

1991

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

James R. Hasenyager; Martin W. Custen; Marquardt, Hasenyager & Custen; Attorney for Appellee . Nelson L. Hayes; George T. Naegle; Richards, Brandt, Miller & Nelson; Michael A. Katz; Purser, Okazaki & Berrett; Attorneys for Appellants.

Recommended Citation

Brief of Appellee, *Dahl v. Kerbs Construction Corp.*, No. 910372.00 (Utah Supreme Court, 1991).
https://digitalcommons.law.byu.edu/byu_sc1/3638

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT
KFU
45.9
89
DOCKET NO.

UTAH SUPREME COURT

BRIEF

910372

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLEE

REVIEW OF AN INTERLOCUTORY RULING OF THE DISTRICT COURT

Nelson L. Hayes
George T. Naegle
RICHARDS, BRANDT, MILLER
& NELSON
50 South Main Street, #700
P.O. Box 2465
Salt Lake City, UT 84110
Telephone: (801) 531-1777
Attorneys for Appellant Kerbs

James R. Hasenyager
Martin W. Custen
MARQUARDT, HASENYAGER & CUSTEN
2551 Washington Boulevard, #202
Ogden, Utah 84401
Telephone: (301) 621-3662
Attorneys for Appellee

Michael A. Katz
PURSER, OKAZAKI & BERRETT
39 Post Office Place, #300
Salt Lake City, UT 84101
Telephone: (801) 532-3555
Attorneys for Appellant Epstein

FILED

APR - 3 1992

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLEE

REVIEW OF AN INTERLOCUTORY RULING OF THE DISTRICT COURT

Nelson L. Hayes
George T. Naegle
RICHARDS, BRANDT, MILLER
& NELSON
50 South Main Street, #700
P.O. Box 2465
Salt Lake City, UT 84110
Telephone: (801) 531-1777
Attorneys for Appellant Kerbs

James R. Hasenyager
Martin W. Custen
MARQUARDT, HASENYAGER & CUSTEN
2551 Washington Boulevard, #202
Ogden, Utah 84401
Telephone: (801) 621-3662
Attorneys for Appellee

Michael A. Katz
PURSER, OKAZAKI & BERRETT
39 Post Office Place, #300
Salt Lake City, UT 84101
Telephone: (801) 532-3555
Attorneys for Appellant Epstein

TABLE OF CONTENTS

TABLE OF AUTHORITIES.	ii-iv
STATEMENT SHOWING JURISDICTION.	1
STATEMENT OF THE ISSUES AND STANDARD OF REVIEW.	1
DETERMINATIVE STATUTES AND RULES.	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS.	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT:	4
POINT I:	4
THE PLAIN LANGUAGE OF SECTIONS 78-27-39 AND 43, U.C.A., AS AMENDED, PRECLUDES A NON-DEFENDANT FROM BEING INCLUDED ON A SPECIAL VERDICT FORM FOR PURPOSES OF APPORTIONING FAULT.	4
POINT II:	14
APPELLEE'S EMPLOYER'S (ALBERTSON'S) IMMUNITY THROUGH WORKER'S COMPENSATION PAYMENTS EXTENDS TO THE APPORTIONMENT OF FAULT	14
POINT III:	17
ADOPTION OF APPELLANTS' POSITION WOULD UNDERMINE THE PURPOSES OF UTAH'S WORKER'S COMPENSATION STATUTES	17
CONCLUSION.	20
ADDENDUM	
A. RULING ON MOTION TO EXCLUDE ALBERTSON'S	
B. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, OR RULES	

TABLE OF AUTHORITIES

CASES CITED

<u>Beringer v. State</u> , 727 P.2d 1222 (Idaho 1986) . . .	7
<u>Bode v. Clark Equipment Co.</u> , 719 P.2d 824 (Okla. 1986)	13
<u>Brown v. Keill</u> , 224 Kan. 195, 580 P.2d 867 (1978) .	11
<u>Clark v. Pacificorp.</u> , 116 Wash.2d 804, 809 P.2d 176 (1991)	12
<u>Connar v. West Shore Equipment of Milwaukee, Inc.</u> , 227 N.W.2d 660 (Wis. 1975)	7,11,13
<u>Cordier v. Stetson-Ross, Inc.</u> , 704 P.2d 86 (Mont. 1979)	15
<u>Correia v. Firestone Tire & Rubber Co.</u> , 388 Mass. 342, 446 N.E.2d 1033 (1983).	16,19
<u>Dietz v. General Electric Company</u> , 821 P.2d 166 (Ariz. 1991)	11
<u>Gernand v. Ost Services, Inc.</u> , 298 N.W.2d 500 (N.D. 1980).	17
<u>Hall v. Archer-Daniels-Midland Co.</u> , 142 Ill. App.3d 200, 491 N.E.2d 879 (1986).	13
<u>Heckendorn v. Consolidated Rail Corporation</u> , 293 Pa. Super. 474, 439 A.2d 674 (1982).	10
<u>Huber v. Henley</u> , 656 F. Supp. 508 (S.D. Ind. 1987).	12
<u>Jensen v. Intermountain Health Care, Inc.</u> , 679 P.2d 903 (Utah 1984)	5,7
<u>Kelly v. Carborundum Company</u> , 453 A.2d 624 (Pa. Super. 1982).	9
<u>Kirby Building Systems v. Mineral Explorations</u> , 704 P.2d 1266 (Wyo. 1985).	12
<u>Leonard v. Johns Manville Sales Corp.</u> , 305 S.E.2d 528 (N.C. 1983).	11
<u>Mihoy v. Proulx</u> , 113 N.H. 698, 313 A.2d 723 (1973).	8

<u>Mills v. Brown</u> , 735 P.2d 603 (Ore. 1987).	10
<u>Pape v. Kansas Power & Light Co.</u> , 231 Kan. 441, 647 P.2d 320 (1982).	13
<u>Pate v. Marathon Steel Co.</u> , 777 P.2d 428 (Utah 1989).	5,15
<u>Pocatello Industrial Park Co. v. Steel West, Inc.</u> , 101 Idaho 783, 621 P.2d 399 (1980)	7,11
<u>Seattle First National Bank v. Shoreline Concrete</u> , 588 P.2d 1308 (Wash. 1978)	17
<u>Stephens v. Henderson</u> , 741 P.2d 952 (Utah 1987) . .	7
<u>Taylor v. Delgarno</u> , 100 N.M. 138, 667 P.2d 445 (1983)	13
<u>Therrien v. Safeguard Manufacturing Company</u> , 35 Conn. Supp. 268, 408 A.2d 279 (1979). . . .	17
<u>Thompson v. Sterns Chemical Corp.</u> , 345 N.W.2d 131 (Iowa 1984).	17
<u>Warmbrodt v. Blanchard</u> , 692 P.2d 1282 (Nev. 1984) .	8
<u>Williams v. White Mountain Construction Company</u> , 749 P.2d 423 (Colo. 1988).	11,13

STATUTES AND RULES CITED

Arizona Revised Statutes, Section 12-250.	11
Colorado Revised Statutes, Section 13-21-111.5 . .	11
Indiana Code, Section 34-4-2(a)	12
North Carolina General Statutes, Section 97-10.2 .	11
Pennsylvania Consolidated Statutes Annotated, Title 42 Section 7102.	9
Revised Code of Washington, Section 4.22.070 . . .	12
Rule 5, Utah Rules of Appellate Procedure	1
Utah Code Annotated, Section 35-1-60, as amended . .	2,5,6,15

Utah Code Annotated, Section 35-1-62, as amended. .	2,18,19,20
Utah Code Annotated, Section 35-1-65, as amended. .	17
Utah Code Annotated, Section 35-1-66, as amended. .	18
Utah Code Annotated, Section 35-1-67, as amended. .	18
Utah Code Annotated, Section 78-2-2(3)(j), as amended	1
Utah Code Annotated, Section 78-27-37, as amended .	2,4
Utah Code Annotated, Section 78-27-38, as amended .	2,4
Utah Code Annotated, Section 78-27-39, as amended .	1,2,4
Utah Code Annotated, Section 78-27-40, as amended .	2,19
Utah Code Annotated, Section 78-27-41, as amended .	2,6
Utah Code Annotated, Section 78-27-42, as amended .	2
Utah Code Annotated, Section 78-27-43, as amended .	1,2,6,14

OTHER AUTHORITIES CITED

Annotation,	<u>Modern Status of Effect of State Workman's Compensation Acts on Rights of Third-Person Tortfeasor to Contribution or Indemnity from Employer of Injured or Killed Workman</u> ; 100 A.L.R.3d 350 (1980)	14
-------------	---	----

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLEE

STATEMENT SHOWING JURISDICTION

Jurisdiction to hear this appeal is conferred by Section 78-2-2(3)(j), which gives the Supreme Court appellate jurisdiction over orders of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and Rule 5, Utah Rules of Appellate Procedure, which allows the Supreme Court discretion to hear interlocutory appeals.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The issue presented for review is as follows:

Does the plain language of Sections 78-27-39 and 43, and Section 35-1-60, Utah Code Annotated, as amended, prohibit

inclusion of a non-party who cannot be named as a defendant, on a special verdict form for purposes of apportioning fault?

Counsel agrees with Appellant Kerbs's statement of the standard of review.

DETERMINATIVE STATUTES AND RULES

Sections 78-27-37, 38, 39, 40, 41, 42 and 43, Utah Code Annotated, as amended. Sections 35-1-60 and 62, Utah Code Annotated, as amended.

STATEMENT OF THE CASE

Appellee agrees with the Statement of the Case in Appellant Kerbs's Brief.

STATEMENT OF THE FACTS

Appellant Epstein Construction, Inc. (hereinafter "Epstein") was construction manager with respect to a remodelling project at Albertsons' North Salt Lake Distribution Center, which project included installation of new banana storage rooms (R., at 2-3; 265). Epstein subcontracted with Appellant Kerbs Construction Corporation (hereinafter "Kerbs") for work which included cutting a trench in the concrete floor of the Distribution Center for purposes of placing utility lines and the banana room walls (R., at 266).

Appellee Jodie Dahl was an employee of Albertsons and, on February 14, 1989, during the course of her employment, fell backward over the trench, suffering serious

and permanent injuries, including a herniated disc and other physical complications. (R., at 3). Ms. Dahl received workers compensation benefits for her injuries. (R., at 3).

Ms. Dahl filed suit for her injuries against Kerbs and Epstein. (R., at 1-4). Kerbs and Epstein alleged, inter alia, comparative negligence on the part of Ms. Dahl and her employer, Albertsons, (R., at 13-17), and filed motions seeking the inclusion of Albertsons on the special verdict form. (R., at 565). Judge Cornaby at first granted this motion, but upon reconsideration, he reversed himself and refused to permit the fault of Albertsons to be assessed pursuant to Section 78-27-39, Utah Code Annotated, as amended. (R., at 749-750). This interlocutory appeal followed, and the trial in this case has been stayed pending the decision of this appeal. (R., at 978-979 and 982-983).

Appellee submits that these are the relevant facts necessary to resolve this appeal, that the Statement of Facts in Appellant Kerbs's Brief is unnecessarily long, and goes more to the merits of the case than to the facts necessary to resolve the appeal, and, accordingly, requests this Court to disregard the lengthy Statement of Facts.

SUMMARY OF THE ARGUMENT

There is no conflict between the plain language of Utah's Comparative Negligence Statutes and the Utah's Worker's Compensation Act. The former expressly and repeatedly

excludes employers from inclusion as parties defendant and from inclusion on special verdict forms for purposes of fault determination. The Comparative Negligence Statutes also expressly recognize the statutory immunity from liability of employers under the Utah's Worker's Compensation Act.

By recognizing an employer's immunity from suit and from apportionment of fault in the Comparative Fault statutes, our legislature has determined that the strong policies underlying the Worker's Compensation Act merit the immunity given to employers. To adopt Appellants' position would not only result in a judicial rewriting of these statutes, but would undermine the purposes of the Worker's Compensation Act and the manner in which employers function under it.

ARGUMENT

POINT I. THE PLAIN LANGUAGE OF SECTIONS 78-27-39 AND 43, UTAH CODE ANNOTATED, AS AMENDED, PRECLUDES A NON-DEFENDANT FROM BEING INCLUDED ON A SPECIAL VERDICT FORM FOR PURPOSES OF APPOINTING FAULT.

Utah's Comparative Fault Statutes, Sections 78-27-37 through 43, Utah Code Annotated, as amended, set forth a tightly worded scheme by which the comparative fault of defendants, and only defendants, may be assessed (emphasis added). Section 78-27-37 defines a "defendant" as "any person not immune from suit..." (emphasis added). Section 78-27-38

provides that no defendant is liable in excess of the proportion of fault of that defendant (emphasis added).

Section 78-27-39 provides:

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, (emphasis added).

It is a general principle of statutory construction that, unless technical terms are used, words employed in a statute must be given their usual and ordinary meaning. Cache Auto Co. v. Central Garage, 63 Utah 10, 221 P.862 (1923). In construing a statute, all words are presumed to have been used advisedly. Pate v. Marathon Steel Co., 777 P.2d 428 (Utah 1989).

Appellants' argue that there is some form of inequity in the Comparative Fault Statutes and some perceived conflict with the Worker's Compensation Act. They concede that the plain language of the Comparative Fault Statutes limits special verdict forms to apportionment of fault among plaintiff and defendants, but argue that this was not really the intended result. However, "the best evidence of the true intent and purpose of the Legislature in enacting the Act is the plain language of the Act," Jensen v. Intermountain Health Care, Inc., 679 P.2d 903 (Utah 1984).

Section 35-1-60, Utah Code Annotated, as amended,

provides that "...no action at law may be maintained against an employer... based upon any accident, injury or death of any employee." This immunity from suit is recognized explicitly in Section 78-27-43, which provides:

Nothing in Sections 78-27-37 through 78-27-42 affects or impairs any common law or statutory immunity from liability, including, but not limited to... the exclusive remedy provisions of Chapter 1, Title 35...(emphasis added).

Thus, what our legislature has done in creating the scheme of our Comparative Fault Statutes, is provide for apportionment of fault among those persons or entities who can be sued as defendants. Liability is no longer joint and several; it is apportioned. But employers are excluded expressly and repeatedly from this apportionment because of the strong policies underlying the no-fault theory of worker's compensation, as will be more fully argued under Point III below. Since Albertsons is immune from suit under Sections 78-27-43, and 35-1-60, it cannot be a defendant, and hence cannot be included on a special verdict form.

Additionally, Section 78-27-41 provides:

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. (emphasis added).

Given this specific statute, if the Legislature had intended

to allow inclusion of immune employers on the special verdict forms, it would have stated so explicitly.

Appellants rely principally on case law from Idaho and Wisconsin, claiming that Utah's Comparative Fault Statute is modeled after the statutory schemes of those states. Utah's Comparative Negligence Act was adopted in 1973, and the cases cited by Appellants from the other jurisdictions were decided subsequent to that date [Beringer v. State, 727 P.2d 1222 (Idaho 1986) (Kerbs's Brief, at p.17); Pocatello Industrial Park Company v. Steel West, Inc., 101 Idaho 783, 621 P.2d 399 (1980) (Kerbs's Brief, at p.16 and Epstein's Brief at pp.10,13); Connar v. West Shore Equipment of Milwaukee, Inc., 227 N.W.2d 660 (Wis. 1975) (Epstein's Brief, at p.9)]. However, in Jensen v. Intermountain Health Care, Inc., 679 P.2d 903 (Utah 1984), the Utah Supreme Court held that the presumption that the Legislature intended to adopt Idaho's judicial interpretations along with its Comparative Negligence Statute, does not apply to Idaho court decisions subsequent to the 1973 date of adoption. 679 P.2d 903, at 905.

Furthermore, Utah's Comparative Negligence Act was repealed in 1986, and replaced with the Liability Reform Act, current Section 78-27-37 through 43. Stephens v. Henderson, 741 P.2d 952 (Utah 1987). The Liability Reform Act's language changed the wording concerning who could be included on

special verdict forms from determining the negligence of "each party" (language of the former Comparative Negligence Act) to determining "the percentage or proportion of fault attributable to... each defendant." By changing this wording, the Legislature has evidenced an intent to include only plaintiffs and defendants on the special verdict form, and any Idaho judicial interpretations may and should be disregarded. Jensen, supra.

Other courts have interpreted their comparative fault or negligence statutes in this manner. In Warmbradt v. Blanchard, 692 P.2d 1282 (Nev. 1984), the Nevada Supreme Court observed that where the plain language of the comparative negligence statute required apportioning liability "among the defendants" and returning a special verdict indicating the percentage of negligence "attributable to each party", no reference was made to the negligence of other possible persons or entities. The court held that the jury should not have been instructed to consider the negligence of one who was neither a defendant nor a party.

In Mihoy v. Proulx, 113 N.H.698, 313 A.2d 723 (1973), the New Hampshire Supreme Court noted that their statute spoke only in terms of actual defendants, and not in terms of other tortfeasors who were potential defendants, but immune because of a covenant not to sue. This court held that, under those circumstances, the defendant may not implead

a third party as codefendant for purposes of apportioning liability. It is submitted that a tortfeasor who is protected by a covenant not to sue is analogous to an employer granted immunity by the Worker's Compensation Act.

In Kelly v. Carborundum Company, 453 A.2d 624 (Pa. Super. 1982), the Superior Court of Pennsylvania held, in an action by an employee against a third-party tortfeasor, that the employer could not be joined either as an additional defendant or as an involuntary plaintiff for purposes of apportioning fault under Pennsylvania's Comparative Negligence Act, which provided:

...[w]here recovery is allowed against more than one defendant, each defendant shall be liable for proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed... 42 Pa.C.S.A. Section 7102. 453 A.2d 624, at 627.

The Pennsylvania Superior Court held:

Contrary to the premise for appellant's argument, this statute does not provide for apportionment among all tortfeasors causally responsible for an injury. "It merely provides for apportionment among those defendants against whom recovery is allowed. There is no suggestion in that statute that all possible tortfeasors be brought into court, and certainly no requirement that this be done to achieve the purposes of the act. The trier of fact is simply to apportion liability on a percentage basis among those defendants on the record against whom recovery is allowed..."

[citation omitted]. We observed in Heckendorn, and repeat here, that under existing law, an employer is not a defendant "against whom recovery is allowed." 453 A.2d 624, at 627 (emphasis added).

The Pennsylvania Superior Court had already held, in Heckendorn v. Consolidated Rail Corporation, 293 Pa. Super 474, 439 A.2d 674 (1982), that an employer who accepts the responsibility of providing worker's compensation benefits is not a party whose negligence is to be included in the apportionment required by the Comparative Negligence Law. The Kelly court then held:

It seems clear, therefore, that substantive law precludes the joinder of an employer for the purpose of determining fault in an action commenced by an employee against a third person. 453 A.2d, 624, at 627.

This reasoning is applicable equally to Utah's current statutory scheme.

In Mills v. Brown, 735 P.2d 603 (Ore. 1987), The Oregon Supreme Court interpreted its comparative negligence statute, which provided for special verdicts determining the "degree of each party's fault expressed as a percentage of the total fault attributable to all parties represented in the action." The court confined the determination to the actual named parties, relying on the plain language of the Oregon statute. In so holding, the Oregon Supreme Court declined to follow the reasoning of the following cases cited by

Appellants: Connar v. West Shore Equipment of Milwaukee, 68 Wis.2d 42, 227 N.W.2d 660 (1975) (Epstein's Brief at p.9); Pocatello Industrial Park Co. v. Steel West, Inc., 101 Idaho 783, 621 P.2d 399 (1980) (Kerbs's Brief at p.16; Epstein's Brief at pp.10,13); Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978) (Epstein's Brief at pp.11,15).

Most of the cases cited by Appellants do not actually support their position that Utah's statutes require an immune employer's include on the special verdict form. Appellants' cited cases fall into the following five categories:

(1) The statutory language being construed expressly directed the inclusion of immune employers: Williams v. White Mountain Construction Company, 749 P.2d 423 (Colo. 1988), see excerpts from Section 13-21-111.5(1), 6A C.R.S. (1987) in Addendum; Dietz v. General Electric Company, 821 P.2d 166 (Ariz. 1991), A.R.S. Section 12-2506, requiring considering fault of "all persons who have contributed to the alleged injury... regardless of whether the person was, or could have been, named as a party to the suit..." and that percentage of fault assessed against such "nonparties are used only as a vehicle for accurately determining the fault of the named parties..."; Leonard v. Johns Manville Sales Corp., 305 S.E.2d 528 (N.C. 1983), N.C.G.S. 97-10.2 expressly allows for inclusion of immune employer and permits employer to defend;

Clark v. Pacificorp., 116 Wash.2d 804, 809 P.2d 176 (1991), RCW 4.22.070: "In all actions involving fault of more than one 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." (emphasis added). In these cases, the various courts were construing plain language conspicuously absent from and different than the relevant Utah statutes.

(2) The statutory language expressly disallowed inclusion of employers: Huber v. Henley, 656 F.Supp. 508 (S.D. Ind. 1987). In this case, the issue was inclusion of a subdivision of the state, not otherwise immune, but against which the statute of limitations had run. The relevant Indiana statute permitted joinder of a "nonparty" to determine comparative fault. Indiana Code 34-4-2(a) provided:

"Nonparty" means a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant. A nonparty shall not include the employer of the claimant. (emphasis added).

(3) Cases in which the decision did not deal with the issue of inclusion of an employer: Kirby Building Systems v. Mineral Explorations, 704 P.2d 1266 (Wyo. 1985). This was a business tort case, but in discussing the statutes, the court noted that Wyoming's comparative negligence statute

allowed joinder of anyone against whom plaintiff could seek judgment. In Utah, this would not include an employer.

(4) Cases in which ambiguities in that state's comparative negligence statute only were resolved by judicial decisions permitting inclusion of an employer, without a discussion of the immunity issue: Pape v. Kansas Power & Light Co., 231 Kan. 441, 647 P.2d 320 (1982); Taylor v. Delgarno, 100 N.M. 138, 667 P.2d 445 (1983); Hall v. Archer-Daniels-Midland Co., 142 Ill. App.3d 200, 491 N.E.2d 879 (1986).

(5) Cases which allow consideration of an employer's fault, but with statutory language greatly different from Utah's: Connar v. West Shore Equipment of Milwaukee, Inc., 227 N.W.2d 660 (Wis. 1975); Bode v. Clark Equipment Co., 719 P.2d 824 (Okla. 1986).

In none of the cited cases in Appellants' Briefs is there a statutory scheme similar to Sections 78-27-37 through 43. All of the Appellants' cited cases in (3) through (5) of Appellee's five designated categories, dealt with the issue of permitting third party claims of contribution from negligent employers under state comparative negligence statutes. As noted by the Supreme Court of Colorado in Williams v. White Mountain Construction Company, supra, the great majority does not permit a claim for contribution against the employer:

...In states with statutory schemes similar to that of Colorado, the majority

rule is to prohibit such claims. This rule fulfills the twin public policy goals of speedy, predictable determination of job-related injuries and a reluctance to create a judicial remedy that invades the province of the legislature. 749 P.2d 423, at 428.

In footnote 5 of Williams, the Colorado Supreme Court mentions that this is the rule in the federal courts and in thirty-four states. See also, Annotation, Modern Status of Effect of State Workmen's Compensation Act on Right of Third-Person Tortfeasor to Contribution or Indemnity from Employer of Injured or Killed Workman, 100 A.L.R.3d 350, 356-364 (1980).

Thus, the cases cited by Appellants are, largely, distinguishable, and those few supporting their position are clearly the minority viewpoint. Even among those few, the statutory scheme is different from Utah's. Our legislature did not intend the inclusion of employers on the special verdict forms.

POINT II: APPELLEE'S EMPLOYER'S (ALBERTSONS)
IMMUNITY THROUGH WORKER'S COMPENSATION
PAYMENTS EXTENDS TO THE APPORTIONMENT OF
FAULT.

Ms. Dahl received worker's compensation benefits for her injuries. Nothing in Utah's Comparative Fault Statutes "affects or impairs any... statutory immunity from liability, including... the exclusive remedy provisions of Chapter 1, Title 35." Section 78-27-43.

Section 35-1-60 provides:

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee... shall be the exclusive remedy against the employer... and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever.

See also, Pate v. Marathon Steel Co., 777 P.2d 428 (Utah 1989). It is submitted that the Liability Reform Act of 1986 does not affect Albertson's immunity, and that this extends to liability from apportionment of fault.

Courts of other states have so held. In Cordier v. Stetson-Ross, Inc., 704 P.2d 86 (Mont. 1979), the Montana Supreme Court followed the majority rule and held that an employer, immune from liability under worker's compensation statutes, is not liable to a third party for contribution. The court relied on Montana's worker's compensation statutes, which are similar to Utah's:

It is the intent and purpose of the Worker's Compensation Act that the right of action against a responsible third party belongs to the employee. Consequently, it is uniformly held that the employer's contributory negligence may not be used as a defense in an action by the injured employee against the responsible party...

Therefore, under the Montana scheme, the negligence, if any, of the employer (but not of the employee himself) never becomes an issue in the injured employee's action against a responsible third party. His right to recover damages is determined without reference to his employer's negligence...

While this may result in a "negligent" employer profiting through subrogation, the employee's cause of action cannot be split. In choosing between two possible injustices, allowing a negligent employer to profit, or reducing the recovery allowed to an injured employee, the Montana legislature has opted in favor of the employee by providing him full recovery. 604 P.2d 86, at 93.

Another case with a similar holding is Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 446 N.E.2d 1033 (1983). In Correia, the Supreme Court of Massachusetts had to deal with an "equitable" solution proposed by the third-party tortfeasor to the supposed inequity of not allowing contribution from the employer. This proposed "equitable" solution was similar to that suggested in the present case by Appellants. The Massachusetts Supreme Court held:

...Similar solutions have been proposed without success in a number of other states where the workmen's compensation statutes have been construed to bar contribution against the employer [citation omitted]. A common ground for the decisions denying equitable solutions, aside from difficulties with the solutions themselves, has been that the workmen's compensation laws are economic regulations representing the Legislature's balance of competing societal interest and that the courts have no place in reshaping public policy in the face of such comprehensive legislation [citations omitted]. We accepted this rationale in Westerlind... we think its rationale extends to preclude our making any decision here in the name of equity which would undercut the legislative scheme... Workmen's compensation is not an area so "long left

to the common law [that] change may come about by the same medium of development... 446 N.E.2d 1033, at 1036-1037.

Other cases supporting this position include: Seattle First National Bank v. Shoreline Concrete, 588 P.2d 1308 (Wash. 1978); Therrien v. Safeguard Manufacturing Company, 35 Conn. Supp. 268, 408 A.2d 273 (1979); Thompson v. Stearns Chemical Corp., 345 N.W.2d 131 (Iowa 1984); and Gernand v. Ost Services, Inc., 298 N.W.2d 500 (N.D. 1980).

POINT III ADOPTION OF APPELLANTS' POSITION WOULD
UNDERMINE THE PURPOSES OF UTAH'S WORKER'S
COMPENSATION STATUTES.

Appellee's main argument is, as set forth in Point I above, that the plain language of the relevant Utah statutes precludes a "non-defendant" from being included on special verdict forms. Nonetheless, Appellants raise certain policy arguments, most notably the feared "double recovery" of an employee (Epstein's Brief, at pp.16-17). This fear is not only unfounded but, if anything, it is the employee who would not recover fully and the employer who would benefit.

Appellant Epstein argues that under Utah's worker's compensation benefits, an employee is reimbursed for most if not all economic losses, e.g., lost wages. Actually, as is well known, employees may recover only up to two-thirds of their lost wages, Section 35-1-65, to a maximum of 100 percent

of the state's average weekly wage. A similar limit is set on permanent wage loss, Section 35-1-67. There are limits of a maximum of six years, and two-thirds wage loss on permanent partial disability, Section 35-1-66, and two-thirds wage loss on permanent total disability, Section 35-1-67. An injured worker does not recover any general damages for pain and suffering. An injured worker earning \$1,000.00 per week can only recover two-thirds up to about \$237.00 per week, currently, on lost wages. Regardless of the employer's or worker's fault, the employer or its insurance carrier is reimbursed dollar-for-dollar out of any third-party recovery of the injured worker, Section 35-1-62.

This entire scheme is a considered legislative judgment. The injured worker benefits by receiving a speedy payment for his or her injuries. The worker does not have to prove employer fault and, in fact, may often recover even if the worker was at fault. The worker does not have to go through the protracted litigation process. But the worker does not receive the type or full amount of damages available in an action at law against the employer.

On the other side, the employer benefits by paying less than it would in a law action if it were at fault. The tradeoff is that the employer pays even if it is not at all at fault. As an overall benefit and tradeoff, the employer is reimbursed out of the third party recovery.

Adoption of the Appellants' position would upset this balancing of interests by the legislature. The injured employee would still have to reimburse the employer from his or her third-party recovery, so it would be the employer who benefitted by its own fault-based conduct, not the employee. And the employer would be a phantom entity in the third party litigation - its fault would be determined, but it would not be there to assert its own position. Neither would the employer have any motivation to be involved in the third-party suit. The employer still is reimbursed, Section 35-1-62, and there is no right of contribution, Section 78-27-40. Thus, adopting Appellants' policy argument would require not just ignoring the plain language of Sections 78-27-37 through 43, but a judicial rewriting of Section 35-1-62.

Addressing this issue, the Supreme Judicial Court of Massachusetts, in Correia v. Firestone Tire & Rubber Co., supra, observed:

As an example of the unfairness of the rule [of excessive plaintiff's recovery], Firestone presents the scenario of a third party whose negligence contributed only one percent to the employee's damages, nevertheless having to pay full damages in the event that the employee's negligence was no greater than that of the third party. While we consider such a result harsh, we can conceive of instances where, under the first three instructions suggested by Firestone, an employee whose negligence was minimal or nonexistent would be denied recovery or receive substantially less than he would have had he not

received workmen's compensation. Moreover, we are not so naive as to fail to acknowledge that one of the practical effects of Westerlind is to favor one insurance company (the employer's carrier) over another insurance company (the third party's carrier). 446 N.E.2d 1033, at 1036, n.5.

Since Utah's Worker's Compensation statutes are premised on a no-fault concept, if an employer's right to reimbursement under Section 35-1-62 were subject to a credit or set-off for the employer's apportioned share of fault, the employer would be motivated to contest the worker's compensation claim by showing fault on the part of the employee, so as to protect its right to reimbursement.

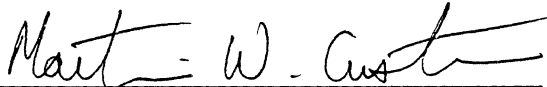
Finally, Epstein's position, at p.18 of its Brief, that "a subrogee must not himself be at fault or contributing to the loss on which he sues," is erroneous for two reasons. First, since the employer is not and cannot be a party to the third-party tort litigation, it is not bound by any apportioned fault or any res judicata aspect of the judgment. Second, the employer's right to reimbursement is based upon statute, and fault has nothing to do with it, Section 35-1-62(2).

CONCLUSION

Our legislature has expressed its considered decision in the Liability Reform and Worker's Compensation Acts. The plain language of the former shows that the legislature intended that employers who are immune from suit,

because of worker's compensation payments, not be included on the special verdict forms. To allow their inclusion would undermine the no-fault and other policies of the worker's compensation statutes, and would amount to a rewriting of those statutes, and the comparative fault statutes by the judiciary. Judge Cornaby's ruling should be affirmed, and this Court should lift the stay on the trial date and remand this case for trial.

Respectfully submitted this 3rd day of April, 1992.


James R. Hasenyager
Martin W. Custen
MARQUARDT, HASENYAGER & CUSTEN
2661 Washington Blvd., #202
Ogden, Utah 84401
Attorneys for Appellee

CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of April, 1992, I caused four true and correct copies of the foregoing Brief of Appellee to be served upon the following, by placing copies thereof in the United States mail, postage prepaid, addressed as follows:

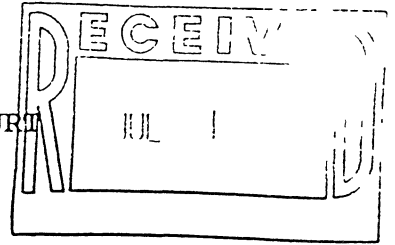
Mr. Nelson L. Hayes
Mr. George T. Naegle
RICHARDS, BRANDT, MILLER & NELSON
P.O. Box 2465
Salt Lake City, UT 84110-2465

Mr. Michael A. Katz
PURSER, OKAZAKI & BERRETT, P.C.
39 Post Office Place, #300
Salt Lake City, UT 84101-2104


MARTIN W. CUSTEN

ADDENDUM

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

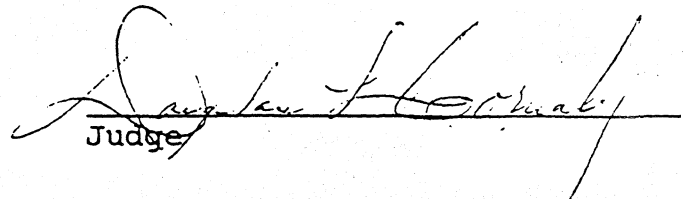
point out that there is no such thing as a motion for reconsideration in Utah. This rule works well when the Court has made factual findings, but not so well when, as here, no one is hurt by the application of the better reasoned law.

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:

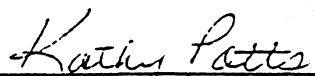
This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to:

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

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

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

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

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

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. 1977, § 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."

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.

TITLE 13. COURTS AND COURT PROCEDURE
DAMAGES
DAMAGES

ARTICLE 21. DAMAGES
PART 1. GENERAL PROVISIONS

C.R.S. 13-21-111.5 (1991)

21-111.5. Civil liability cases - pro rata liability of defendants

1) In an action brought as a result of a death or an injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss, except as provided in subsection (4) of this section.

2) The jury shall return a special verdict, or, in the absence of a jury, the court shall make special findings determining the percentage of negligence or fault attributable to each of the parties and any persons not parties to the action of whom notice has been given pursuant to paragraph (b) of subsection (3) of this section to whom some negligence or fault is found and determining the total amount of damages sustained by each claimant. The entry of judgment shall be made by the court based on the special findings, and no general verdict shall be returned by the jury.

(3) (a) Any provision of the law to the contrary notwithstanding, the finder of fact in a civil action may consider the degree or percentage of negligence or fault of a person not a party to the action, based upon evidence thereof, which shall be admissible, in determining the degree or percentage of negligence or fault of those persons who are parties to such action. Any finding of a degree or percentage of fault or negligence of a nonparty shall not constitute a presumptive or conclusive finding as to such nonparty for the purposes of a prior or subsequent action involving that nonparty.

(b) Negligence or fault of a nonparty may be considered if the claimant entered into a settlement agreement with the nonparty or if the defending party gives notice that a nonparty was wholly or partially at fault within ninety days following commencement of the action unless the court determines that a longer period is necessary. The notice shall be given by filing a pleading in the action designating such nonparty and setting forth such nonparty's name and last-known address, or the best identification of such nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault. Designation of a nonparty shall be subject to the provisions of section 13-17-102. If the designated nonparty is a licensed health care professional and the defendant designating such nonparty alleges professional negligence by such nonparty, the requirements and procedures of section 13-20-602 shall apply.