

1991

Kenneth Sullivan v. Union Pacific Railroad Company; a Utah corporation, Trackmobile, Inc., a Georgia corporation, formally known as Whiting Corp., Oregon Short Line Railroad Company, a Utah corporation, Utah Power and Light Company, a Utah corporation, G.W. Van Keppel Company, a Missouri corporation : Brief of Appellant

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.

Paul M. Belnap; Victoria K. Kidman; Strong & Hanni; D. Gary Christian; Michael F. Skolnick; Kipp & Christian; Attorneys for Defendants.

L. Rich Humpherys; Christensen, Jensen & Powell; Attorneys for Plaintiff.

Recommended Citation

Brief of Appellant, *Sullivan v. Union Pacific Railroad*, No. 910482.00 (Utah Supreme Court, 1991).
https://digitalcommons.law.byu.edu/byu_sc1/3710

This Brief of Appellant 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.

910482

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH SULLIVAN,

Plaintiff/Certified Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY;

a Utah corporation, TRACKMOBILE, INC.,

a Georgia corporation, formally known

as Whiting Corp., OREGON SHORT LINE

RAILROAD COMPANY, a Utah corporation,

UTAH POWER & LIGHT COMPANY, a

Utah corporation, G.W. VAN KEPPEL

COMPANY, a Missouri corporation,

Defendants/Certified Defendants.

Case No. 910482

Priority 12

On Certification of Question of Utah Law From the
United States District Court, District of Utah,
Honorable Thomas J. Greene

JOINT BRIEF OF CERTIFIED DEFENDANTS

L. RICH HUMPHIERYS
CHRISTENSEN, JENSEN & POWELL
175 South West Temple, #510
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Certified
Plaintiff

PAUL M. BELNAP
VICTORIA K. KIDMAN
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111

Attorneys for Defendant/Certified
Defendant Trackmobile, Inc.

D. GARY CHRISTIAN
MICHAEL F. SKOLNICK
KIPP & CHRISTIAN
175 East 400 South, #330
Salt Lake City, Utah 84111

Attorneys for Defendant/Certified
Defendant G.W. Van Keppel Company

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH SULLIVAN,)	
)	
Plaintiff/Certified Plaintiff,)	
)	
vs.)	
)	
UNION PACIFIC RAILROAD COMPANY;)	Case No. 910482
a Utah corporation, TRACKMOBILE, INC.,)	
a Georgia corporation, formally known)	Priority 12
as Whiting Corp., OREGON SHORT LINE)	
RAILROAD COMPANY, a Utah corporation,)	
UTAH POWER & LIGHT COMPANY, a)	
Utah corporation, G.W. VAN KEPPEL)	
COMPANY, a Missouri corporation,)	
)	
Defendants/Certified Defendants.)	

On Certification of Question of Utah Law From the
United States District Court, District of Utah,
Honorable Thomas J. Greene

JOINT BRIEF OF CERTIFIED DEFENDANTS

**L. RICH HUMPHIERYS
CHRISTENSEN, JENSEN & POWELL**
175 South West Temple, #510
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Certified
Plaintiff

**PAUL M. BELNAP
VICTORIA K. KIDMAN
STRONG & HANNI**
Sixth Floor Boston Building
Salt Lake City, Utah 84111

Attorneys for Defendant/Certified
Defendant Trackmobile, Inc.

**D. GARY CHRISTIAN
MICHAEL F. SKOLNICK
KIPP & CHRISTIAN**
175 East 400 South, #330
Salt Lake City, Utah 84111

Attorneys for Defendant/Certified
Defendant G.W. Van Keppel Company

II. JAMES CLEGG
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, #1100
Salt Lake City, Utah 84111

Attorneys for Defendant/Certified
Defendant Utah Power & Light Company

J. CLARE WILLIAMS
UNION PACIFIC RAILROAD
406 West 100 South
Salt Lake City, Utah 84101

Attorneys for Defendant/Certified
Defendant Union Pacific Railroad

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION OF THE UTAH SUPREME COURT	1
STATEMENT OF THE ISSUE	1
DETERMINATIVE STATUTES	1
STATEMENT OF THE CASE	2
A. Nature of the Case.	2
B. Course of Proceedings.	2
STATEMENT OF FACTS	3
A. General Background of the Facts and Parties.	3
B. The Accident.	7
C. Relevant Procedural History.	8
D. Negligent Actions of Scoular.	9
SUMMARY OF ARGUMENT	10
ARGUMENT	12
POINT I	
THE COMPARISON OF THE SCOULAR PARTIES' FAULT IS REQUIRED BY THE UTAH COMPARATIVE FAULT ACT	12
A. The Purpose and Terms of the Act Taken as a Whole Mandate the Inclusion of the Scoular Parties on the Special Verdict Form	12
B. Negligence Principles Require the Fault of All Parties to Be Compared by the Trier of Fact	14
C. The Scoular Parties Are Either "Defendants" or "Persons Seeking Recovery" Within the Definitions of the Act and as Such Should Be Included on the Special Verdict.	17

	<u>Page</u>
D. The Law of Other Jurisdictions Supports Comparison of the Scoular Parties' Fault. . . .	19
POINT II	
THE COMPARISON OF THE SCOLAR PARTIES FAULT IS NOT PROHIBITED BY THE WORKERS' COMPENSATION ACT	26
A. The Purpose and Terms of the Workers' Compensation Act Do Not Prohibit Comparison of the Scoular Parties' Fault. . . .	26
B. Comparison of the Scoular Parties' Fault is Not "Civil Liability" or an "Action at Law" as Set Forth in the Workers' Compensation Act.	27
POINT III.	
CONSTITUTIONAL PRINCIPLES COMPEL THE INCLUSION OF THE SCOLAR PARTIES ON THE SPECIAL VERDICT FORM	29
A. Equal Protection	29
B. Open Court and Uniform Operation of Laws	30
CONCLUSION	31

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases Cited</u>	
<u>Anderson v. National Carriers, Inc.</u> , 695 P.2d 1293 (Kan. App. 1985)	23
<u>Bishop v. Nielsen</u> , 632 P.2d 864 (Utah 1981)	15
<u>Bode v. Clark Equipment Co.</u> , 719 P.2d 824 (Okla. 1986)	22, 23
<u>Burton v. Fisher Controls Co.</u> , 713 P.2d 1137 (Wyo. 1986)	24
<u>Conner v. West Shore Equipment of Milwaukee</u> , 227 N.W.2d 660 (Wisc. 1975)	23
<u>Gaither v. City of Tulsa</u> , 664 P.2d 1026 (Okla. 1983)	22
<u>Godesky v. Provo City Corp.</u> , 690 P.2d 541 (Utah 1984)	14, 15
<u>Huber v. Henley</u> , 656 F.Supp. 508 (S.D. Ind. 1987)	24
<u>Jensen v. Intermountain Health Care, Inc.</u> , 679 P.2d 903 (Utah 1984)	12
<u>Katie R. Campbell v. Otis Elevator Co.</u> , 808 F.2d 429 (5th Cir. 1987)	21
<u>Madsen v. Salt Lake City School Board</u> , 645 P.2d 658 (Utah 1982)	16
<u>Martinez v. First National Bank of Santa Fe</u> , 755 P.2d 606, 608 (N.M.App. 1987)	24
<u>Miles v. West</u> , 580 P.2d 876 (Kan. 1978)	17
<u>Monson v. Hall</u> , 584 P.2d 833 (Utah 1978)	13
<u>Murray v. Wasatch Grinding Co.</u> , 73 Utah 430, 274 P. 940 (1929)	26
<u>Nance v. Gulf Oil Corp.</u> , 817 F.2d 1176 (5th Cir. 1987)	19

	<u>Page</u>
<u>Ortega v. Salt Lake Wet Wash Laundry</u> , 108 Utah 1, 156 P.2d 885 (1945)	26
<u>Osuala v. Aetna Life & Casualty Co.</u> , 608 P.2d 242 (Utah 1980)	13
<u>Paul v. N. L. Industries, Inc.</u> , 624 P.2d 68 (Okla. 1980)	22
<u>Philpott v. Superior Court</u> , 36 P.2d 635 (Cal. 1934)	27
<u>Pocatello Ind. Park Co. v. Steel West, Inc.</u> , 621 P.2d 399 (Idaho 1980)	24
<u>Rowe v. Dolphin-Titan International</u> , 655 F.Supp. 186 (E.D.La. 1987)	21
<u>Royal Indemnity Co. v. Sangor</u> , 164 N.W. 821 (Wisc. 1917)	27
<u>Sun Valley Waterbeds v. Herm Hughes & Son</u> , 782 P.2d 188 (Utah 1989)	30
<u>Utah Power & Light v. Municipal Power Systems</u> , 784 P.2d 137 (Utah 1989)	12
<u>Yantes v. Signode Corp., et al.</u> , Civil No. 89-NC-00555	28
<u>Zarella v. Miller</u> , 217 A.2d 673 (R.I. 1966)	16

Statutes and Other Authorities Cited

Heft & Heft, <u>Comparative Negligence Manual</u> , §8.131, at 12 (1978)	24
Schwartz, <u>Comparative Negligence</u> , 262 (2d ed. 1986)	25
U. S. Const. amend. XIV, § 1	29
Utah Code Ann. §35-1-60 (1988) 1, 8, 18, 27, 28	
Utah Code Ann. §35-1-62 (1988) 1, 19	
Utah Code Ann. §78-2-2(1) (1991) 1	
Utah Code Ann. §78-27-37 (1987) 1	

	<u>Page</u>
Utah Code Ann. §78-27-37(1) (1987)	17
Utah Code Ann. §78-27-37(3) (1987)	17, 19
Utah Code Ann. §78-27-38 (1987)	1, 12, 13
Utah Code Ann. §78-27-39 (1987)	1, 13, 18
Utah Code Ann. §78-27-40 (1987)	1, 13
Utah Code Ann. §78-27-41 (1987)	1
Utah Code Ann. §78-27-43 (1987)	2, 28
Utah Const. art. I, § 11	29, 30
Utah Const. art. I, § 24	29, 30
Utah Rules of Appellate Procedure, Rule 41	3

JURISDICTION OF THE UTAH SUPREME COURT

The Supreme Court has jurisdiction of this appeal pursuant to Utah Code Annotated §78-2-2(1)(1991).

STATEMENT OF THE ISSUE

Under the Utah Comparative Fault Act, Utah Code Ann. §78-27-38, et. seq., can a jury apportion the fault of the plaintiff's employers that caused or contributed to the accident.

DETERMINATIVE STATUTES

The following statutes are reproduced in full and can be found in Addendum A to this brief:

1. Utah Code Ann. §35-1-60 (1988) -- Exclusive remedy against employer, or officer, agent or employee -- Occupational disease excepted.
2. Utah Code Ann. §35-1-62 (1988) -- Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of said employer -- Rights of employer or insurance carrier in cause of action -- Maintenance of action -- Notice of intention to proceed against third party -- Right to maintain action not involving employee-employer relationship -- Disbursement of proceeds of recovery.
3. Utah Code Ann. §78-27-37 (1987) -- Utah Liability Reform Act: Definitions.
4. Utah Code Ann. §78-27-38 (1987) -- Comparative negligence.
5. Utah Code Ann. §78-27-39 (1987) -- Separate special verdicts on total damages and proportion of fault.
6. Utah Code Ann. §78-27-40 (1987) -- Amount of liability limited to proportion of fault.
7. Utah Code Ann. §78-27-41 (1987) -- Joinder of defendants.

8. Utah Code Ann. §78-27-43 (1987) -- Effect on immunity, exclusive remedy, indemnity, contribution.

STATEMENT OF THE CASE

A. Nature of the Case.

This is a personal injury action involving an employee who was injured in an accident which occurred on the railroad tracks at the Freeport Center, Clearfield, Utah. Plaintiff Kenneth Sullivan ("Sullivan") filed suit against his employers, various railroad companies, a utility company, and a manufacturer and distributor of a machine involved in the accident. Sullivan's employers (a grain handling company, Freeport Center's owner and a joint venture of the two) were dismissed from the lawsuit based upon workers' compensation defenses and a finding that these entities were not subject to FELA liability. The Denver & Rio Grande Western Railroad Company was also dismissed. The remaining defendants allege that Sullivan's employers were negligent, and, therefore, should be added to the special verdict form for an apportionment and deduction of their fault.

B. Course of Proceedings.

This issue comes to this Court by way of an Order of Certification signed by the Honorable Thomas J. Greene, U.S. District Court Judge, on October 4, 1991. (R. at 292) Defendant Trackmobile Inc. ("Trackmobile") filed a motion to have the jury apportion and compare the fault of all named defendants, whether dismissed or present at trial. (R. at 231-32) The motion was

contested by Sullivan who claimed that only the fault of the nonemployer party defendants may be compared. (R. at 252) The district court has not yet ruled on the motion.

In certifying the matter to this Court, pursuant to Rule 41 of the Utah Rules of Appellate Procedure, the district court found that there appeared to be no controlling Utah law with respect to this question. (R. at 292) Also, the court found that the Utah state courts and the United States District Courts for the State of Utah have rendered differing opinions on this question. (Id.) Therefore, the district court requested an answer to this question of Utah law. (Id.)

STATEMENT OF FACTS

A. General Background of the Facts and Parties.

In his Third Amended Complaint, Sullivan named the following parties as defendants: Scoular Grain Company, Freeport Center Associates, Scoular Grain Company of Utah (all three parties are collectively referred to as the "Scoular parties" throughout this brief), Union Pacific Railroad Company ("Union Pacific"), the Denver and Rio Grande Western Railroad Company ("D&RGW"), the Oregon Short Line Railroad Company ("Oregon Short Line"), Utah Power & Light Company ("UP&L"), G.W. Van Keppel Company ("Van Keppel") and Trackmobile. (R. at 175) A brief background of the facts and description of each party's alleged involvement is as follows:

In 1986 the U.S. government desired to store surplus grain. The Scoular parties agreed to receive shipments of the government grain at the Freeport Center. The grain was transported to the Freeport Center by various railroads. (Deposition of Borchert, pp. 5-6, 11-16, 20; Deposition of Oman, pp. 96-97; Deposition of Folland, pp. 110-16, 125-27, 130-31)

The Freeport Center comprises numerous rows of warehouses which are leased to several commercial tenants. All of the tracks between the rows of warehouses are owned and maintained by Union Pacific and the D&RGW who also provided rail services for the various tenants. There is a center (through) track approximately one mile long down each warehouse row, with side tracks on both sides that abut and serve the warehouses. (The physical layout of the Freeport Center is depicted in Addendum B.) (Deposition of Lux pp. 67-68; Deposition of Erskine, Vol. II, pp. 17, 35-36)

Union Pacific brought grain cars into its Clearfield Yard pursuant to bills of lading and freightway bills which designated "CCC c/o Scoular Grain Company, Clearfield, Ut." as the consignee. Union Pacific notified Scoular at the Freeport Center when the shipments arrived. The grain cars were then stored or held in the Clearfield Yard until Scoular requested Union Pacific to switch them to a particular location at their warehouse facility in the Freeport Center. Union Pacific delivered the cars to specific locations at or near Scoular's warehouses as requested by Scoular.

(Deposition of Lux, pp. 37, 45, 69; Deposition of Erskine, pp. 27, 43, 52-53.)

Scoular would then move the loaded cars to the desired warehouses located anywhere from 1/4 to 1 mile away, by means of a Trackmobile. A Trackmobile is a self-propelled machine which runs on rail wheels or rubber tires, depending upon the intended use. (Deposition of Fields, p. 5; Deposition of Keyt, pp. 14-15, 76-92)

Scoular employees would unload the grain into the warehouses. When the process of unloading was completed, Scoular would switch the empty cars back onto the center line, accumulate numerous empty cars and prepare them for pick up by Union Pacific. Scoular followed this procedure at the Freeport Center, handling over 10,000 rail cars in less than a year. (Deposition of Fields, p. 5; Deposition of Keyt, pp. 14-15, 76-92)

On October 17, 1986, Sullivan was working at the Freeport Center as an employee of the Scoular parties. Sullivan was 23 years old when he was first hired by the Scoular parties on October 12, 1986 (nine days before the accident). He had no prior experience working around railroad yards. His shift was from 7:00 p.m. to 7:00 a.m., six days a week and his duties were to assist in the unloading and in the switching and spotting of the rail cars, as needed. (R. at 149; Deposition of Nicholas, pp. 17, 23)

Sullivan has alleged that the Scoular parties negligently and carelessly maintained, supervised, controlled and operated the area where the accident occurred and failed to maintain a safe working

place for Sullivan, including failure to properly warn, instruct and train Sullivan. Sullivan has also alleged that he was injured by a locomotive and railcars owned and/or under the control of the Scoular parties, Union Pacific, D&RGW, and the Oregon Short Line and the accident was directly caused by violations of the Safety Appliance Act ("SAA"), the Boiler Inspection Act ("BIA"), and other statutes and regulations. He has also alleged that the parties were liable under the Federal Employer's Liability Act ("FELA"). (R. at 175)

Trackmobile was the manufacturer and Van Keppel was the distributor of the Trackmobile equipment owned and used by Scoular to move the railroad cars on the tracks at the Freeport Center. Sullivan has alleged that the Trackmobile was defective when manufactured and sold and thereby created an unreasonable danger to both users of the Trackmobile and those working around the Trackmobile. (R. at 175)

Sullivan alleges that UP&L owned, installed, and upon notice from its customer that a light was "out", maintained portions of the exterior area lighting system in the area where the accident occurred. That is, a tenant could install its own lighting or it could contract with UP&L to install area lights, or it could do both, or it could do neither. Sullivan has alleged that UP&L failed to properly maintain lighting in the area of the accident. (R. at 175)

B. The Accident.

The accident occurred at approximately 4:30 a.m. on October 17, 1986, on the center track between warehouses D10 and D11. Each warehouse is about 206 yards long and typically contains several bays. Sullivan was working at warehouse D10, unloading grain by use of a vaculator, a machine which sucked grain as it fell from the bottom of the car and blew it into the warehouse. Once the vaculator was in position and working, the workers had little to do but monitor the intake of the vaculator. Because of the extreme noise caused by the vaculator, the workers monitored the unloading from the side of the car closest to the center track. (Deposition of Hussein, pp. 29-30; Deposition of Stewart, p. 83)

There were five stationary empty cars on the center track where Sullivan was standing. The operator of the Trackmobile picked up two loaded cars near warehouse G10 or F11 (approximately 3/4 of a mile away), and pushed them down the center line toward the five empty cars. As he approached the empty cars (traveling between 10 and 20 miles per hour), the Trackmobile operator slowed, and released the Trackmobile's coupler, allowing the cars to coast unattended in excess of a hundred feet until they rammed into the five empty cars. (A diagram of the accident scene is set forth in Addendum C.) (Deposition of Nicholas, pp. 56-61)

The impact propelled the empty cars down the track knocking Sullivan down and running over him. Sullivan recalls that he was standing between the ends of two of the empties. He was pushed

down on the track where wheels could run over him. As a result of the accident Sullivan's left arm and left leg were amputated. Sullivan received approximately \$200,000 in workers' compensation for his injuries. (Deposition of Nicholas, pp. 56-61; Deposition of Sullivan, Vol. I, pp. 185-90)

C. Relevant Procedural History.

Sullivan filed his initial complaint in 1987. (R. at 1) In 1989, Sullivan and the Scoular parties filed cross-motions for summary judgment. The district court granted the Scoular parties motion for summary judgment and found that they were not a "common carrier by railroad" under FELA and dismissed the cause of action. (R. at 186) 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, Utah Code Ann. §35-1-60. (Id.) The Tenth Circuit Court of Appeals has affirmed the district court's rulings.

The railroads also filed dispositive or partially dispositive motions in 1990 which were granted in whole or in part. D&RGW was dismissed from the lawsuit and Sullivan's causes of action against Union Pacific, based upon the FELA, SAA, and BIA were dismissed.

D. Negligent Actions of Scoular.

The remaining defendants in the case are UP&L, Trackmobile, Van Keppel, Union Pacific and Oregon Short Line. 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. There are numerous negligent acts and omissions attributable to the Scoular parties including, but not limited to the following:

a. The Scoular parties gave little or no warning, instruction and training concerning railroad yard procedures and safety to Sullivan who had no railroad experience. (Deposition of Lux, pp. 85-86, 89); Deposition of Keyt, pp. 105-06)

b. The Scoular parties hired a young man 18 years old, with no experience or formal training in railroad procedures and safety, to operate the Trackmobile. (Deposition of Lux, pp. 87-88, 106-08; Deposition of Folland, p. 226; Deposition of Nicholas, pp. 5, 7, 13, 15, 16, 18, 20-21)

c. The operator of the Trackmobile made a "blind kick" in the dark without warning and without flagmen, brakemen and other men necessary to safely move cars. (Deposition of Lux, pp. 99-104, 108-10; Deposition of Keyt, pp. 93-94, 97-100; Deposition of Nicholas, pp. 56-61)

d. The Scoular parties provided no lighting on the "far side" of the sidetrack, even though their men were expected to work there. (Deposition of Lux, pp. 105, 121-28)

e. Because the Trackmobile's electrical system was not functioning, it had no headlights, flashing safety lights or horn to warn workmen of approaching cars; vehicle maintenance was Scoular's responsibility. (Deposition of Lux, pp. 73-74; Deposition of Keyt, p. 112; Deposition of Nicholas, pp. 37-40, 43, 45)

These issues may, indeed, rise to a level higher than ordinary negligence, in view of the operations conducted and the machinery being used.

SUMMARY OF ARGUMENT

The fault of the Scoular parties should be considered by the jury. The purpose and terms of the Utah Comparative Fault Act as a whole require the fault of all parties to be compared by the jury at trial. Under the Comparative Fault Act, no defendant can be liable for any amount in excess of the proportion of fault attributable to that defendant. Therefore, the fault of the Scoular parties must be considered by the jury to effectuate the purpose and intent of the Act.

Negligence principles also require the fault of all entities involved in the subject accident to be compared by the jury. A jury would be unable to fairly and accurately assess the issue of proximate cause if the negligence of the Scoular parties is excluded from trial. It would be unjust to preclude the jury from considering the fault of all potential negligent actors in evaluating the cause of the subject accident.

The Scoular parties are either "defendants" or "persons seeking recovery" under the terms of the Comparative Fault Act and as such should be included on the special verdict form. The Scoular parties are "defendants" because they are not "immune from suit" in actions seeking only to have the employers' fault considered by the jury. The Scoular parties are also "persons seeking recovery" because, as statutory employers, they are entitled to reimbursement of the workers' compensation benefits they paid to Sullivan.

The comparison of the Scoular parties' fault is not prohibited by the Workers' Compensation Act. The underlying purpose and terms of the Workers' Compensation Act do not prohibit comparison of the Scoular parties' fault. The salutary purposes of the workers' compensation system would not be disrupted by comparing the employers' fault on the special verdict form.

The express language of the Workers' Compensation Act also does not preclude the inclusion of the employers on the special verdict form for a determination as to their proportionate fault. An action for apportionment does not create "civil liability" and does not constitute an "action at law" as set forth in the Workers' Compensation Act. As such the Workers' Compensation Act does not prevent the Scoular parties from being included on the special verdict form.

ARGUMENT

POINT I

THE COMPARISON OF THE SCOLAR PARTIES' FAULT IS REQUIRED BY THE UTAH COMPARATIVE FAULT ACT

A. The Purpose and Terms of the Act Taken as a Whole Mandate the Inclusion of the Scolar Parties on the Special Verdict Form.

Taking the Utah Comparative Fault Act as a whole, it requires the fault of all parties to an occurrence to be compared at trial in order for the fault of the respective parties to be accurately apportioned. The 1986 Act abolished the doctrine of joint and several liability in Utah. The comparative negligence statute, U.C.A. §78-27-38, was instituted to remove joint and several liability and insure that "no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant." Not including the Scolar parties on the special verdict form will effectively subject the remaining parties to joint and several liability. This certainly does not appear to be the intent of the Utah Legislature.

This Court has repeatedly held that 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 construed in isolation from the rest of the act. Utah Power & Light v. Municipal Power Systems, 784 P.2d 137, 140 (Utah 1989) citing, Jensen v. Intermountain Health Care, Inc., 679 P.2d 903 (Utah 1984). See

also, Osuala v. Aetna Life & Casualty Co., 608 P.2d 242 (Utah 1980); Monson v. Hall, 584 P.2d 833 (Utah 1978).

The Utah Comparative Fault Act requires the fault of all parties to an occurrence to be compared at trial in order for the fault of the respective parties to be accurately apportioned. Utah Code Annotated §§78-27-38 and 78-27-40 illustrate that no defendant should be held liable for any amount in excess of its proportion of fault actually attributable to that defendant. Those sections provide, in part:

§78-27-38 Comparative Negligence. . . .
However, no defendant is liable to any person seeking recover for any amount in excess of the proportion of fault attributable to that defendant.

§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 fault attributed to that defendant. No defendant is entitled to contribution from any other person.

To effectuate the purpose of these two provisions, it is critical that the actions of all entities be taken into account by the trier of fact. In order to determine a defendant's "proportion of fault", the Act relies on the use of special verdicts which find "the percentage or proportion of fault attributable to each person seeking relief and to each defendant." Utah Code Ann. §78-27-39. Therefore, to effectuate the purpose and intent of the Act, the Scoular parties must be included on the special verdict form.

B. Negligence Principles Require the Fault of All Parties to Be Compared by the Trier of Fact

Evidence relating to the negligence of all entities involved in the subject accident must be presented to the jury to permit it to properly determine the issue of proximate cause. A jury is unable to fairly decide the question of proximate cause without considering all of the facts and circumstances surrounding the subject accident. Case law firmly supports the position that the conduct of all parties must be considered by the jury for the purpose of fairly determining negligence.

While not passing on the precise issue presented, this Court has, on a number of occasions, allowed the jury's consideration of a non-party's negligence. For example, Godesky v. Provo City Corp., 690 P.2d 541 (Utah 1984), involved a personal injury action brought by a roofer who was injured when he came into contact with an electrical wire. The plaintiff was employed by Pride Roofing Company ("Pride"). Pride was dismissed prior to trial presumably due to the exclusivity of the workers' compensation remedy. In other words, Pride was immune from further liability.

The case went to the jury which found Provo City Corporation, the owner of the electrical wire, 70 percent negligent. The jury also found Monticello Investors, the owner of the building, 20 percent negligent. The jury also assessed 10 percent of the fault to Pride, which was not a party to the action. The case was appealed to this Court which affirmed the decision in all respects. In

commenting upon the correctness of the jury's verdict, this Court stated:

This is precisely what the jury did in this case. It compared the negligence of Provo, Monticello and Pride and determined that each actor's negligence concurred to cause plaintiff's injury and that Pride's 10% negligence did not supersede Provo's 70% negligence as a matter of fact. Id. at 545.

The fact scenario in Godesky is analogous to the instant action. Pride was presumably dismissed prior to trial due to its immunity under workers' compensation. Even though Pride was not a party to the action, the trial court had the jury apportion its negligence on the special verdict form because Pride's activities contributed to the injury.

In Bishop v. Nielsen, 632 P.2d 864 (Utah 1981), this Court similarly permitted contribution against an arguably immune party, finding it a "joint tort-feasor." In Bishop, a father brought an action to recover property damages sustained in a collision between automobiles driven by defendant and plaintiff's minor daughter. Defendant joined plaintiff's daughter as a third-party defendant, seeking contribution.

Third-party defendant moved for summary judgment on the ground that she was not liable to her father by virtue of the doctrine of parent-child immunity. The trial court denied her motion and the jury apportioned negligence 30 percent to the daughter and 70 percent to defendant.

On appeal this Court held that equities in favor of contribution outweighed the benefit to be achieved by strict application of parent-child immunity. In reaching this conclusion this Court relied upon language in Zarella v. Miller, 217 A.2d 673 (R.I. 1966) which provided, in part:

We agree with the words of Dean Prosser that "There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone * * * while the latter goes scot free." Bishop, 632 P.2d at 867. (citations omitted)

Also in Madsen v. Salt Lake City School Board, 645 P.2d 658, 663 (Utah 1982), this Court recognized the importance of having the fault of all negligent entities considered by the jury. This Court held:

Excluding the City could result in the school board being held liable for the total recovery allowed (less reductions required by §78-27-42) even though, as stated, its percentage of liability, if any, might be found to be small while that of Faddis, the City's employee, be found to be large. To allow this to occur would be manifestly unjust. . . . [I]t is imperative that the issue of proportionate fault should be litigated between all joint tort-feasors in the same action and resolved by the same trier of the issues of fact.

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

The ill fortune of being injured by an immune or judgment-proof person now falls upon the plaintiffs rather than upon the other defendants as was the practice prior to the enactment of the

Comparative Fault Act. The risk of such ill fortune is the price plaintiffs must pay for being relieved of the burden formerly placed upon them by the complete bar to recovery based upon contributory negligence. Miles v. West, 580 P.2d 876, 880 (Kan. 1978).

Based upon the foregoing general negligence principles, it is imperative that the actions of the Scoular parties be taken into account by the jury. It would be "manifestly unjust" to preclude the jury from considering the fault of all potential negligent actors in evaluating the cause of the subject accident. A jury would be unable to fairly and accurately assess the issue of negligence and causation if the negligence of the Scoular parties is excluded from trial.

C. The Scoular Parties Are Either "Defendants" or "Persons Seeking Recovery" Within the Definitions of the Act and as Such Should Be Included on the Special Verdict.

In the definition section of the Act, "defendant" means any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery. Utah Code Ann. §78-27-37(1). "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. Utah Code Ann. §78-27-37(3). Under the Comparative Fault Act a court is to include on the special verdict form the percentage or proportion of fault attributable "to each person seeking recovery and to each

defendant." Utah Code Ann. §78-27-39. The Scoular parties are either "defendants" or "persons seeking recovery" and as such should be included on the special verdict form.

The Scoular parties are "defendant[s]" within the definition of the Comparative Fault Act because they are not "immune from suit." Although the Workers' Compensation Act contains an exclusive remedy provision, Utah Code Ann. §35-1-60, examination of the terms of that Act supports the conclusion that employers are not immune from suit in actions seeking only to have the employer's fault considered by the jury.

The exclusive remedy provision of the Workers' Compensation Act relates only to "civil liability." Utah Code Ann. §35-1-60. Additionally, the Act only provides that "no action at law" may be maintained against an employer. Id. Therefore, under the exclusive remedy provision employers are only "immune" from "civil liability" in "actions at law."

By adding the Scoular parties to the special verdict form they would not be faced with any "civil liability." Defendants are not seeking to obtain any monetary recovery from the Scoular parties. Therefore the Scoular parties, as employers, are not "immune" from fault apportionment under the provisions of the Comparative Fault Act. As such they should have their fault considered by the jury as "defendants" on the special verdict form.

The Scoular parties should also be included on the special verdict form because they are "persons seeking recovery" within the

definition of the Comparative Fault Act. The definition of a "persons seeking recovery" is any person "seeking damages or reimbursement." Utah Code Ann. §78-27-37(3) (Emphasis added) Under Utah Code Ann. §35-1-62, an employer shares in any recovery by the employee or the employee's heirs, to the extent compensation has been paid. In the instant action Sullivan received over \$200,000.00 in Workers' Compensation benefits. The Scoular parties, as statutory employers, would fall under the Act's definition of "any person seeking damages or reimbursement" and therefore should be included on the special verdict form.

D. The Law of Other Jurisdictions Supports Comparison of the Scoular Parties' Fault.

Other jurisdictions have held that all parties' and non-parties' proportion of fault must be ascertained by the trier of fact even if a party cannot be held legally responsible for its proportion of fault. Although the language of the comparative fault acts in the other jurisdictions is not identical to Utah's Act, the reasoning set forth by the other courts is instructive.

The Fifth Circuit Court of Appeals examined a similar issue in Nance v. Gulf Oil Corp., 817 F.2d 1176 (5th Cir. 1987). In 1984, plaintiff Nance, an employee of Service Equipment & Engineering Company ("SEE"), brought a negligence and strict liability suit against Gulf Oil Corporation. Plaintiff tripped on a water hose and fell from the drill floor of SEE's rig to the top deck of an offshore drilling platform owned by Gulf Oil Corporation. The jury

found Gulf negligent and strictly liable and judgment was awarded to plaintiff.

Despite a request by Gulf, the district court refused to include on the verdict form a question pertaining to the percentage of fault attributable to SEE, because SEE was not a party to the suit. Id. at 1180. By failing to include this question on the verdict form, Gulf argued the district court misapplied the Louisiana comparative negligence statute. Gulf acknowledged that, as Nance's employer, SEE's payment of workers' compensation insulates it from liability for damages or contribution. Id. Gulf nevertheless deemed SEE's percentage of fault important because of the likelihood that it would reduce the proportionate negligence to which Gulf was otherwise exposed.

The Fifth Circuit Court determined that the percentage of SEE's fault was an issue material to apportioning the liability between Gulf and Nance and the district court should have included this issue either in its charge or the verdict form. Id. at 1181. The court recognized that with the adoption of comparative fault, the fault or non-fault, and the percentage of fault attributable to each person whether party to lawsuit or not, has become relevant in determination of damages to which an injured plaintiff is entitled. Id. at 1180. Thus, the Fifth Circuit concluded that the district court erred when it excluded from the verdict form a question inquiring into the employer's proportionate share of fault. Id. at 1181.

The United States District Court for the Eastern District of Louisiana also found that the exclusive liability provision of a workers' compensation act did not preclude measuring the employer's proportion of fault for purposes of determining liability. In Rowe v. Dolphin-Titan International, 655 F.Supp. 186 (E.D.La. 1987), plaintiff alleged that he sustained injuries to his back while working for Rebel Rentals on a rig owned by Dolphin-Titan International situated on a platform owned by Tenneco Oil Company. Rebel Rentals, employer of plaintiff, objected to the court's stated intention of having a jury apportion fault between all actors to the alleged accident so that the court could enter judgment in accordance with the Louisiana Comparative Negligence Act. Rebel Rentals took the position that since it is statutorily immune from suit, its proportion of fault should not be measured. The court determined that the fault, if any, of Rebel Rentals was necessary, not to cast Rebel Rentals liable for a share of the judgment, but rather to determine whether Tenneco would be liable for all damages less plaintiff's contributory fault, or whether Tenneco was liable only for its share. Id. at 188.

In reaching this determination, the court relied upon Katie R. Campbell v. Otis Elevator Co., 808 F.2d 429 (5th Cir. 1987), where applying the law of Louisiana, the court sanctioned the computation of fault of all actors to the accident, including the statutorily immune employer. The court recognized that this was done, not to cast the employer in liability, but rather to determine whether

Otis Elevator was liable for the entire share of the verdict less plaintiff's fault, or only for its share. Id. at 189. Although the case was reversed and remanded for a new trial due to erroneous instructions given on res ipsa loquitur and the duty of care owed by the elevator maintenance companies, the Fifth Circuit did not find error in the court's apportionment of fault among the actors.

The Oklahoma Supreme Court has also recognized that the negligence of the employer must be considered in determining comparative fault even if the employer is immune from common law tort liability because of the exclusive remedy provided by the workers' compensation law. Bode v. Clark Equipment Co., 719 P.2d 824 (Okla. 1986). The Oklahoma Supreme Court recognized that "the cornerstone of comparative negligence is founded on attaching liability in direct proportion to the fault of each entity whose negligence caused the damage." Id. at 827 (emphasis in original).

The Oklahoma court additionally found substantial authority to support the conclusion that the negligence of non-parties, or "ghost tortfeasors" should be considered in assessing proportionate fault in comparative negligence cases. Id.

In Paul v. N. L. Industries, Inc., 624 P.2d 68, 70 (Okla. 1980), and in Gaither v. City of Tulsa, 664 P.2d 1026, 1029 (Okla. 1983), the Oklahoma Supreme Court held that the negligence of tortfeasors who are not parties to the lawsuit should be considered by the jury in order to properly apportion the negligence of the parties. The Oklahoma court also relied upon a Kansas decision

Anderson v. National Carriers, Inc., 695 P.2d 1293, 1298 (Kan.App. 1985). In Anderson, a subcontractor joined his principal, the injured party's employer, as a "phantom" party to the suit in order to have the employer's percentage of liability assessed by the jury. The plaintiff appealed and the court ruled that even though the employer was immune from negligence liability because of the workers' compensation statutes, it was a necessary party for purpose of considering and allocating proportionate fault. Based upon the foregoing, the Oklahoma Supreme Court in Bode reached the "unavoidable conclusion" that the negligence of a party defendant must be combined with the percentage of negligence attributable to non-party tortfeasors in order to determine if the degree of fault charged to the plaintiff is greater than that owing to all persons, firms or corporations causing such damage. Bode, 719 P.2d at 827.

Conner v. West Shore Equipment of Milwaukee, 227 N.W.2d 660 (Wisc. 1975), also concerned an appeal brought to ascertain whether it was proper to exclude from the special verdict form a question relating to the negligence of the employer, when the employer was not a party to the negligence action and could not be held liable by reason of the exclusivity of the workers' compensation remedy. In holding that it was proper to ask the jury to consider the negligence of the employer, the court stated:

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

not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release. . . . at the requested special-verdict stage of a lawsuit, it is immaterial that the entity is not a party or is immune from further liability. [citations omitted] [T]he apportionment must include all whose negligence may have contributed to the arising of the cause of action. Id. at 662.

The Idaho court adopted this rule in Pocatello Ind. Park Co. v. Steel West, Inc., 621 P.2d 399 (Idaho 1980). The Idaho court stated that, "The reason for such [a rule] is that true apportionment cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case." Id. at 403, quoting Heft & Heft, Comparative Negligence Manual, §8.131, at 12 (1978). The Idaho court also noted that apparently only Florida has adopted a contrary position. Other cases espousing this viewpoint include Huber v. Henley, 656 F.Supp. 508, 509 (S.D.Ind. 1987) (Any damages sustained by plaintiff will be diminished, not only in proportion to his own fault, but also in proportion to fault attributable to any nonparties); Martinez v. First National Bank of Santa Fe, 755 P.2d 606, 608 (N.M.App. 1987) (Under comparative negligence, fault may be allocated between defendant and a tortfeasor not joined as a party to the action); Burton v. Fisher Controls Co., 713 P.2d 1137, 1143 (Wyo. 1986) (In a comparative negligence case where relative fault is in issue, the jury must not only consider causative negligence

of the parties to the litigation, but it must also ascertain the percentage of fault for all of the participants in the tortious conduct which causes injury).

The treatises which discuss this issue are in accord in concluding that the better reasoned approach is to require the negligence of all concurrent tortfeasors, whether they are parties to the action or not, to be taken into account by the jury in apportioning liability.

It is accepted practice to include all tortfeasors in the apportionment question. This includes non-parties who may be unknown tortfeasors, phantom drivers, and persons alleged to be negligent but not liable in damages to the injured party such as the third-party cases arising in the workmen's compensation area. Heft & Heft, Comparative Negligence Manual, §8.100, at 14 (rev. ed.)

See also, Schwartz, Comparative Negligence, at 262-63 (2d ed. 1986).

The respective negligence of the Scoular parties must be apportioned by the fact finder in order to comply with the stated purpose of Utah's Comparative Fault Act. Plaintiff's experts have concluded that the Scoular parties are at fault in more than one particular. Plaintiff's fellow employees have described in great detail the lack of safety procedures and training before the accident. As such, the comparison of the Scoular parties' fault is required by the Comparative Fault Act.

POINT II

THE COMPARISON OF THE SCOLAR PARTIES FAULT IS NOT PROHIBITED BY THE WORKERS' COMPENSATION ACT

A. The Purpose and Terms of the Workers' Compensation Act Do Not Prohibit Comparison of the Scolar Parties' Fault.

Since the enactment of the Workers' Compensation Act in 1917, the exclusive remedy of an employee who is injured in the course of employment is the right to recover compensation provided for in the Act. Murray v. Wasatch Grinding Co., 73 Utah 430, 274 P. 940, 942 (1929). The Workers' Compensation Act is predicated on the police power, the right of the state to regulate the status of employer and employee for the general welfare of the people and the state. Ortega v. Salt Lake Wet Wash Laundry, 108 Utah 1, 156 P.2d 885, 887 (1945). It is a beneficial act, passed to protect employees and those dependant upon them and to tax the costs of human wreckage against the industry which employs it. Id.

The purpose of the Act is to view the worker as a part of the industrial setup and impose upon the industry the costs and burdens of the breakage, wreckage or destruction of the human part of the industrial machinery. Compensation under the Act is, therefore, allowed without reference to negligence, risk inherent in the tasks, or the conduct of other workers. Id.

The purposes of the Workers' Compensation Act are not thwarted by including the employer on the special verdict form. The legislative scheme of the Act is independent of negligence

principles. By comparing the fault of the employer on the special verdict form the State's police power is not compromised. The employees remain protected and industry still retains the costs and burdens of any injury it may cause its workers. The salutary purposes of the system would not be disrupted in any respect.

B. Comparison of the Scoular Parties' Fault is Not "Civil Liability" or an "Action at Law" as Set Forth in the Workers' Compensation Act.

The express language of the Workers' Compensation Act does not preclude the inclusion of an employer on a special verdict form for a determination as to its proportionate fault. The exclusive remedy provision of the Act, Utah Code Ann. §35-1-60 provides, in part:

The right to recover compensation . . . 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, at common law or otherwise . . . and no action at law may be maintained against an employer . . . based upon any accident . . . of an employee.

An action for apportionment of fault does not create "civil liability" and does not constitute an "action at law." "Actions at law" have generally been defined as actions for money damages, as opposed to suits in equity for injunctive relief. Philpott v. Superior Court, 36 P.2d 635 (Cal. 1934); Royal Indemnity Co. v. Sangor, 164 N.W. 821 (Wisc. 1917).

Taken in this context, the exclusive remedy provision of the Workers' Compensation Act was implemented to shield employers from paying any additional money than that required under the express provisions of the Act. The Act does not expressly prevent the apportionment of the employer's fault by including them on the special verdict form.

In Yantes v. Signode Corp., et al., Civil No. 89-NC-0055-S, the Utah Attorney General's Office was asked to comment upon an issue concerning the constitutionality of the exclusive remedy provision of Utah Code Ann. §35-1-60, and of the comparative negligence provision which preserves statutory immunities, Utah Code Ann. §78-27-43. (A copy of the opinion is attached in the Addendum at D.) In the opinion letter, the Attorney General's Office noted that it appeared that a constitutional challenge would only arise if the exclusive remedy provision prevented the joining of an employee for the appointment of fault. The Attorney General's Office stated:

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

In the instant action defendants are not attempting to impose "civil liability" and are not maintaining an "action at law" against the Scoular parties. Rather, defendants are merely seeking to include the Scoular parties on the special verdict form for an apportionment of their fault. As such the Workers' Compensation Act does not prevent the Scoular parties from being included on the special verdict form.

POINT III.

CONSTITUTIONAL PRINCIPLES COMPEL THE INCLUSION OF THE SCOLAR PARTIES ON THE SPECIAL VERDICT FORM

If the Scoular parties are not included on the special verdict form defendants' constitutional rights will be violated. Defendants will be denied equal protection of the laws under the U. S. Constitution, Amendment XIV, § 1, as well as under Article I, § 24 of the Utah Constitution. Additionally, defendants will be denied open access to the courts under the Utah Constitution, Article I, § 11. Finally, if the Scoular parties are not included on the special verdict form the Uniform Operations of Laws Clause of the Utah Constitution will be violated.

A. Equal Protection

The United States Constitution provides that a state cannot deprive a person of equal protection of the laws. U.S. Const. amend. XIV. The Utah Constitution similarly commands that "all laws of a general nature shall have uniform application." Utah Const. art. I, § 24. The named defendants' rights under these two

constitutional provisions will be violated if the Scoular parties are not listed on the special verdict form.

In the instant action the named defendants will be held accountable for the amount of negligence attributable to Sullivan's employers if the negligent employers are not included on the special verdict form. In other words, defendants will be liable for more than their proportionate share of the operative negligence as it is clear that plaintiff's employer and fellow employees were very negligent; witness plaintiff's very strenuous attempts to keep them in the suit. In cases involving only non-employer defendants, each defendant would only be liable for its own proportionate amount of fault. Therefore, defendants would be treated differently. This results in an unequal application of the laws which would violate both the United States and Utah Constitution.

B. Open Court and Uniform Operation of Laws

Utah's Constitution provides that "all courts shall be open" and every person "shall have remedy by due course of law." Utah Const. art. I, § 11. This Court has held that Article I, § 11 is satisfied if the law provides an alternative or substitute remedy to the injured person or if the elimination of a remedy eliminates a social or economic evil. Sun Valley Waterbeds v. Herm Hughes & Son, 782 P.2d 188 (Utah 1989). If the Scoular parties are not included on the special verdict form, defendants will be deprived of their right to have the negligence of all parties compared by the trier of fact. The defendants will be automatically liable for

the Scoular parties' proportionate amount of fault without an alternative remedy or method by which the jury can consider and deduct the employers' negligence.

No social evil is eliminated if a jury is not allowed to compare the fault of the negligent employers and fellow employees on the special verdict form. As previously set forth in this brief, the salutary purposes of the Workers' Compensation system would not be disrupted. An evil will be created if any defendant is held responsible for more than its proportionate share of fault. Therefore, the Open Courts and the Uniform Operations of Laws Clauses of the Utah Constitution will be violated if the Scoular parties are not included on the special verdict form.

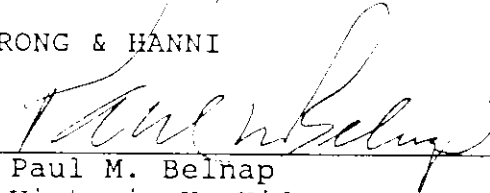
CONCLUSION

Certified defendants request that this Court provide an answer to the Honorable Thomas J. Greene, U.S. District Court Judge, on this outstanding question of Utah law. Namely, certified defendants request an opinion that under the Utah Comparative Fault Act a jury can apportion the fault of Sullivan's employers who caused or contributed to the subject accident.

Respectfully submitted this 15 day of April, 1992.

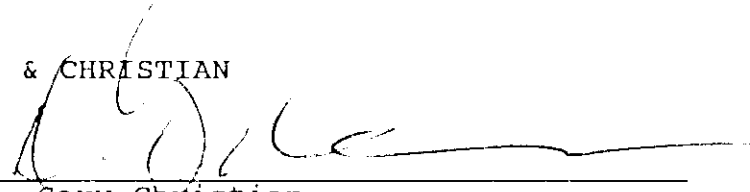
STRONG & HANNI

By


Paul M. Belnap
Victoria K. Kidman
Attorneys for Defendant/Certified
Defendant Trackmobile, Inc.


KIPP & CHRISTIAN

By


D. Gary Christian
Michael F. Skolnick
Attorneys for Defendant/Certified
Defendant G.W. Van Keppel Company

UNION PACIFIC RAILROAD


By


J. Clare Williams
Attorneys for Defendant/Certified
Defendant Union Pacific Railroad

UP&L appears specially, noting its claim that the trial court is without jurisdiction over it.

SNOW, CHRISTENSEN & MARTINEAU

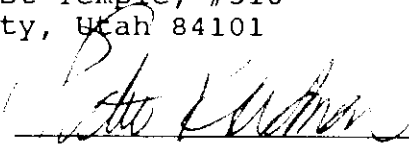
By


H. James Clegg
Attorneys for Defendant/Certified
Defendant Utah Power & Light Company

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Joint Brief of Certified Defendants was mailed, first-class postage prepaid, this 20th day of April, 1992, to the following:

L. Rich Humpherys
CHRISTENSEN, JENSEN & POWELL
Attorneys for Plaintiff/Certified Plaintiff
175 South West Temple, #510
Salt Lake City, Utah 84101



ADDENDUM

INDEX TO ADDENDUM

	<u>Page</u>
ADDENDUM A	
DETERMINATIVE AUTHORITIES	A-1
ADDENDUM B	
PHYSICAL LAYOUT OF FREEPORT CENTER	A-5
ADDENDUM C	
DIAGRAM OF ACCIDENT SCENE	A-6
ADDENDUM D	
OPINION LETTER OF ATTORNEY GENERAL'S OFFICE	A-7

ADDENDUM A
DETERMINATIVE AUTHORITIES

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.

35-1-62. Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of said employer -- Rights of employer or insurance carrier in cause of action -- Maintenance of action -- Notice of intention to proceed against third party -- Right to maintain action not involving employee-employer relationship -- Disbursement of proceeds of recovery.

When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said employer, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission. Before proceeding against the third party, the injured employee, or, in case of death, his heirs, shall give written

notice of such intention to the carrier or other person obligated for the compensation payments, in order to give such person a reasonable opportunity to enter an appearance in the proceeding.

For the purposes of this section and notwithstanding the provisions of Section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. Any such fee chargeable to the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in Subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

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.

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.

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.

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.

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.

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.

ADDENDUM B

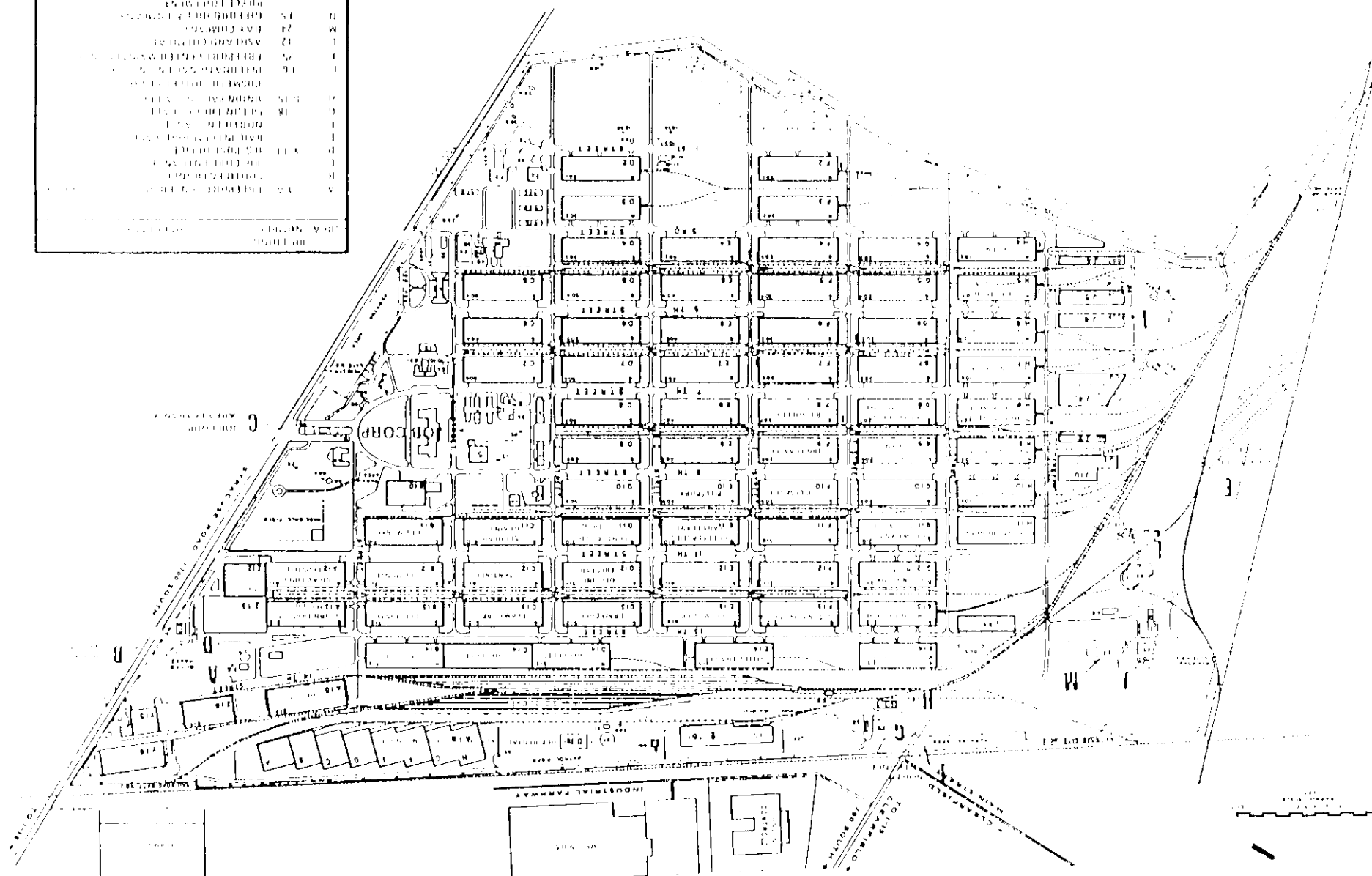
PHYSICAL LAYOUT OF FREEPORT CENTER

DEPOSITION
EXHIBIT

Address	Value	Comment
00000000	00000000	0
00000001	00000001	1
00000002	00000002	2
00000003	00000003	3
00000004	00000004	4
00000005	00000005	5
00000006	00000006	6
00000007	00000007	7
00000008	00000008	8
00000009	00000009	9
0000000A	0000000A	A
0000000B	0000000B	B
0000000C	0000000C	C
0000000D	0000000D	D
0000000E	0000000E	E
0000000F	0000000F	F
00000010	00000010	10
00000011	00000011	11
00000012	00000012	12
00000013	00000013	13
00000014	00000014	14
00000015	00000015	15
00000016	00000016	16
00000017	00000017	17
00000018	00000018	18
00000019	00000019	19
0000001A	0000001A	1A
0000001B	0000001B	1B
0000001C	0000001C	1C
0000001D	0000001D	1D
0000001E	0000001E	1E
0000001F	0000001F	1F
00000020	00000020	20
00000021	00000021	21
00000022	00000022	22
00000023	00000023	23
00000024	00000024	24
00000025	00000025	25
00000026	00000026	26
00000027	00000027	27
00000028	00000028	28
00000029	00000029	29
0000002A	0000002A	2A
0000002B	0000002B	2B
0000002C	0000002C	2C
0000002D	0000002D	2D
0000002E	0000002E	2E
0000002F	0000002F	2F
00000030	00000030	30
00000031	00000031	31
00000032	00000032	32
00000033	00000033	33
00000034	00000034	34
00000035	00000035	35
00000036	00000036	36
00000037	00000037	37
00000038	00000038	38
00000039	00000039	39
0000003A	0000003A	3A
0000003B	0000003B	3B
0000003C	0000003C	3C
0000003D	0000003D	3D
0000003E	0000003E	3E
0000003F	0000003F	3F
00000040	00000040	40
00000041	00000041	41
00000042	00000042	42
00000043	00000043	43
00000044	00000044	44
00000045	00000045	45
00000046	00000046	46
00000047	00000047	47
00000048	00000048	48
00000049	00000049	49
0000004A	0000004A	4A
0000004B	0000004B	4B
0000004C	0000004C	4C
0000004D	0000004D	4D
0000004E	0000004E	4E
0000004F	0000004F	4F
00000050	00000050	50
00000051	00000051	51
00000052	00000052	52
00000053	00000053	53
00000054	00000054	54
00000055	00000055	55
00000056	00000056	56
00000057	00000057	57
00000058	00000058	58
00000059	00000059	59
0000005A	0000005A	5A
0000005B	0000005B	5B
0000005C	0000005C	5C
0000005D	0000005D	5D
0000005E	0000005E	

1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

THE LINGUISTIC LOGIC OF LIFE



ADDENDUM C
DIAGRAM OF ACCIDENT SCENE

STREET

N
↑

D 11

600'

G

D 10

4-57'-4"

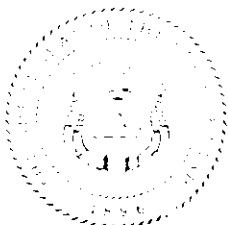
STREET

STREET

STREET

ADDENDUM D

**OPINION LETTER OF
ATTORNEY GENERAL'S OFFICE**



STATE OF UTAH

January 12, 1990

JOSEPH E. TENCH
OFFICE OF THE ATTORNEY GENERAL

HAND DELIVERED

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

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

Dear Magistrate Gould:

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

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

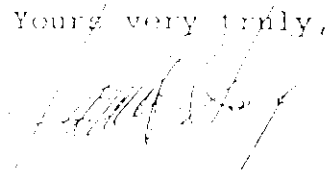
Since the exclusive remedy provision, Utah Code Ann. § 35-1-60, accomplishes its purpose by providing that "no action or law suit, action for money damages, may be maintained against an employer, there is no conflict with joining an employer as a party to apportion fault, a proceeding which cannot impose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

The foregoing statutes are sound and consistent in their purpose and their purpose is applied in this office believed in good faith. Their constitutionality will not be presented. If legal action is therefore to be taken by the Attorney General, it is left to his action at this time.

Honorable Calvin Gould
January 12, 1990
Page Two

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

Yours very truly,


JAMES R. SOPER
Assistant Attorney General
Litigation Division

JRS/sh

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

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

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

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

Roger E. Larson, Esq.
49 North First East
Brigham City, Utah 84302

Stephen C. Stevenson, Esq.
Assistant Attorney General
276 State Capitol
Salt Lake City, Utah 84114