is hereby ordered and decreed that judgment be entered in favor of Gramoll Construction Company, for no cause of action on the Third-Party Complaint, and that Gramoll Construction Company and the third-party plaintiff are to bear their respective costs and disbursements.

DATED this 10 day of May, 1990.

BY THE COURT:

  
Honorable Aydon J. Anderson  
United States District Court  
Judge

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this \_\_\_\_\_ day of \_\_\_\_\_, 1990, to the following counsel of record. Service is made pursuant to Rule 13(a)&(c) Civil Rules of Practice of the United States District Court for the District of Utah.

Julia C. Attwood, Esq.  
PARSONS, BEHLE & LATIMER  
185 South State Street, Suite 700  
P.O. Box 11898  
Salt Lake City, Utah 84147-0898

2-14-99

FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH

FEB 9 1999

MARCUS S. ZIMMER, CLERK  
BY \_\_\_\_\_

ROBERT A. BURTON, #0516  
STRONG & HANNI  
Attorneys for Defendant  
Heather Wehrmeister Garrett  
Sixth Floor Boston Building  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7080

---

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

---

ANGELA L. SCOTT,	)	
	)	
Plaintiff,	)	
	)	<u>MAGISTRATE'S ORDER</u>
vs.	)	
	)	
HEATHER A. WEHRMEISTER,	)	
VOLKSWAGENWERK	)	
AKTIENGESSELLSCHAFT, a foreign	)	
corporation, and VOLKSWAGEN OF	)	
AMERICA, INC., a New Jersey	)	
corporation,	)	Civil No. 87-C-895S
	)	
Defendants.	)	

---

Defendants' Joint Motion for Leave to File Third-Party Complaints was heard on January 11, 1999, at 3:30 p.m. Plaintiff Angela L. Scott was represented by her counsel of record David J. Jordan and Jeffrey E. Nelson of Van Cott, Bagley, Cornwall & McCarthy. Defendant Heather A. Wehrmeister, aka Heather Garrett, was represented by her counsel of record Robert A. Burton of Strong & Hanni. Defendant Volkswagen of America, Inc. was represented by its counsel of record Shawn E. Draney of Snow, Christensen & Martineau. The court having reviewed the memoranda

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of the parties and having heard the arguments of counsel and good cause appearing therefor.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants at trial are entitled to raise as an affirmative defense, pursuant to Utah Code Annotated §78-27-37 et seq. the negligence of the Chi Triellas Sorority, its officers and Brigham Young University, and defendants are entitled to have the negligence and/or fault, if any, of these parties compared on the special verdict form submitted to the jury.

2. Defendants are entitled to file their third-party complaints but they need not file nor serve the third-party complaints in order to preserve their right to have the negligence and/or fault of the Chi Triellas Sorority, its officers and Brigham Young University compared on the special verdict form, which will be submitted to the jury at trial.

DATED this 31 day of Jan, 1989.

BY THE COURT:

Calvin Gould  
United States Magistrate Calvin Gould

APPROVED AS TO FACTS:  
Shawn E. Draney  
Counsel for Volkswagen of  
America, Inc.

Robert A. Burton  
Counsel for Heather A.  
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cc: attys 2/10/89:dp  
David J. Jordan, Esq.  
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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ANNA G. E. MORRISON,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. 880900358
vs.	:	
EARL H. BOOTH,	:	
Defendant.	:	

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Now before the Court is defendant's Motion to Compare Fault, or alternatively for Leave to File a Third Party Complaint. The Court has reviewed the Memoranda submitted in connection with said Motion, and now rules as follows:

The Court is of the opinion that in order to satisfy the intent and purpose of the Tort Reform Act and related legislation, that the "fault" of all parties contributing to the injury must be compared, whether that fault is negligence or intentional conduct, or a combination of both. To rule otherwise would defeat the purpose of the applicable legislation.

The plaintiff could easily undermine the purpose of this legislation by singling out a single defendant who, for

example, may have greater resources to satisfy a judgment than other defendants, and if that defendant were not able to compare the fault of other persons who had contributed to the injury then he would likely, if he had some fault, end up paying a greater proportion of the damages than his fair share. It is, of course, this precise thing that the legislation seeks to avoid. It is clear that the legislature wants defendants to pay only for damages that they themselves have caused. The fact that the conduct of some of the other defendants may have been intentional, is no reason to undermine the beneficial purpose of this legislation. Why would the legislature want defendants who are only negligent to run the risk of having to pay for the intentional conduct of other defendants while being so careful to insure that they do not run the risk of paying for the negligent conduct of other defendants?

In the opinion of the Court, it makes much more sense in terms of judicial economy, and the savings of time and effort and attorney's fees to allow a jury to compare the conduct of named defendants with the conduct of unnamed defendants who may have contributed to the injury, rather than requiring defendants to file third party complaints. Of course,

plaintiff was always at liberty from the beginning to name all individuals as defendants who may have contributed to her injury.

Accordingly, defendant's Motion to Compare the Fault of Robert Lee Boog, Jr. and Maren Matkin is granted. Assuming that there is some evidence of conduct on the part of these individuals that may have contributed to the plaintiff's injury, then the Court will allow their conduct to be compared on the Special v form.

Counsel for defendant is to prepare an Order consistent with this ruling, and submit it in accordance with the Local Rules of Practice.

Dated this 24<sup>th</sup> day of June, 1991.

51 Frank G. Noel  
FRANK G. NOEL  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy  
of the foregoing Memorandum Decision, to the following,  
this \_\_\_\_day of June, 1991:

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