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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

APPELLANT KERBS CONSTRUCTION CORP.'S REPLY BRIEF

Review of an Interlocutory Ruling of the District Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

APPELLANT KERBS CONSTRUCTION CORPORATION'S REPLY BRIEF

Review of an Interlocutory Ruling of the District Court

Defendant/Appellant Kerbs Construction Corporation respectfully submits its Reply Brief in these appeal proceedings.

ARGUMENT

POINT I

PLAINTIFF ARGUES TO CONVERT THE TORT SYSTEM INTO SOMETHING OTHER THAN A MECHANISM FOR DETERMINING THE JUST DISTRIBUTION OF ACCIDENT LOSSES.

The tort system, as it has evolved under American Jurisprudence, is a mechanism for determining the just distribution of accident losses. As Professor George P. Fletcher argues, our tort system is now suffering from "declining expectations." Professor Fletcher observes, however, that:

> Some writers seek to convert the set of discreet litigations into a makeshift medium of accident insurance or into a mechanism for maximizing social utility by shifting the cost of accidents (or accident prevention) to the party to whom it represents the least disutility. Thus, the journals cultivate the idiom of cost-spreading, risk-distribution and cost-avoidance. Discussed less and less are precisely those questions that make tort law a unique repository of intuitions of corrective justice: What is the relevance of risk creating conduct to the just distribution of wealth? What is the rationale for the individual's "right" to recover for his losses? What are the criteria for justly singling out some people and making them, and not their neighbors, bear the cost of accidents? These persistent normative questions are the stuff of tort theory, but they are now too often ignored for the sake of inquiries into insurance and the efficient allocation of resources.

Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972).

Professor Fletcher accurately identifies the subtle shift in tort theory espoused by the plaintiff in this case, and unwittingly embraced by a minority of courts. Generally, as the tort system evolved, tort feasors were held liable for their own acts, evidenced by the prevalent doctrine, of the time, of strict liability. That tort system evolved, with the explosion of insurance coverage, into a system where the courts were not as concerned with the individual fault of tort feasors as they were with the ultimate recovery of the plaintiff. In other words, the courts became more concerned with the plaintiff's recovery than

the defendant's fault. This shift in tort theory was evidenced through the doctrine of joint and several liability. Because of insurance requirements, a plaintiff was able to completely recover from a defendant who may have only been one percent at fault in causing the plaintiff's injuries. Eventually, tort theory again evolved back to a more equitable system where the defendants were only required to pay their proportionate share of fault, regardless of their ability, or inability to pay. The courts recognized that on occasion, a plaintiff may not be fully compensated for his or her injuries under this system, but focused more upon the inequity of forcing a defendant to pay in excess of his or her proportionate share of fault.

The plaintiff now seeks to persuade this Court to hark back to the bygone days of joint and several liability. They do so based upon conflicting statutes which, depending upon your point of view, ensure a full recovery to the plaintiff, at the expense of "non-immune" defendants, or insure that multiple defendants are only required to pay their proportion of fault.

Should this court be persuaded by plaintiff's arguments, this court's decision will revive a theory of tort recovery which the legislatures and courts of this country have systematically abandoned, including Utah's courts and legislatures. The contemporary system of tort recovery is one

based on equity where at-fault persons only pay their proportionate share of fault. This is true, regardless if the defendant is GM Corporation, or private citizen John Doe. It makes little legal or equitable sense to protect the negligent employer of the plaintiff, at the expense of a negligent employer of the defendant.

While the worker's compensation scheme, which immunizes employers from further "liability" is laudable, and should be protected, its protection can be insured while at the same time the protection of non, or less negligent defendants can be insured. This system is laid out in Kerbs' initial brief.

POINT II

INCORPORATION OF EPSTEIN'S REPLY BRIEF.

The defendant Kerbs Construction Corporation hereby incorporates by reference Epstein Construction, Inc.'s Reply Brief in these appeal proceedings.

CONCLUSION

The defendant/appellant Kerbs respectfully requests this Court to reverse the ruling of the District Court excluding Albertsons from the special verdict form.

DATED this 4 day of May, 1992.

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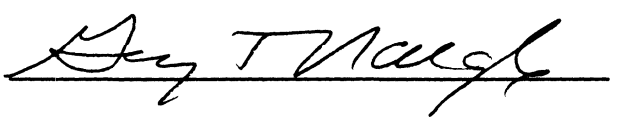

BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

APPELLANT EPSTEIN CONSTRUCTION'S REPLY BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

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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.[1] 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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[1]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.[2]

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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[2]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 <u>reduce</u> not eliminate the employee's recovery against a third-party tortfeasor <u>by that of proportion of fault attributable to this other tortfeasor</u>. 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 22nd day of April, 1992.

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