

1991

Kenneth Ray Sullivan v. Trackmobile, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH RAY SULLIVAN,)	
)	No. 910482
Plaintiff and Respondent,)	
)	87-C-330G
v.)	Priority 12
)	
TRACKMOBILE, INC.,)	
)	
Defendant and Petitioner.)	

BRIEF OF CERTIFIED RESPONDENT KENNETH SULLIVAN

QUESTION CERTIFIED TO THE UTAH SUPREME COURT
BY THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

The Honorable Thomas J. Greene, Presiding

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Defendant-Petitioner

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(1) (1992) and Rule 41, Utah Rules of Appellate Procedure. The United States District Court for the District of Utah, Central Division signed an Order of Certification on October 4, 1991 (Appendix A) which was transmitted on October 17, 1991 (Appendix B). This Court granted the district court's petition by order dated December 17, 1991 (Appendix C).

ISSUES PRESENTED

A. Statement of Issues.

As framed by the United States District Court, the issues are as follows:

- (1) Under the Utah Comparative Fault Act, Utah Code Ann. § 78-27-38, [sic] et. seq., can a jury apportion the fault of the plaintiff's employers that caused or contributed to the accident although said employers are immune from suit under Utah Worker's Compensation Act, Utah Code Ann. § 35-1-60 et. seq.
- (2) Under the Utah Comparative Fault Act, Utah Code Ann. § 78-27-38, [sic] et. seq., can a jury apportion the fault of an individual or entity that has been dismissed from the litigation but against whom it is claimed that they have caused or contributed to the accident.

B. Standard of Appellate Review.

The trial court has yet to rule on these issues. Pursuant to Rule 41, Utah Rules of Appellate Procedure, this Court has original jurisdiction to answer questions of Utah law certified by the federal courts.

DETERMINATIVE STATUTES

The trial court has requested this Court to interpret the Utah Comparative Fault Act, Utah Code Ann. §§ 78-27-37 et. seq. (Sullivan has reproduced the text of this act in Appendix D.)

STATEMENT OF THE CASE

The nature of the case, the course of the proceedings below, and the statement of facts material to the resolution of these issues are set forth in the Order of Certification. (Appendix A)

SUMMARY OF ARGUMENT

In 1986, the Utah Legislature enacted the Comparative Fault Act embodied in Utah Code Ann. §§ 78-27-37 through 78-27-43 (1992). As part of that legislation, the Legislature provided that (1) a "defendant" could only be held liable to a party seeking damages in proportion to the defendant's "fault," (2) any "defendant" could join another party to the action for the purpose of having that party's "fault" determined, (3) the trial court when requested should direct the jury to determine the total amount of damages sustained and the percentage of "fault" attributable to each "defendant" and each person seeking recovery. (Utah Code Ann. §§ 78-27-38, 40, and 41 (1992)).

This Court's duty is to determine the Legislature's intent. After analyzing the legislation in light of well-recognized rules of statutory construction, the Court can only conclude that it would be inappropriate for the jury in this case to

consider the actions of Mr. Sullivan's employers and Denver and Rio Grande Railroad.

Under the Utah Comparative Fault Act, the jury is to apportion "fault" among the "defendants" and the person seeking recovery. The keys to the Act are the definitions found in Utah Code Ann. § 78-27-37 (1992). Only those persons who are not immune and are claimed to be liable to the person seeking recovery because of "fault" can be "defendants". The term "fault" refers only to actionable breaches of duty. Accordingly, when the jury apportions "fault" among "defendants" it considers only actionable breaches of duty among the parties who are not immune.

Since Sullivan's employers are immune under the terms of the Utah Worker's Compensation Act, Utah Code Ann. § 35-1-60 (1992) and the only duty these employers owe to Sullivan is the payment of worker's compensation benefits, the employers cannot be "defendants" nor do their actions constitute "fault" under the Act. The jury should not consider the actions or omissions of the Denver and Rio Grande Railroad, because the trial court has already held as a matter of law that the railroad is not at "fault" since it did not breach a duty owed to Sullivan.

The Act is the product of Legislative compromise among competing interests, and it is not the function of this Court to second guess the Legislature's wisdom.

ARGUMENT

INTRODUCTION

Utah Code Ann. §§ 78-27-38, 39, and 40 (1992) state in relevant part:

[N]o defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

* * *

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.

* * *

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.

In the trial court, Trackmobile, Inc. asserted that these statutes require the trial court to add Sullivan's employers and the Denver and Rio Grande Railroad on the verdict form in order that the jury may determine the respective proportions of fault attributable to these entities. Trackmobile argues that the statutory provisions provide that the jury is to examine the conduct of all persons contributing to Sullivan's injuries. However, well-recognized rules of statutory construction unequivocally demonstrate that the Legislature specifically intended to limit the jury's examination to those parties not immune from suit whose actionable breaches of duty caused the injuries.

I. THIS COURT'S FUNCTION IS TO DETERMINE THE
LEGISLATURE'S INTENT.

This Court has left no doubt that its principal duty in interpreting statutes is to determine Legislative intent:

The fundamental consideration which transcends all others in regard to the interpretation and application of a statute is: What was the intent of the Legislature?

Johnson v. State Tax Commission, 411 P.2d 831, 832, 17 Utah 2d 337 (1966). See also, American Coal Company v. Sandstrom, 689 P.2d 1, 3 (Utah 1984) and Parson Asphalt Products, Inc. v. Utah State Tax Commission, 617 P.2d 397, 398 (Utah 1980). Application of rules of statutory construction to the Act demonstrates the Legislature's intent.

A. Separate Parts of an Act Cannot Be Considered in Isolation from the Rest of the Act.

In Jensen v. Intermountain Health Care, Inc., 679 P.2d 903 (Utah 1984), this Court, interpreting portions of the Comparative Negligence Act, stated:

The best evidence of the true intent and purpose of the Legislature in enacting the Act is the plain language of the Act. The meaning of a part of an act should harmonize with the purpose of the whole act. Separate parts of an act should not be considered in isolation from the rest of the act. [Citations omitted.]

Jensen, 679 P.2d at 906. Trackmobile would have this Court unduly concentrate its attention on Sections 38 and 40. While these sections state that a "defendant" is liable for his or her share of "fault," the Court must look elsewhere in the act to determine what

entities are "defendants" and what "fault" is. Section 37 provides the definitions necessary to make these determinations.

B. Terms Appearing in a Statute Are to Be Construed in Accordance with the Legislature's Definitions.

Utah Code Ann. § 68-3-11 (1986) states:

Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition. [Emphasis added.]

The terms "defendant" and "fault" defined in Utah Code Ann. § 78-27-37 (1992) are critical to an understanding of the Legislature's intent. This section states in relevant part:

As used in Sections 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. [Emphasis added.]

By definition, a person who enjoys an immunity cannot be a "defendant" even though that person's acts may have proximately caused injury. Furthermore, even if a person or entity is not immune, that person cannot be a "defendant" unless the person's acts constituted an actionable breach of legal duty to a person seeking

recovery. The Legislature's intent becomes clear when these particular meanings are employed in the interpretation of the other portions of the Act.

C. The Court Presumes That Each Term of the Legislation Is Used Advisedly.

In Board of Education of Granite School District v. Salt Lake County, 659 P.2d 1030, 1035 (Utah 1983), the Court noted:

This Court assumes that the terms of a statute are used advisedly and should be given an interpretation and application which is in accord with their usually accepted meanings.

If the Court assumes that undefined terms are used advisedly, this assumption has even more force in circumstances where the Legislature has specifically defined particular terms in the statute. With that consideration in mind, the meaning of the Legislature's language used in Section 39 becomes apparent.

In § 78-27-39, the Legislature provided that the trial court could, and when requested should, direct the jury to find special verdicts determining the total amount of damages and the percentage or proportion of "fault" attributable to each person seeking recovery and to each "defendant." Hence, the jury is to consider only the acts of those persons who are not immune and who are claimed to be liable for an actionable breach of legal duty. This conclusion is buttressed by other portions of the statute and the legislative history.

D. Statutes Are to Be Construed so as to Render All Parts Thereof Relevant and Meaningful.

In Millett v. Clark Clinic Corp., 609 P.2d 934 (Utah 1980), this Court stated:

It is to be observed, moreover, that statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and that interpretations are to be avoided which render some part of a provision nonsensical or absurd.

Millett, 609 P.2d at 936. Adopting Trackmobile's interpretation of the Act would render a portion of Utah Code Ann. § 78-27-40 (1992) nonsensical.

Trackmobile emphasizes the portion of Section 40 which provides that the maximum amount for which a defendant may be liable is the proportion of fault attributed to that defendant. However, the second sentence of that section states:

No defendant is entitled to contribution from any other person.

If Trackmobile's interpretation were adopted and the jury was directed to apportion the responsibility among all persons whose acts proximately caused injury to the plaintiff regardless of their immunity status, a defendant would never be liable for more than his proportionate share and the prohibition against contribution would be meaningless. However, this sentence does have meaning if the jury does not assess the immune party's activities which proximately caused injury. The Legislature added the last sentence of Section 40 to ensure that once the apportionment of "fault" has been made among the "defendants," a "defendant" cannot thereafter assert a contribution action against an immune party, claiming that

the immune party's acts proximately caused the plaintiff's injuries and that the "defendant" has paid more than its proportionate share.

E. Omissions Are Significant.

In Kennecott Copper Corp. v. Anderson, 514 P.2d 217, 30 Utah 2d 100 (1973), the Court emphasized that omissions from a statute are significant:

It is often said that it should be assumed that all of the words used in a statute were used advisedly and were intended to be given meaning and effect. For the same reasons, the omissions should likewise be taken note of and given effect.

Kennecott, 514 P.2d at 219. Here, the Legislature expressly eliminated from the statute language which would have achieved the result Trackmobile seeks.

The immediate predecessor of the present legislation was embodied in Substitute Senate Bill No. 64, a copy of which appears in Appendix E. As proposed in the bill, § 78-27-39 read:

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 a percentage or proportion of fault attributable to each person seeking recovery, to each defendant, and to each other person whose fault contributed to the injury or damages. [Emphasis added.]

However, the State and Local Standing Committee reported the bill out of committee recommending the bill be amended to delete that portion of § 78-27-39 emphasized above. (Appendix F)

II. THE TRIAL COURT SHOULD NOT ALLOW THE JURY TO
CONSIDER THE ACTS OF SULLIVAN'S EMPLOYERS OR
DENVER AND RIO GRANDE RAILROAD.

A. The Acts of Sullivan's Employers Cannot Be Considered by the Jury in the Apportionment Process Because the Employers are Immune and They Are Not Fault.

Since, a "defendant" is one who is not immune and is claimed to be liable because of fault to the plaintiff, the jury cannot consider the acts of Sullivan's employers. The employers cannot be "defendants" for two reasons. First, they are immune pursuant to Utah Code Ann. § 35-1-60 (1988). Second, the employer's acts cannot constitute "fault," because their liability to Sullivan does not arise out of an actionable breach of legal duty. This Court has heretofore held that the only duty owed by an employer to its employee is a statutory duty provided by the Worker's Compensation Act. See Oliveras v. Caribou-Four Corners, Inc., 598 P.2d 1320, 1323 (Utah 1979).

B. The Jury Cannot Consider the Acts and Omissions of Denver and Rio Grande Railroad Because It Is Not at Fault as a Matter of Law.

Since "fault" is defined as an actionable breach of legal duty, it necessarily follows that the jury cannot consider the acts and/or omissions of Denver and Rio Grande Railroad. The trial court has already granted the railroad summary judgment, holding as a matter of law that the railroad did not breach a legal duty to the plaintiff. Now that the trial court has determined this issue as a matter of law, the jury cannot be given an opportunity to second guess the trial court.

III. THE LIABILITY REFORM ACT ACHIEVED A COMPROMISE
BETWEEN COMPETING INTERESTS.

Trackmobile obviously believes that the Legislature's approach is unfair, because it precludes the jury from considering the acts of immune parties. However, the enactment represents an accommodation of competing interests. One author has cogently stated:

The fairness of any system of comparative fault, as the beauty of a rose, is in the eye of the beholder. There is no objective standard by which to judge the fairness of a given system of comparative fault. The standard necessarily is subjective, because it includes a balancing of several objectives. In order to conclude whether a given system is substantially fair or, on the other hand, unreasonably harsh, one must first define and assign a priority to the goals to be accomplished in the implementation of a comparative fault scheme. Eilbacher, "Non-Party Tortfeasors in Indiana: The Early Cases," Indiana Law Review, Vol. 21, p. 413 (1988).

While one of the thrusts of the Act was to address the perceived inequities in the doctrine of joint and several liability, the Legislature did not ignore a balancing of competing interests.

Prior to 1986, under joint and several liability, a tortfeasor bore the risk of paying not only his or her share of the plaintiff's damages, but also the share of the other tortfeasors who were impecunious or immune from suit. The 1986 Act shifted the risk of the impecunious tortfeasor to the plaintiff.

In Trackmobile's view, fairness demands that each defendant pay only its proportionate share of Sullivan's damages. However fair that result may seem to the defendants, it would work a gross inequity on Sullivan.

Utah Code Ann. § 35-1-62 (1988) imposes a lien on the proceeds of any action brought by an employee against a third party. This lien is not reduced in any respect by the amount that the employer's acts contributed to the employee's injuries. If Trackmobile's interpretation of the Comparative Fault Act were to prevail, Sullivan's damages would be reduced in proportion to the amount that the employers' acts contributed to the accident. Thereafter, Sullivan's recovery would be subject to the full amount of the employers' lien. Surely the Utah Legislature did not intend this highly inequitable result.

Under the interpretation of the Act discussed in Point I, the risk of the immune tortfeasor is shouldered by both the plaintiff and the non-immune tortfeasors in proportion to their respective fault. This result is consistent with the statutory system in Indiana which expressly amended its comparative fault statute to exclude a plaintiff's employer from those non-parties whose fault can be considered by the jury in the apportionment. The court in Hill v. Metropolitan Trucking, Inc., 659 F.Supp. 430 (N.D. Ind. 1987) described the Indiana scheme and the reasoning underlying the legislative amendment as follows:

Under the original version of Indiana's comparative fault law, a fault-free plaintiff suing a third party for injuries suffered in the course of his employment would have faced the prospect that the jury would apportion fault to the employer. Because the worker's compensation laws provide an exclusive remedy, the plaintiff could not recover the share of his damages apportioned to his employer. Further, the employer could enforce his lien on the share of damages recovered from the third party, further reducing the plaintiff's recovery. The 1984 amendments cured this

inequity by defining "nonparty" and excluding the claimant's employer. [Citations omitted; emphasis added.]

Id. at 433. Since Utah allows the employer to recoup its compensation payments in full from the proceeds of the employee's third party action, the Legislature has, like Indiana, disallowed consideration of the employer's actions in apportioning fault thus eliminating the inequity which would otherwise result in third-party actions. While there are some, including Trackmobile, who might disagree with the Legislature's allocation of risk, this Court has already observed that its function is to interpret the law and not to second guess the Legislature's wisdom:

We have frequently stated that this Court's primary responsibility in construing legislative enactments is to give effect to the Legislature's underlying intent. We have also said that a statute should be applied according to its literal wording unless it is unreasonably confused or inoperable. We must assume that each term in the statute was used advisedly by the Legislature and that each should be interpreted and applied according to its usually accepted meaning. Where the ordinary meaning of the terms results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction to the express purpose of the statute, it is not the duty of this Court to assess the wisdom of the statutory scheme. [Citations omitted.]

West Jordan v. Morrison, 656 P.2d 445, 446 (Utah 1982).

CONCLUSION

The jury is not to consider the acts of parties who are immune to the plaintiff and/or the acts of parties who are not at fault as statutorily defined. Since Sullivan's employers are both immune and not at "fault" and since the trial court has already

found as a matter of law that Denver and Rio Grande Railroad did not breach a duty to Sullivan, this Court should inform the trial court that the inclusion of these entities on the verdict form would be improper under Utah law.

DATED this 20th day of April, 1992.

CHRISTENSEN, JENSEN & POWELL, P.C.

By _____
L. Rich Humpherys
M. Douglas Bayly
Attorneys for Kenneth Sullivan

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of April, 1992, four true and correct copies of the BRIEF OF CERTIFIED RESPONDENT KENNETH SULLIVAN were mailed, postage prepaid, to each of the following:

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APPENDIX A

Order of Certification

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FILED IN UNITED STATES DISTRICT
 COURT, DISTRICT OF UTAH

OCT 07 1991

MARKUS B. JAMER, CLERK
 BY _____

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

KENNETH SULLIVAN)

Plaintiff,)

vs.)

ORDER OF CERTIFICATION

SCOULAR GRAIN COMPANY OF UTAH;)
 UNION PACIFIC RAILROAD COMPANY;)
 a Utah corporation, SCOULAR)
 GRAIN COMPANY, THE SCOULAR)
 COMPANY, ROBERT O'BLOCK)
 and GORDON OLCH dba)
 FREEPORT CENTER ASSOCIATES,)
 TRACKMOBILE, INC., a Georgia)
 corporation, formally known as)
 Whiting Corp., THE DENVER AND)
 RIO GRANDE WESTERN RAILROAD)
 COMPANY, a Delaware corporation,)
 OREGON SHORT LINE RAILROAD)
 COMPANY, a Utah corporation,)
 and UTAH POWER & LIGHT COMPANY,)
 a Utah corporation, G.W.)
 VAN KEPPEL COMPANY, a Missouri)
 corporation,)

Civil No. 87-C-330G

Defendants.)

TO THE UTAH SUPREME COURT:

The United States District Court for the District of Utah, on its own motion, pursuant to Rule 41 of the Utah Rules of Appellate Procedure, requests the Utah Supreme Court to answer the following questions of Utah law:

1. Under the Utah Comparative Fault Act, Utah Code Annot. §78-27-38, et.seq., can a jury apportion the fault of the plaintiff's employers that caused or contributed to the accident although said employers are immune from suit under Utah Workers' Compensation Act, Utah Code Ann. § 35-1-60, et. seq.

2. Under the Utah Comparative Fault Act, Utah Code Ann. § 78-27-38, et seq., can a jury apportion the fault of an individual or entity that has been dismissed from the litigation but against whom it is claimed that they have caused or contributed to the accident.

The above questions are controlling issues of law in the above-captioned proceeding pending before the certifying court. It is crucial that the proper determination as to which parties' fault may be compared take place before trial, as an erroneous decision on this issue by the certifying court will certainly result in a retrial of the case.

There appears to be no controlling Utah law with respect to this question. The Utah state courts and the United States District Courts for the State of Utah have rendered differing opinions on this question and the same issue is commonly raised in many personal injury actions involving injuries occurring in the workplace.

NATURE OF CONTROVERSY, CONTEXT IN WHICH QUESTION AROSE,
AND PROCEDURAL STEPS BY WHICH QUESTION WAS FRAMED

The facts relevant to the determination of the question certified are as follows:

1. Plaintiff Kenneth Sullivan ("Sullivan") filed this personal injury action for damages resulting in the loss of his left arm and left leg from an accident which occurred on the railroad tracks at the Freeport Center, Clearfield, Utah, on October 17, 1986. Sullivan was employed by Scoular Grain Company, Freeport Center Associates and Scoular Grain Company of Utah (a joint venture comprised of Scoular Grain Company and Freeport Center Associates), hereafter collectively referred to as "the Scoular Parties." At the time of his injury plaintiff was assigned to unload grain from rail cars into warehouses. Sullivan received approximately \$200,000.00 in worker's compensation for his injuries.

2. Sullivan filed this action against the Scoular Grain Parties, Union Pacific Railroad Company, Denver & Rio Grande

Western Railroad Company, Oregon Short Line Railroad Company, Utah Power & Light Company, Trackmobile, Inc. and G.W. Van Keppel Company. Plaintiff's complaint alleges claims under the Federal Employer's Liability Act ("FELA") (45 U.S.C.A. § 51 et seq.), the Boiler Inspection Act ("BIA") (45 U.S.C.A. § 23), the Safety Appliance Act ("SAA") (45 U.S.C.A. § 1 et seq.), state statutory laws, contractual duties and state common law claims of negligence and products liability.

3. In 1989 the Scoular Parties filed motions for summary judgment. The district court granted defendants' motions for summary judgment and found the Scoular Parties were not a "common carrier by railroad" under FELA and dismissed this cause of action. In addition, the court found that the Scoular Parties were the "immediate and common law employers of the plaintiff," and were therefore immune from plaintiff's claim for personal injuries under the exclusive remedy provision of Utah's Workers Compensation Law, Section 35-1-62, U.C.A. as amended. The Tenth Circuit Court of Appeals has affirmed the district court's rulings.

4. Defendant Denver & Rio Grande Western Railroad Company moved for summary judgment on the following grounds: (1) it was not plaintiff's employer and could not be liable to plaintiff under FELA, (2) it was not liable under the Safety Appliance Act or the Boiler Inspection Act, and (3) it did not owe plaintiff any duty of

care with respect to the condition of the tracks at the Freeport Center. The district court granted this defendant's motion for summary judgment and dismissed it from the lawsuit.

5. Defendant Utah Power & Light Company moved for a dismissal on the grounds that the court's dismissal of the Scoular Parties left no substantial federal question to be decided and the exercise of pendent jurisdiction over defendant would be unconstitutional. The district court has not ruled on this defendant's motion to dismiss.

6. Defendants Union Pacific Railroad Company and Oregon Short Line Railroad Company moved the district court for a dismissal of plaintiff's complaint as against them on the grounds that there is no FELA, BIA or SAA jurisdiction as a matter of law, and that no diversity jurisdiction exists. The district court dismissed plaintiff's causes of action based upon the FELA, BIA and SAA but denied defendants' motion to dismiss for lack of diversity jurisdiction.

7. The remaining defendants in the case are UP&L, Trackmobile, G. W. Van Keppel, Union Pacific Railroad Company and Oregon Short Line Railroad Company.

8. Substantial discovery has taken place in this matter and plaintiff's experts have testified that all named defendants

(including those that have been dismissed) are at fault in more than one particular.

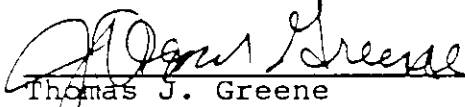
9. Defendant Trackmobile filed a motion to have the jury apportion and compare the fault of all named defendants, whether dismissed or present at trial. This motion is contested by the plaintiff who claims that only the fault of the nonemployer party defendants may be compared. The district court has not yet ruled on this motion.

SUBMISSION OF RECORD

IT IS HEREBY ORDERED that the Clerk of this Court, under its official seal, forward this certification order to the Utah Supreme Court and file with the Utah Supreme Court any portion of the record before this Court that may be required by the Utah Supreme Court.

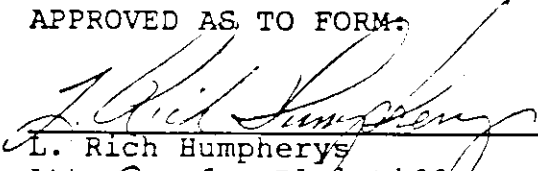
DATED this 14th day of October, 1991.

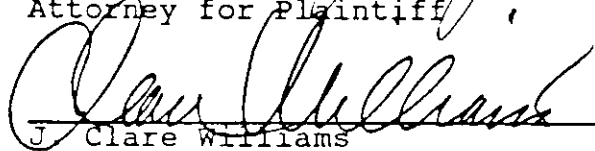
BY THE COURT:

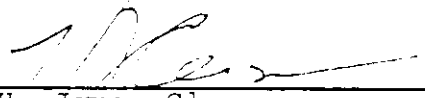


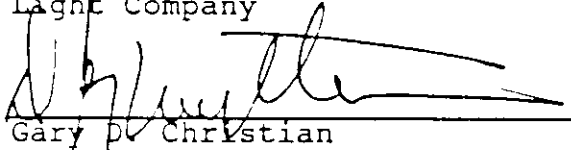
Thomas J. Greene
U.S. District Court Judge

APPROVED AS TO FORM:


L. Rich Humpherys
Attorney for Plaintiff


J. Clare Williams
Attorney for Defendants Union
Pacific and Oregon Shortline


H. James Clegg
Attorney for Utah Power &
Light Company


Gary D. Christian
Attorney for Van Keppel

United States District Court
for the
District of Utah
October 8, 1991

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:87-cv-00330

True and correct copies of the attached were mailed by the clerk to the following:

D. Gary Christian, Esq.
KIPP & CHRISTIAN
175 East 400 South #330
Salt Lake City, UT 84111

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UNION PACIFIC RAILROAD
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L. Rich Humpherys, Esq.
CHRISTENSEN, JENSEN & POWELL
175 S West Temple #510
Salt Lake City, UT 84101

APPENDIX B

Transmittal of Order for Certification

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

OCT 17 1991

MARKUS B. ZIMMER, CLERK

BY _____

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

KENNETH SULLIVAN
Plaintiff,

v.

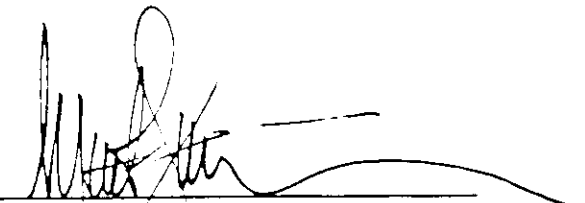
SCOULAR GRAIN COMPANY,
et al.
Defendants.

TRANSMITTAL OF ORDER
OF CERTIFICATION

Civil No. 87-C-330G

Pursuant to the provisions of **Rule 41** of the **Utah Rules of Appellate Procedure**, the attached order of certification is now forwarded to the Utah Supreme Court.

Dated: *October 17, 1991*


Markus B. Zimmer, Clerk

293

United States District Court
for the
District of Utah
October 17, 1991

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:87-cv-00330

True and correct copies of the attached were mailed by the clerk to the following:

D. Gary Christian, Esq.
KIPP & CHRISTIAN
175 East 400 South #330
Salt Lake City, UT 84111

J. Clare Williams, Esq.
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L. Rich Humpherys, Esq.
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175 S West Temple #510
Salt Lake City, UT 84101

APPENDIX C

Order

DEC 18 1991

IN THE SUPREME COURT
STATE OF UTAH
332 STATE CAPITOL
SALT LAKE CITY, UTAH 84114
December 17, 1991

OFFICE OF THE CLERK

L. Rich Humpherys
CHRISTENSEN, JENSEN & POWELL
Attorneys at Law
175 South West Temple
Suite 510
Salt Lake City, UT 84101

Kenneth Sullivan,
Plaintiff and Respondant,
v.
Trackmobile, Inc.,
Defendant and Petitioner,
and,
Secular Grain Company of Utah;
Union Pacific Railroad Company;
a Utah corporation, Secular Grain
Company, et al.,
Defendants and Respondents.

No. 910482
87-C-330G

THIS DAY, Petition from the United States District Court having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that the Petition from the United States District Court be, and the same granted.

Geoffrey J. Butler
Clerk

APPENDIX D

Utah Comparative Fault Act
Utah Code Ann. §§ 78-27-37 et. seq.

78-27-35. Release, settlement, or statement by injured person — Notice of rescission or disavowal.

Notice of cancellation or notice disavowing a statement, if given by mail, is given when it is deposited in a mailbox, properly addressed with postage prepaid. Notice of cancellation given by the injured person need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the injured person not to be bound by the settlement agreement, liability release, or disavowed statement.

History: L. 1973, ch. 208, § 4.

COLLATERAL REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d Release § 14 et seq.
C.J.S. — 76 C.J.S. Release § 38 et seq.

78-27-36. Right of rescission or disavowal of release, settlement, or statement by injured person in addition to other provisions.

The rights provided by this act are intended to be in addition to, and not in lieu of, any rights of rescission, rules of evidence, or provisions otherwise existing in the law.

History: L. 1973, ch. 208, § 5.
Meaning of "this act." — See note following same catchline in notes to § 78-27-32.

78-27-37. Definitions.

As used in Sections 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.

NOTES TO DECISIONS

Cited in *Deats v. Commercial Sec. Bank*, 746 P.2d 1191 (Utah Ct. App. 1987).

COLLATERAL REFERENCES

Journal of Contemporary Law. — For comment, "The Liability Reform Act: An Approach to Equitable Application," see 13 J. Contemp. L. 89 (1987).

A.L.R. — Liability to one struck by golf ball, 53 A.L.R.4th 282.

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.

NOTES TO DECISIONS

ANALYSIS

Assumption of risk
Bailment.
Causation.
Dramshops
Jury instructions.
Last clear chance.
Open and obvious danger.
Unit method of determining negligence.
Wrongful death.
Cited.

Assumption of risk.

"Assumption of risk," i.e., risk of a known danger voluntarily assumed, may amount to a lack of due care constituting negligence; where such is the case and the party assuming the risk is the plaintiff in an action governed by comparative negligence statute, he is chargeable with contributory negligence and is liable to have his recovery reduced or denied in accordance with its provisions. *Rigtrup v. Strawberry Water Users Ass'n*, 563 P.2d 1247 (Utah 1977), overruled on other grounds, *Moore v. Burton Lumber & Hdwe. Co.*, 631 P.2d 865 (Utah 1981).

Assumption of risk language is not appropriate to describe the various concepts previously

dealt with under that terminology but is to be treated, in its secondary sense, as contributory negligence; when the issue is raised attention should be focused on whether a reasonably prudent man in the exercise of due care would have incurred the risk, despite his knowledge of it, and if so, whether he would have conducted himself in the manner in which the person seeking to recover acted in light of all the surrounding circumstances, including the appreciated risk; then, if the unreasonableness of the person seeking to recover is viewed to be less than that of the person from whom recovery is sought, any damages allowed should be diminished in proportion to the amount of negligence attributable to the person recovering. *Jacobsen Constr. Co. v. Structo-Lite Engg. Inc.*, 619 P.2d 306 (Utah 1980).

As used in § 78-27-37, "assumption of risk" is a voluntary and unreasonable exposure to a known danger. *Moore v. Burton Lumber & Hdwe. Co.*, 631 P.2d 865 (Utah 1981).

Assumption of risk language is not appropriate in an instruction under comparative negligence statutes. *Stephens v. Henderson*, 741 P.2d 952 (Utah 1987), applying statute in effect prior to 1986.

The assumption of risk doctrine has been ex-

Brigham Young Law Review. — The Merger of Comparative Fault Principles with Strict Liability in Utah: *Mulherin v. Ingersoll-Rand Co.*, 1981 B.Y.U. L. Rev. 964, 966.

Damage Apportionment in Accounting Malpractice Actions: The Role of Comparative Fault. 1990 B.Y.U. L. Rev. 949.

Journal of Contemporary Law. — For comment, "The Liability Reform Act: An Approach to Equitable Application," 13 J. Contemp. L. 89, 1987.

Am. Jur. 2d. — 57B Am. Jur. 2d Negligence § 1128 et seq.

C.J.S. — 65A C.J.S. Negligence § 169 et seq.

A.L.R. — Comparative negligence rule where misconduct of three or more persons is involved. 8 A.L.R.3d 722.

Retrospective application of state statute substituting rule of comparative negligence for that of contributory negligence. 37 A.L.R.3d 1438.

Indemnity or contribution between joint tortfeasors on basis of relative fault. 53 A.L.R.3d 184.

Modern development of comparative negligence doctrine having applicability to negligence actions generally. 78 A.L.R.3d 339.

Application of comparative negligence doctrine, generally. 86 A.L.R.3d 1206.

Comparative negligence doctrine applied to actions based on strict liability in tort. 9 A.L.R.4th 633.

Effect of adoption of comparative negligence rules on assumption of risk and contributory negligence. 16 A.L.R.4th 700.

Commercial center's negligence liability for customer's personal injuries. 57 A.L.R.4th 1186.

Liability to one struck by golf club. 63 A.L.R.4th 221.

Liability for injury incurred in operation of power golf cart. 66 A.L.R.4th 622.

Tort liability for window washer's injury or death. 69 A.L.R.4th 207.

Comparative fault: calculation of net recovery by applying percentage of plaintiff's fault before or after subtracting amount of settlement by less than all joint tortfeasors. 71 A.L.R.4th 1108.

Rescue doctrine: applicability and application of comparative negligence principles. 75 A.L.R.4th 875.

Key Numbers. — Negligence — 97 et seq.

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.

NOTES TO DECISIONS

ANALYSIS

Jury instructions.
Cited.

Jury instructions.

If requested, a trial court must inform the jury of the legal consequences of apportioning

to the plaintiff 50% or more of the negligence it finds in a comparative negligence case, if the effect of such an instruction will not be to confuse or mislead the jury. *Dixon v. Stewart*, 658 P.2d 591, Utah 1982.

Cited in *Reeves v. Gentile*, 513 P.2d 111 (Utah 1991).

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

Subject to Section 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-E.

Joint obligations, § 15-4-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Applicability of section.

Indemnity contract.

Plaintiff's minor child as joint tortfeasor.

Workers' compensation.

Cited.

Applicability of section.

A statute, such as this section, eliminating joint and several liability may not be applied to injuries occurring prior to its effective date. Where the injuries occurred on November 8, 1984, and the Liability Reform Act was not effective until April 28, 1986, the trial court was correct in holding that the Liability Reform Act did not apply. *Stephens v. Henderson*, 741 P.2d 952 (Utah 1987).

Indemnity contract.

The former comparative negligence provisions did not invalidate an employer's indemnity contract with a third party whereby employer agreed to indemnify the third party against claims arising out of injuries to the em-

ployer's employees. *Shell Oil Co. v. Brinknot-Signal Drilling Co.*, 658 P.2d 1187 (Utah 1983).

Plaintiff's minor child as joint tortfeasor.

Where plaintiff was awarded a judgment in action against a defendant to recover the property loss sustained as the result of a collision between automobiles operated by defendant and the minor unemancipated daughter of the plaintiff, and where the daughter's negligence contributed to the property loss sustained by her father, the minor daughter was a joint tortfeasor and liable to the defendant for contribution. *Bishop v. Nielsen*, 632 P.2d 864 (Utah 1981).

Workers' compensation.

Employer cannot be a joint tortfeasor as to an injury to his employee covered by the Workmen's Compensation Act. *Curtis v. Harmon Elec. Inc.*, 552 P.2d 117 (Utah 1976); *Phillips v. Union Pac. R.R.*, 614 P.2d 153 (Utah 1980).

Cited in *Warren v. Honda Motor Co.*, 669 F. Supp. 365 (D. Utah 1987).

COLLATERAL REFERENCES

Brigham Young Law Review. — Utah Allows Contribution Against Cotortfeasor Despite Immunity from Direct Suit: *Bishop v. Nielsen*, 1982 B.Y.U. L. Rev. 429.

Journal of Contemporary Law. — Comment, The Liability Reform Act: An Approach to Equitable Application, 13 J. Contemp. L. 89 (1987).

A.L.R. — Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant aggravating injury or causing new injury in course of treatment, 72 A.L.R.4th 231.

Products liability: seller's right to indemnity from manufacturer, 79 A.L.R.4th 278.

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.

COLLATERAL REFERENCES

A.L.R. — Products liability: seller's right to indemnity from manufacturer, 79 A.L.R.4th 278.

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.

COLLATERAL REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d Release § 35 et seq.

C.J.S. — 76 C.J.S. Release § 38 et seq.

A.L.R. — Tortfeasor's general release of cotortfeasor as affecting former's right of contribution against cotortfeasor, 34 A.L.R.3d 1374.

Release of one responsible for injury as affecting liability of physician or surgeon for negligent treatment of injury, 39 A.L.R.3d 260.

Voluntary payment into court of judgment

against one joint tortfeasor as release of others, 40 A.L.R.3d 1181.

Release of one negligently treating injury as affecting liability of one originally responsible for injury, 64 A.L.R.3d 839.

Validity and effect of agreement with one cotortfeasor setting aside his maximum liability and providing for reduction or extinguishment thereof relative to recovery against non-agreeing cotortfeasor, 65 A.L.R.3d 602.

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

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, governmental immunity as provided in Title 63, Chapter 30, and the exclusive remedy provisions of Title 35, Chapter 1. Nothing in Sections 78-27-37 through 78-27-42 affects or impairs any right to indemnity or contribution arising from statute, contract, or agreement.

APPENDIX E

Liability Reform Act
Substitute Senate Bill No. 64

LEGISLATIVE GENERAL COUNSEL

Approved for Filing DAT

Date 01-31-86 4:54 PM

(LIABILITY REFORM ACT)

1986

GENERAL SESSION

SUBSTITUTE

S. B. No. 64

By Haven J. Barlow

Jack M. Bangerter

C. E. Peterson

Paul Rogers

Warren E. Pugh

Glade M. Sowards

Eldon A. Money

Dona M. Wayment

Brent G. Overson

John P. Holmgren

Wayne L. Sandberg

AN ACT RELATING TO THE JUDICIAL CODE; MODIFYING PROVISIONS RELATING TO
COMPARATIVE NEGLIGENCE; SPECIFYING DUTIES OF JURORS AND JUDGES;
ABOLISHING JOINT AND SEVERAL LIABILITY AND RIGHTS OF CONTRIBUTION
AMONG DEFENDANTS; REQUIRING FAULT OF DEFENDANTS TO BE DETERMINED IN
ONE TRIAL; AND DEFINING CERTAIN TERMS.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:

78-27-53, AS ENACTED BY CHAPTER 166, LAWS OF UTAH 1979

REPEALS AND REENACTS:

1 78-27-37, AS ENACTED BY CHAPTER 209, LAWS OF UTAH 1973

2 78-27-38, AS ENACTED BY CHAPTER 209, LAWS OF UTAH 1973

3 78-27-39, AS ENACTED BY CHAPTER 209, LAWS OF UTAH 1973

4 78-27-40, AS ENACTED BY CHAPTER 209, LAWS OF UTAH 1973

5 78-27-41, AS ENACTED BY CHAPTER 209, LAWS OF UTAH 1973

6 78-27-42, AS ENACTED BY CHAPTER 209, LAWS OF UTAH 1973

7 78-27-43, AS ENACTED BY CHAPTER 209, LAWS OF UTAH 1973

8 Be it enacted by the Legislature of the state of Utah:

9 Section 1. Section 78-27-37, Utah Code Annotated 1953, as enacted by
10 Chapter 209, Laws of Utah 1973, is repealed and reenacted to read:

11 78-27-37. As used in Sections 78-27-37 through 78-27-43:

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

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

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

23 Section 2. Section 78-27-38, Utah Code Annotated 1953, as enacted by
24 Chapter 209, Laws of Utah 1973, is repealed and reenacted to read:

1 78-27-38. The fault of a person seeking recovery shall not alone bar
2 recovery by that person. He may recover from any defendant or group of
3 defendants whose fault exceeds his own. However, no defendant is liable to
4 any person seeking recovery for any amount in excess of the proportion of
5 fault attributable to that defendant.

6 Section 3. Section 78-27-39, Utah Code Annotated 1953, as enacted by
7 Chapter 209, Laws of Utah 1973, is repealed and reenacted to read:

8 78-27-39. The trial court may, and when requested by any party shall,
9 direct the jury, if any, to find separate special verdicts determining the
10 total amount of damages sustained and the percentage or proportion of fault
11 attributable to each person seeking recovery, to each defendant, and to
12 each other person whose fault contributed to the injury or damages.

13 Section 4. Section 78-27-40, Utah Code Annotated 1953, as enacted by
14 Chapter 209, Laws of Utah 1973, is repealed and reenacted to read:

15 78-27-40. Subject to Section 78-27-38, the maximum amount for which a
16 defendant may be liable to any person seeking recovery is that percentage
17 or proportion of the damages equivalent to the percentage or proportion of
18 fault attributed to that defendant. No defendant is entitled to
19 contribution from any other person.

20 Section 5. Section 78-27-41, Utah Code Annotated 1953, as enacted by
21 Chapter 209, Laws of Utah 1973, is repealed and reenacted to read:

22 78-27-41. A person seeking recovery, or any defendant who is a party
23 to the litigation, may join as parties any defendants who may have caused
24 or contributed to the injury or damage for which recovery is sought, for
25 the purpose of having determined their respective proportions of fault.

1 Section 6. Section 78-27-42, Utah Code Annotated 1953, as enacted by
2 Chapter 209, Laws of Utah 1973, is repealed and reenacted to read:

3 78-27-42. A release given by a person seeking recovery to one or more
4 defendants does not discharge any other defendant unless the release so
5 provides.

6 Section 7. Section 78-27-43, Utah Code Annotated 1953, as enacted by
7 Chapter 209, Laws of Utah 1973, is repealed and reenacted to read:

8 78-27-43. Nothing in Sections 78-27-37 through 78-27-42 affects or
9 impairs any common law or statutory immunity from liability, including, but
10 not limited to, governmental immunity as provided in Chapter 30, Title 63,
11 and the exclusive remedy provisions of Chapter 1, Title 35. Nothing in
12 Sections 78-27-37 through 78-27-42 affects or impairs any right to
13 indemnity or contribution arising from statute, contract, or agreement.

14 Section 8. Section 78-27-53, Utah Code Annotated 1953, as enacted by
15 Chapter 166, Laws of Utah 1979, is amended to read:

16 78-27-53. Notwithstanding anything in ~~[section]~~ Sections 78-27-37
17 through 78-27-43 to the contrary, no skier ~~[shall]~~ may make any claim
18 against, or recover from, any ski area operator for injury resulting from
19 any of the inherent risks of skiing.

20 Section 9. If any provision of Sections 78-27-37 through 78-27-43, or
21 the application of any provision of those sections to any person or
22 circumstance, is held invalid, the remaining provisions of those sections
23 shall be given effect without the invalid provision or application.

1 Section 10. This act takes effect upon approval by the governor, or
2 the day following the constitutional time limit of Article VII. Sec. 8
3 without the governor's signature, or in the case of a veto, the date of
4 veto override.

APPENDIX F

Liability Reform Act
Amendment to Substitute Senate Bill No. 64



SENATE CHAMBER
STATE OF UTAH
SALT LAKE CITY

February 4, 1986

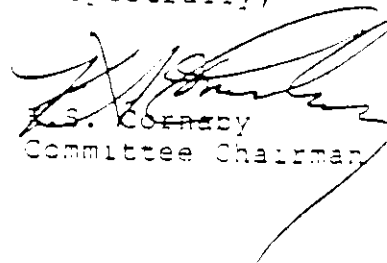
Mr. President:

The State and Local Standing Committee, to which was referred S.B. No. 64, LIABILITY REFORM ACT, by Senator Haven J. Barlow et al, has carefully considered the bill and reports it out of committee with the recommendation that the original bill be deleted in body and title and that Substitute S.B. No. 64 replace the original bill.

Substitute S.B. No. 64 to be amended as follows:

1. Page 3, line 11:
After "recovery" delete "," and insert "and"
2. Page 3, line 11:
After "defendant" delete the rest of the line.
3. Page 3, line 12:
Line 12, delete the rest of the line except the period.

Respectfully,


J.S. Cornaby
Committee Chairman