

1991

Kenneth Ray Sullivan v. Trackmobile, Inc. : Petition for Rehearing

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 15
)	
TRACKMOBILE, INC.,)	
)	
Defendant and Petitioner.)	

PLAINTIFF SULLIVAN'S PETITION FOR REHEARING

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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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(1) and Rules 35 and 41, U.R.A.P. A slip opinion answering the certified questions from the U.S. District Court was issued by this Court on April 22, 1993. (Appendix A) This Court extended the time to file this petition for rehearing by order dated May 5, 1993. (Appendix B)

ISSUES PRESENTED

(1) Did the Court misperceive the statutory definition of "fault" contained in Utah Code Ann. § 78-27-37 (1992) and thus erroneously conclude that the Liability Reform Act was ambiguous?

(2) Does the Court's interpretation of the Liability Reform Act create irreconcilable conflicts with Utah Code Ann. § 31-1-62 (1988), a provision of the Utah Worker's Compensation Act?

(3) Does the Court's interpretation of the Liability Reform Act render the act unconstitutional?

(4) Did the Court misapprehend the legislative intent behind the Liability Reform Act?

STANDARD OF APPELLATE REVIEW

Pursuant to Rule 35, Utah Rules of Appellate Procedure, the Court grants a rehearing at its discretion.

DETERMINATIVE STATUTES

Utah Code Ann. § 78-27-37 et. seq. (Appendix C) and Utah Code Ann. § 35-1-62 (1988) (appendix D) are determinative.

STATEMENT OF THE CASE

The nature of the case, the course of proceedings below, and the statement of facts material to the resolution of this issue were set forth in the Order of Certification (Appendix E).

SUMMARY OF ARGUMENT

A. The Court Misapprehended the Definition of "Fault" as Defined in the Act.

The Court concluded that the Liability Reform Act was ambiguous, because the term "defendant" as defined in Utah Code Ann. § 78-27-37 (1992) appeared to contradict sections 78-27-38 and 40 (1992), which state that each defendant is liable only for that defendant's proportionate share of fault. The perceived ambiguity arose only because the Court applied the term "fault" in a moral sense to arrive at its determination. When the term "fault" is applied as statutorily defined, the definition of "defendant" is consistent with the principle that each defendant is responsible for its own proportionate share of "fault."

B. The Court's Interpretation that of Liability Reform Act Conflicts with the Worker's Compensation Act in Two Respects.

(1) The interpretation voids employee rights granted by Utah Code Ann. § 35-1-62.

Utah Code Ann. § 35-1-62 (1988) provides that a worker injured in the course of employment has both a right to collect worker's compensation, and if the injury was caused by the wrongful conduct of a third party, the right to bring an action against the third party for damages. The Court's interpretation of the

Liability Reform Act has voided the worker's right to both claim compensation and obtain damages.

- (2) The Court's interpretation of the Act regarding an employer's right to reimbursement renders the Worker's Compensation Act ambiguous.

The Court held that the employer is a "person seeking recovery" under the Liability Reform Act. Under the Act a person seeking recovery, such as an employer, cannot recover from any defendant or group of defendants whose negligence is less than the person seeking recovery. Yet, under § 35-1-62, the legislature provided that the employer is to be fully reimbursed from damages obtained from third parties regardless of the employer's negligence.

C. The Court's Interpretation of the Liability Reform Act Renders the Act Unconstitutional.

The Court's interpretation renders the Liability Reform Act incompatible with rights previously granted to an employee under the Utah Worker's Compensation Act. Accordingly, the Liability Reform Act is unconstitutional, because the legislature took a right from plaintiff Sullivan without providing a substitute benefit or without demonstrating a compelling governmental interest.

D. The Court Misapprehended the Legislative Intent Behind the Liability Reform Act.

Numerous affidavits of the 1986 legislators, including the sponsors and co-sponsors of the Act, clearly demonstrate that the intent of the legislature was not to have the employer's fault apportioned by the factfinder.

ARGUMENT

- I. THE COURT EMPLOYED A NON-STATUTORY DEFINITION OF "FAULT" TO DETERMINE THAT THE LIABILITY REFORM ACT WAS AMBIGUOUS.

On page 3 of the Slip Opinion, the Court acknowledged that "the best evidence of legislative intent is the plain language of the statute." However, on pages 4 and 5, the Court determined that the language of the statute was ambiguous and thereafter determined legislative intent from sources outside the statutory language. This determination of ambiguity was premised on the Court's application of a non-statutory definition of "fault." While the legislature statutorily defined the term "fault" to include only "actionable" breaches of duty, acts or omissions, the Court appears to have applied a much broader definition of "fault" to include a notion of moral culpability. Hence, the Court concluded that excluding employers in the fault apportionment would contravene § 78-27-30 and 40 of the Act:

If the Scoular parties, who allegedly contributed to the accident, are not included on the special verdict form, the remaining defendants will be potentially liable to plaintiff for an amount in excess of their proportion of fault. For example, if the Scoular parties were 90% at fault and the defendants remaining in the action were 10% at fault, the remaining defendants would be apportioned 100% of any damages awarded even though they were only 10% at fault. Such a result would violate the plain language of Sections 78-27-38 and -40.

Slip Opinion, p. 5. When one applies the statutorily defined definition of "fault," sections 78-27-37, -38, and -40 are consistent and unambiguous.

In discussing "fault" the Court addressed the meaning of the word "actionable" as used in the statutory definition:

The relevant definitions of the Act provide:

- (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

. . . .

Utah Code Ann. § 78-27-37(1), (2) (1986) (emphasis added). Plaintiff asserts that the requirement that "fault" be "actionable" precludes the inclusion of D&RG in apportionment.

Plaintiff urges a definition of "actionable" fault that is too restrictive. An act or omission may be actionable even if the plaintiff cannot, as a practical matter, secure a judgment against a defendant. Black's defines "actionable" as "[t]hat for which an action will lie, furnishing legal ground for an action." Black's Law Dictionary 29 (6th Ed. 1990). A plaintiff may have legal grounds for a cause of action against a defendant, and the defendant may be dismissed due to, for example, the assertion of a successful affirmative defense. Thus, the Act's definition of "fault" does not necessarily preclude the apportionment of fault of non-parties.

Slip Opinion, p. 11 (emphasis in the original.)

The Black's definition, upon which the Court relied, also refers the reader to the definition of "Cause of Action" which states:

The fact or facts which give a person a right to judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which would entitle [a]

party to sustain [an] action and give him a right to seek judicial remedy in his behalf.

Thus, Black's definition of "actionable" in conjunction with the definition of "cause of action" leads to the conclusion that for an act or omission to be "actionable" there must be legal grounds for the party to bring an action in a court to enforce a right.

While a plaintiff may have grounds to assert a claim in court and yet be denied that claim due to an affirmative defense (such as a statute of limitation), the same concept is not true in the employee-employer context. The only recognized cause of action that an employee may assert against his employer in court is the employer's refusal to pay worker's compensation benefits. In Salt Lake City v. Industrial Commission, 74 P.2d 657, 659 (Utah 1937), this Court stated:

When the employer refuses or ceases to pay compensation, the cause of action against him arises.

This result necessarily follows from the fact that an employee has no cause of action against his employer arising out of fault in the sense of moral culpability.

Early on, this Court noted in Baker v. Wycoff, 79 P.2d 77, 85 (Utah 1938):

The liability of the employer and insurance carrier accrues because of an accidental injury arising out of or in the course of employment. It does not depend on or arise out of negligence of the employer. The statute has provided a new remedy for injury in industry instead of common-law remedy for negligence.

The fact that fault plays no role in the worker's compensation context was most recently stated by the Utah Court of Appeals in

Large v. Industrial Commission of Utah, 758 P.2d 954, 956 (Utah App. 1988):

Proximate cause is used primarily in tort law and involves analysis of foreseeability, negligence and intervening causes. These factors are not present in the statutory worker's compensation system, which excludes consideration of fault.

Since an employee has no legal grounds for an action against his employer premised on an employer's acts, the employer cannot, as a matter of statutory definition, be at "fault" under the Liability Reform Act. Because the employer cannot be at "fault" under the statutory definition, there is no "fault" to be apportioned to the employer, and the non-employer defendants participate in damages in proportion to their own "fault" without reference to the employer's acts.

The Liability Reform Act is internally consistent and unambiguous when the defined terms are appropriately applied. This Court, therefore, does not need to refer to sources outside the specific language of the statute to determine the legislature's intent.

II. THE COURT'S INTERPRETATION OF THE LIABILITY REFORM ACT RENDERS THE ACT INCONSISTENT WITH THE WORKER'S COMPENSATION ACT.

On page 6 of the Slip Opinion, the Court states:

This interpretation of the Liability Reform Act is in harmony with the Worker's Compensation Act; "when a construction of an act will bring it into serious conflict with another act," we have a duty to "construe the acts to be in harmony and to avoid conflicts." Jerz v. Salt Lake County, 822 P.2d 770, 773 (Utah 1991) (citations omitted).

The Court's interpretation of the Liability Reform Act conflicts with the Worker's Compensation Act in two respects. First, the interpretation negates rights granted to the employee under Utah Code Ann. § 35-1-62 (1988). Second, the Court's categorization of the employer as "a person seeking recovery" under the Liability Reform Act places in question the employer's right to reimbursement under the Worker's Compensation Act.

A. The Court's Interpretation Precludes an Employee from Obtaining His or Her Statutorily Granted Right to Obtain Both Compensation and Damages.

Utah Code Ann. § 35-1-62 (1988) states in relevant part:

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, . . . the injured employee, . . . may claim compensation and the injured employee . . . may also have an action for damages against such third person.

While the foregoing statute purports to permit the injured employee to claim both compensation and damages, the Court's interpretation of the Liability Reform Act precludes any possibility of that eventuality ever taking place.

As the Court has previously recognized, § 35-1-62(2) provides that an employer "shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys fees." As the Court has interpreted the Liability Reform Act, non-employers liable in tort to the injured employee would pay only their proportionate share of damages based on their "fault." This recovery is always paid to the employer to the extent of the employer's lien.

If the recovery exceeded compensation, the net recovery to the employee is the total damages paid by the tortfeasors, and thus, the employee would, in essence, receive no compensation from the employer.¹ If the recovery was less than the worker's compensation, the employer would take the full recovery to satisfy its lien. The employee would therefore be left with only the net amount of the worker's compensation payment. One of these two alternatives results no matter what the apportionment of fault between the employer and non-employer defendants. Under the Court's interpretation of the Liability Reform Act, the employee has no possibility of ever receiving both compensation and damages -- a result not only clearly contradicting the terms of § 35-1-62 (1988) but also unconstitutional. (See Argument III.)

B. The Court's Interpretation Creates an Ambiguity as to What the Employer May Recover.

On page 7 of the Slip Opinion, the Court states:

Third, the Utah Liability Reform Act also provides for a jury to apportion the fault of "person seeking recovery." *Id.* § 78-27-39. The Act defines "person(s) seeking recovery" as "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." *Id.* § 78-27-37(3). Thus, due to the reimbursement provision of the Worker's Compensation Act, employers (or their insurance carriers) may be legitimately viewed as persons seeking recovery under the Act.

¹This Court recognized the inequity of this result, but indicated that Sullivan's remedy was a legislative one. Slip opinion, p. 11. Sullivan respectfully suggests that any legislative attempt to retroactively change the lien statute would most probably be held unconstitutional.

If the employer is considered "a person seeking recovery" under the Liability Reform Act, the provisions of § 78-27-38 come into play:

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. [Emphasis added.]

Under the Court's interpretation, the Liability Reform Act precludes an employer from obtaining damages if the employer's fault exceeds that of non-employer defendants. Yet, this result is directly contrary to the provisions of Utah Code Ann. § 35-1-62 (1988) which specifically states that the employer shall be reimbursed in full from the damages obtained from non-employer defendants.

III. THE COURT'S INTERPRETATION OF THE LIABILITY REFORM ACT RAISES SERIOUS CONSTITUTIONAL ISSUES.

The Court's opinion recognized that its interpretation of the Liability Reform Act shifted the risk of an immune or insolvent tortfeasor from other tortfeasors to the plaintiff. See Slip Opinion at 9. The Court erroneously suggested that "Plaintiff's recovery from nonemployer defendants would be reduced directly in proportion to the percentage of fault, if any, the jury attributes to the employer." Id. (See Point II -- The employee may well receive nothing from nonemployee defendants depending on the apportionment.)

At the same time, the lien reimbursement provisions of § 35-1-62 allow an employer or insurer to obtain full reimbursement without reduction in any respect by the employer's having contributed to the employee's injuries. See Slip Opinion, at 10. The

inequitable outcome of the interaction of these provisions as interpreted by the Court was noted:

Consequently, when a verdict is granted to the plaintiff in an amount equal to or greater than the employer's workers' compensation payments, the Act allows an at-fault employer to escape liability altogether at the expense of the injured employee. We agree with plaintiff that this result is inequitable, but the effect of the statutory language is clear.

Id. (footnote omitted).

The inequitable result visited upon the plaintiff through this interpretation is not simply unfortunate, but unconstitutional. The Court should interpret legislation in harmony with other, existing law and in a manner upholding its constitutionality, if at all possible. Murray City v. Hall, 663 P.2d 1314, 1317 (Utah 1983); State v. Stromberg, 783 P.2d 54, 58 (Utah App. 1989).

Under the Worker's Compensation Act the plaintiff is granted the right to pursue an action for an on-the-job injury, notwithstanding worker's compensation benefits, with the proviso that upon successfully obtaining a third party recovery those benefits must be repaid. Section 35-1-62. Once granted this right, Utah Const. Art. I, Sec. 11 (the "open courts provision") precludes it being abrogated without "an effective and reasonable alternative remedy 'by due court of law' for vindication of [one's] constitutional interest. Berry by and through Berry v. Beech Aircraft, 717 P.2d 670, 684 (Utah 1985). The substitute benefit "must be substantially equal in value or other benefit to the remedy abrogated. . . ." Id.

As the dissent notes, "the policy adopted by the legislature divides the fault of an immune party among both plaintiffs and defendants. The policy adopted by the majority, on the other hand, loads that fault entirely onto a plaintiff." Slip Opinion at 16, Stewart, J. dissenting (emphasis in original). The Court's interpretation of the Act directly abrogates a plaintiff's recovery to the extent fault is attributed to the employer, with no substitute benefit whatsoever. Such a result runs directly counter to the protections afforded by our Constitution in the open courts provision, Utah Const. Art. I, Sec. 11.

[T]he basic purpose of Article I, section 11 is to impose some limitation on [the power of the Legislature to create new rules of law and to abrogate old ones] for the benefit of those persons who are injured in their persons, property or reputations since they are generally isolated in society, belong to no identifiable group, and rarely are able to rally the political process in their aid.

Condemarin v. University Hosp., 775 P.2d 348, 357 (Utah 1989) (citing Berry, 717 P.2d at 676).

The Court's interpretation runs afoul of the due process clause, Utah Const. Art. I, Sec. 7, as well.² As this Court noted in Condemarin, "the open courts provision and the due process clause . . . have an overlapping function, to some extent, with respect to the abrogation of causes of action." Id. (citing Berry, 717 P.2d at 679). The Condemarin court recognized that "the seriousness of the

²Where the industrial injury results in death, the protections of the Utah Const. Art. XVI, Sec. 5 absolutely precluding abrogation of the right to recover damages for wrongful death are also compromised by the Court's application of the Act. See Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1989); Berry, 717 P.2d at 684, 685; Malan v. Lewis, 693 P.2d 661, 667 (Utah 1984).

abrogation of personal rights . . . [requires] a . . . straightforward balancing process. . . , " of a due process analysis where the Court will "assess the reasonableness" of the legislative incursion upon individual rights "against the degree of intrusion on rights protected by the Utah Constitution." Id. at 356-357.

Adopting the analytic process of Berry, the Condemarin court acknowledged that

Legislative attempts to abrogate those rights [protected by article I, section 11] should be closely examined by this Court and struck down when the disability they seek to impose on individual rights is too great to be justified by the benefits accomplished or when the legislation is simply an arbitrary and impermissible shifting of collective burdens to individual citizens.

Id. at 358. Such is the case at hand. The rights to third party recovery are protected by our Constitution. The interpretation of the Act adopted by this Court impermissibly abrogates those rights and arbitrarily shifts the burden entirely upon the injured plaintiff, rather than apportioning that burden as the legislation was intended to accomplish.

A legislative determination to interfere with, limit, or abrogate the availability of remedies for injuries to person, property, or reputation requires an important state interest and a rational means of implementation. The greater the intrusion upon the constitutionally protected interest, the great and more explicit the state's reasons must be. It is necessary for the legislature, first, and this Court, second, to balance the weight of the governmental interest at stake against the countervailing importance of the individual rights being compromised.

Id. This Court's opinion has identified no important government interest requiring this degree of compromise of the injured plain-

tiff's rights, nor is the one-sided application of that Act a rational means of implementation. As Justice Zimmerman noted in his concurrence in Condemarin,

The constitution's drafters understood that the normal political processes would not always protect the common law rights of all citizens to obtain remedies for injuries. . . . At any one time, only a small percentage of the citizenry will have recently been harmed and therefore will need to obtain a remedy from the members of any particular defendant class. The vast majority of the populace will have no interest in opposing legislative efforts to protect such a defendant class because the majority will not readily identify with those few persons unlucky enough to have been harmed. And those few persons directly affected will, in all likelihood, lack the political power to prevent the passage of legislation that, in essence, requires every member of the citizenry who is injured by members of the defendant class to bear some or all of the cost of those injuries.

Id. at 367 (Zimmerman, J., concurring in Part) (citations omitted).

IV. THE COURT MISAPPREHENDED THE LEGISLATIVE INTENT BEHIND THE LIABILITY REFORM ACT.

This Court recognized that its primary function is to accurately determine the legislative intent in interpreting a statute in dispute. "The Court's principal duty in interpreting statutes is to determine legislative intent" Slip Opinion, p. 3. The Appendix F contains the affidavits of numerous legislators from the 1986 session which overwhelmingly demonstrate that the legislative intent was to not have the employer's conduct included in the determination of fault.

Those legislators addressing the issue include the primary sponsor of S.B. 64 (which became the Liability Reform Act of 1986), Sen. Haven Barlow; the representative that carried the bill through

the House of Representatives, former Representative Jack DeMann; and numerous other present and former legislators who co-sponsored the bill and/or acted upon it. The legislative intent could not be more clearly stated than by the bill's sponsor, Sen. Barlow, who states at paragraph 9 of his affidavit, "It is my opinion that the Legislature intended that employers be excluded from any fault comparison so as not to alter the Worker's Compensation Act because their responsibility for their injured employees was already provided for in the Act."

CONCLUSION, RELIEF REQUESTED AND CERTIFICATION

Utah R. App. P. contemplates that rehearing may be granted if there are "points of law or fact which . . . the court has overlooked or misapprehended" Rule 35(a) U.R.A.P. Petitioner respectfully submits that for the foregoing reasons, the Court misapprehended legislative intent when interpreting the Liability Reform Act and that the Court should grant the petition for rehearing. Counsel certifies that this petition is presented in good faith and not for delay.

DATED this 20th day of May, 1993.

CHRISTENSEN, JENSEN & POWELL, P.C.

By M. Douglas Bayly
L. Rich Humpherys
M. Douglas Bayly
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CERTIFICATE OF SERVICE

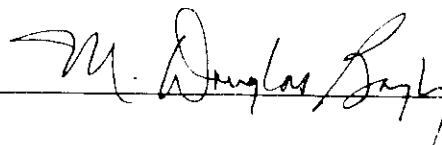
This is to certify that on the 20th day of May, 1993, four true and correct copies of the PLAINTIFF SULLIVAN'S PETITION FOR REHEARING were mailed, postage prepaid, to each of the following:

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APPENDIX A

Sullivan v. Scoular et al. Slip Opinion
No. 910482

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Kenneth Ray Sullivan,
Plaintiff,

v.

No. 910482

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,
formerly known as Whiting Corp.;
The Denver and Rio Grande
Western Railroad Company, a
Delaware corporation; Oregon
Short Line Railroad Company,
a Utah corporation; Utan
Power & Light Company, a
Utah corporation; and G.W.
Van Keppel Company, a
Missouri corporation,
Defendants.

F I L E D
April 22, 1993

Geoffrey J. Butler, Clerk

Federal Certification

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Line Railroad and Union Pacific Railroad
H. James Clegg, Salt Lake City, for Utah Power
and Light

On Certification from the United States District
Court for the District of Utah, Central Division,
The Honorable J. Thomas Greene

DURHAM, Justice:

This case comes to us pursuant to rule 41 of the Utah Rules of Appellate Procedure as a question certified from the United States District Court for the District of Utah. Two issues have been accepted on certification:

1. Under the Utah Comparative Fault Act,¹ 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.²

We hold that the purpose and intent of the Utah Liability Reform Act require that a jury account for the relative proportion of fault of a plaintiff's employer that may have caused or contributed to an accident, even though the employer is immune from suit. Apportionment of fault does not of itself subject the employer to civil liability. Rather, the apportionment process merely ensures that no defendant is held liable to any claimant for an amount of damages in excess of the percentage of fault attributable to that defendant.

We also hold that an individual or entity dismissed from a case pursuant to an adjudication on the merits of the

¹ These issues are reproduced exactly as certified by the United States District Court. However, "Utah Comparative Fault Act" is not the official name of the act cited here. In 1986, the Utah Legislature repealed what was the Comparative Negligence Act and enacted the present Liability Reform Act. 1986 Utah Laws ch. 199.

² These are issues of first impression in Utah. Defendant Trackmobile cited three Utah cases in support of the merits of its motion to apportion fault. We do not address those cases because they were decided before the enactment of the statute at issue and are not dispositive of any question now before the court.

liability issue may not be included in the apportionment.³ When a defendant is dismissed due to a determination of lack of fault as a matter of law, the defendant's exclusion from apportionment does not subject the remaining defendants to liability for damages in excess of their proportionate fault.

The following facts are taken from the federal district court's certification order. In October 1986, plaintiff Kenneth Sullivan lost his left arm and left leg in an accident on the railroad tracks at the Freeport Center in Clearfield, Utah. At the time of his injury, Sullivan was assigned to unload grain from rail cars into warehouses. He was employed by Scoular Grain Company, Freeport Center Associates, and Scoular Grain Company of Utah ("the Scoular parties").

Sullivan filed this action against the Scoular 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. In 1989, the federal district court found the Scoular parties immune from plaintiff's claim under the exclusive remedy provision of Utah's Workers' Compensation Law and dismissed them from the action. That court also found that defendant Denver & Rio Grande Western Railroad had no legal duty to Sullivan and dismissed it from the lawsuit. The remaining defendants in the case are Utah Power & Light, Trackmobile, G.W. Van Keppel, Union Pacific Railroad, and Oregon Short Line Railroad. A motion to dismiss Utah Power & Light for lack of jurisdiction is pending at this time.

Defendant Trackmobile moved to have the jury apportion and compare the fault of all the originally named defendants, whether dismissed or present at trial. Plaintiff opposed this motion, claiming that only the fault of parties who are defendants at trial may be compared.

I. IMMUNE EMPLOYERS

A. Statutory Interpretation

The court's principal duty in interpreting statutes is to determine legislative intent, and the best evidence of legislative intent is the plain language of the statute. Jensen

³ We do not decide whether a jury may apportion the fault of persons who are not parties in an action for reasons other than dismissal on the merits. The question may arise when potentially liable persons are excluded from an action due to, for example, failure of service of process, settlement, a covenant not to sue, a plaintiff's failure to join a party, an applicable statute of limitations, or some other affirmative defense.

v. Intermountain Health Care, Inc., 679 P.2d 903, 906 (Utah 1984).

Plaintiff argues that his former employers must be excluded from the apportionment process because they are not "defendants" under the Liability Reform Act's definition. Section 68-3-11 of the Utah Code states that "words and phrases . . . [which] are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition." Under section 78-27-39 of the Liability Reform Act, a jury may be instructed "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." Section 78-27-37(1) defines "defendant" as "any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery." (Emphasis added.) Therefore, plaintiff argues, because the district court found the Scoular parties to be "immune from suit" under the exclusive remedy provision of Utah Workers' Compensation Act, Utah Code Ann. § 35-1-60, they are not defendants and are excluded from apportionment under the plain language of the Act.

Excluding plaintiff's employers from the apportionment process, however, would directly conflict with the language of other sections of the Act which require that no defendant be held liable for damages in excess of its proportion of fault.⁴ The relevant portions of sections 78-27-38 and -40 read as follows:

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.

78-27-40. 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.

⁴ This is true except in those cases in which an employer did not cause or contribute to the employee's injury.

(Emphasis added.) If the Scoular parties, who allegedly contributed to the accident, are not included on the special verdict form, the remaining defendants will be potentially liable to plaintiff for an amount in excess of their proportion of fault. For example, if the Scoular parties were 90% at fault and the defendants remaining in the action were 10% at fault, the remaining defendants would be apportioned 100% of any damages awarded even though they were only 10% at fault.⁵ Such a result would violate the plain language of sections 78-27-38 and -40.

Thus, we are faced with two arguably contradictory statutes within the same article. Section 78-27-37 defines "defendant" in a way that appears to preclude the inclusion of an employer from apportionment. But excluding employers from apportionment would violate the mandate of section 78-27-40 that no defendant be held liable for damages greater than its proportion of fault. This conflict creates an ambiguity that requires the court to make a policy inference as to the overall purpose and intent of the Act.

B. Legislative History

"When interpreting an ambiguous statute, we first try to discover the underlying intent of the legislature, guided by the purpose of the statute as a whole and the legislative history." Hansen v. Salt Lake County, 794 P.2d 838, 841 (Utah 1990) (citations omitted). We then try to harmonize ambiguous provisions accordingly. Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1045 (Utah 1991).

In the 1986 session of the Utah Legislature, Substitute Senate Bill No. 64 proposed that a jury may determine 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.) Before being enacted, the bill was amended by deleting the part underlined above and inserting the word "and" before "to each defendant." The result is codified at Utah Code Ann. § 78-27-39:

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.

⁵ The percentages used here are merely for purposes of illustration and do not reflect any factual determination of the actual fault of the parties involved.

Sullivan argues that this amendment shows that the legislature did not intend to include nonparties in the apportionment process.

Trackmobile counters that the reason for the amendment is not clear and argues that, by contrast, the intent of the comparative negligence statute to limit a defendant's liability to his or her proportion of fault is clear. That purpose is to ensure that "no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant." Utah Code Ann. § 78-27-38.

"The primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve." Reeves v. Gentile, 813 P.2d 111, 115 (Utah 1991) (footnote omitted). Thus, failing to include immune employers in the apportionment violates the main purpose of the Act by improperly subjecting the remaining defendants to liability in excess of their proportion of fault.

Other portions of the Act's history support this conclusion. First, during a floor debate prior to the adoption of the bill, one senator observed that "it is the basic fairness concept we're driving at. The defendant ought to be on the hook only for its own percentage of damages, but ought not be the guarantor for everyone else's damages." Floor Debate, Utah Senate, 46th Leg. 1986, General Sess., Senate Day 31, Records No. 63 (Feb. 12, 1986). Second, each preliminary draft of Senate Bill 64 states in the title that the purpose of the Act was, among other things, "abolishing joint and several liability." If the jury is prevented in this case from considering the relative fault of the Scoular parties in the apportionment process, Trackmobile and the other defendants will be held liable in the event of a verdict for plaintiff, not only for their own proportionate share of fault, but also for the proportionate share of fault attributable to the Scoular parties. Thus, one of the major evils of joint and several liability would result, and the stated purpose of the legislature in abolishing it would be frustrated.

This interpretation of the Liability Reform Act is in harmony with the Workers' Compensation Act; "when a construction of an act will bring it into serious conflict with another act," we have a duty to "construe the acts to be in harmony and to avoid conflicts." Jerz v. Salt Lake County, 822 P.2d 770, 773 (Utah 1991) (citations omitted). The Workers' Compensation Act provides an injured employee's "exclusive remedy" against an employer in place of any other "civil liability" and provides that no "action at law" may be maintained against an employer based on any injury to an employee. Utah Code Ann. § 35-1-60. In our view, this exclusive remedy does not bar the Scoular parties from the apportionment process because apportionment is not an action at law and would not impose any civil liability on

the Scoular parties. Thus, the jury should consider acts or omissions by the Scoular parties in its liability deliberations.

Plaintiff's concerns about procedural problems with apportionment are not persuasive. We believe that employers are not prejudiced by being included in the apportionment process for three reasons. First, employers have a financial interest in the outcome of the action. The Workers' Compensation Act provides, "The person liable for compensation payments shall be reimbursed in full for all payments made [by the third-party defendant to the injured employee] less the proportionate share of costs and attorneys' fees" Id. § 35-1-62(2).

Second, the Workers' Compensation Act expressly provides employers (or their insurance carriers) notice and a reasonable opportunity to appear in the action. The Utah Workers' Compensation Act provides:

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.

Utah Code Ann. § 35-1-62.

Third, the Utah Liability Reform Act also provides for a jury to apportion the fault of "person[s] seeking recovery." Id. § 78-27-39. The Act defines "person seeking recovery" as "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." Id. § 78-27-37(3). Thus, due to the reimbursement provision of the Workers' Compensation Act, employers (or their insurance carriers) may be legitimately viewed as persons seeking recovery under the Act.

Therefore, employers have a financial interest in the apportionment process. Because the legislature has expressly provided (1) that employers be given notice and an opportunity to appear and (2) that the jury may apportion the fault of persons seeking recovery, we believe that it is not procedurally unfair for a jury to apportion the fault of nonparty employers.

C. Other Jurisdictions

Other states have dealt with the issue of how to apportion fault in workers' compensation third-party actions in a variety of ways. See Appendix for examples. Although these decisions involve somewhat different statutes, their reasoning may be helpful. For example, the California Court of Appeal

recently ruled in a case substantially similar to the case at bar. Mills v. MMM Carpets, Inc., 1 Cal. Rptr. 2d 813 (Ct. App. 1991), review dismissed, 10 Cal. Rptr. 2d 635 (1992). In Mills, a bank employee sued various parties for damages because she was injured when the heel of her shoe punctured a section of carpeting that had been laid over an uncovered utility hole. The employer's insurer intervened, seeking indemnity for workers' compensation benefits it had paid to the plaintiff on behalf of the employer. The defendants claimed that under California's Fair Responsibility Act, the contributive fault of the employer should be considered in determining the proportionate share of each defendant's liability for noneconomic damages. California's Fair Responsibility Act provides in relevant part:

In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

Cal. Civ. Code § 1431.2(a) (West Supp. 1993) (emphasis added). The court, noting that the purpose of the Act was to abolish the inequity and injustice of joint and several liability, decided that excluding the plaintiff's employer from apportionment would "result [in] a form of joint liability which the statute is meant to avoid" and held that "the apportionment of liability . . . must take into account the fault of all tortfeasors, whether or not they are named as defendants, [or] subject to liability for damages." 1 Cal. Rptr. at 814, 817. The court conceded that employers are "generally immune from tort liability" under California's workers' compensation law and noted in addition that the Fair Responsibility Act "is not intended, in any way, to alter the law of immunity." Id. at 818. Nevertheless, creating a rule which it found consistent with both acts, the court explained that "the negligent employer's fault in a case like this one is measured, not in order to impose tort liability on it, but to determine the comparative fault and commensurate liability of a defendant in the action." Id.

We have applied similar reasoning in holding that Utah's Liability Reform Act requires a jury to apportion the fault of a plaintiff's employer even though the employer is immune from suit under Utah's Workers' Compensation Act.

D. Equitable Considerations

Any judicial or legislative decision concerning tort liability requires a balancing of competing interests and a policy decision as to which party should bear the risks of an immune or insolvent tort-feasor. Prior to 1986, under joint and several liability, a tort-feasor bore the risk of paying not only his or her share of the plaintiff's damages, but also the shares of other tort-feasors who were impecunious or immune from suit. The 1986 Utah Liability Reform Act shifted the risks caused by impecunious or immune tort-feasors to the plaintiffs by abolishing joint and several liability and contribution among tort-feasors.

Plaintiff correctly asserts that if his employer's actions are included in apportionment, his recovery may be significantly reduced. Plaintiff's recovery from nonemployer defendants would be reduced directly in proportion to the percentage of fault, if any, the jury attributes to the employer.

On the other hand, in Trackmobile's view, fairness to the defendants requires that each defendant pay only its proportionate share of the plaintiff's damages. If the Scoular parties are not included in apportionment, Trackmobile and the other defendants would be liable for damages in excess of their proportion of fault. "There is nothing inherently fair about a defendant who is[, for example,] 10% at fault paying 100% of the loss" Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978).

General comparative negligence theory also supports the inclusion of nonparty employers in apportionment. For example, according to Heft and Heft:

It is accepted practice to include all tortfeasors in the apportionment question. This includes nonparties who may be unknown tortfeasors, phantom drivers, and persons alleged to be negligent but not liable in damages to the injured party such as in the third party cases arising in the workmen's compensation area.

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The reason for such rules 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.

Carroll R. Heft & C. James Heft, Comparative Negligence Manual, § 8.100, at 14 (John J. Palmer & Stephen M. Flanagan eds., rev.

ed. 1992) (footnote omitted). Thus, it is accepted practice for the jury to apportion the comparative fault of all tort-feasors when comparative negligence is at issue.⁶

Plaintiff also protests the detrimental effect on his recovery created by the employer reimbursement provisions of the Workers' Compensation Act. Section 35-1-62 provides for an employer or insurer to obtain reimbursement for any payments made to an injured employee. This lien is not reduced in any respect by the amount by which the employer's act or omission contributed to the employee's injuries. Thus, any judgment Sullivan wins against a party defendant will be reduced up to the amount the insurer in this case paid to Sullivan in workers' compensation benefits.

Consequently, when a verdict is granted to the plaintiff in an amount equal to or greater than the employer's workers' compensation payments, the Act allows an at-fault employer to escape liability altogether at the expense of the injured employee.⁷ We agree with plaintiff that this result is inequitable, but the effect of the statutory language is clear.

However, "[w]here statutory language is plain and unambiguous," we will "not look beyond the same to divine legislative intent." Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989). The language of section 35-1-62(2) is unambiguous on this point: "The person liable for compensation payments shall be reimbursed in full for all payments made [by a third party to an injured employee] less the proportionate share of costs and attorney's fees provided for in Subsection (1)." Utah Code Ann. § 35-1-62(2) (emphasis added). We are not free "to

⁶ A solid majority of states in the Pacific region have adopted the practice of apportioning the fault of nonparties in negligence actions. These states have done so either expressly by statute or by judicial interpretation. In addition, several states allow consideration of nonparty negligence while retaining joint and several liability. See Appendix for a sampling of cases.

⁷ The Kansas Supreme Court recognized the inequity in allowing a partially negligent employer to recover full subrogation in Negley v. Massey Ferguson, Inc., 625 P.2d 472, 475 (Kan. 1981), but refused to reduce the employer's lien because "[t]he extent and nature of the subrogation rights of an employer under the workmen's compensation statutes are matters for legislative determination." Id. at 476. To remedy this inequity, the Kansas Legislature amended its workers' compensation law to provide that the employer's subrogation interest "shall be diminished by the percentage of the damage award attributed to the negligence of the employer." Kan. Stat. Ann. § 44-504(d) (Supp. 1990).

assess the wisdom of a statutory scheme." West Jordan v. Morrison, 656 P.2d 445, 446 (Utah 1982). Moreover, no challenge to the validity of the reimbursement provision of the Workers' Compensation Act is before this court at this time. Thus, plaintiff's remedy on this point is a legislative one.

II. DISMISSED NONEMPLOYER DEFENDANTS

The remaining nonemployer defendants in the case are Utah Power & Light, Trackmobile, G.W. Van Keppel, Union Pacific Railroad, and Oregon Short Line Railroad. As noted above, the district court found that Denver & Rio Grande Western Railroad ("D&RG") had no legal duty to Sullivan and dismissed it from the lawsuit.

Trackmobile urges that all named defendants, including those dismissed from the proceeding, be included in apportionment. However, plaintiff argues that because the trial court dismissed D&RG, it is not a defendant and the jury may not consider its actions or omissions in the apportionment process. Plaintiff again relies heavily on the definitions of the Liability Reform Act for support. The relevant definitions of the Act provide:

(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
. . . .

Utah Code Ann. § 78-27-37(1), (2) (1986) (emphasis added). Plaintiff asserts that the requirement that "fault" be "actionable" precludes the inclusion of D&RG in apportionment.

Plaintiff urges a definition of "actionable" fault that is too restrictive. An act or omission may be actionable even if the plaintiff cannot, as a practical matter, secure a judgment against a defendant. Black's defines "actionable" as "[t]hat for which an action will lie, furnishing legal ground for an action." Black's Law Dictionary 29 (6th ed. 1990). A plaintiff may have legal grounds for a cause of action against a defendant, and the defendant may be dismissed due to, for example, the assertion of a successful affirmative defense. Thus, the Act's definition of "fault" does not necessarily preclude the apportionment of fault of nonparties.

Nevertheless, we hold that D&RG, which was dismissed pursuant to an adjudication on the merits, may not be included in apportionment. D&RG was dismissed due to a lack of fault as a

matter of law. Thus, D&RG's exclusion will not subject remaining defendants to potential liability for damages in excess of their proportionate fault.

Trackmobile has also raised an equal protection argument under the state and federal constitutions. Because we have interpreted the statutes at issue to require that the jury apportion the fault of employers of plaintiffs in third-party workers' compensation litigation, this issue need not be reached.

Based on the foregoing analysis, our answers to the questions certified from the federal court are as follows:

1. A jury may apportion the fault of employers under Utah Code Ann. § 78-27-38 to -43 notwithstanding their immunity under Utah Code Ann. § 35-1-60.

2. A jury may not apportion the fault of a party that has been dismissed from the lawsuit pursuant to an adjudication on the merits of the liability issue.

WE CONCUR:

Gordon R. Hall, Chief Justice

Michael D. Zimmerman, Justice

Appendix

Apportionment of Nonparty Fault in Negligence Actions in States Reported in the Pacific Reporter

States that have expressly adopted this practice by statute include Arizona, Ariz. Rev. Stat. Ann. § 12-2506.B (1991), Dietz v. General Elec. Co., 821 P.2d 166, 171 (Ariz. 1991) (including immune employers); Colorado, Colo. Rev. Stat. § 13-21-111.5(3)(a) (1987), Williams v. White Mountain Constr. Co., 749 P.2d 423, 429 (Colo. 1988) (same); Kansas, Kan. Stat. Ann. § 44-504(d) (1986 & Supp. 1991), Brabander v. Western Coop. Elec., 811 P.2d 1216, 1219 (Kan. 1986) (same); New Mexico, N.M. Stat. Ann. § 41-3A-1.B (1989), Taylor v. Delgarno Transp., Inc.,

667 P.2d 445, 448 (N.M. 1983) (same), overruled on other grounds, Montoya v. Akal Sec., Inc., 838 P.2d 971 (N.M. 1992); Washington, Wash. Rev. Code Ann. § 4.22.070(1) (1988), Clark v. Pacificorp, 822 P.2d 162, 165 (Wash. 1991) (same).

In other states, courts have interpreted general comparative negligence statutes to require apportionment of nonparty fault. California, Cal. Civ. Code § 1431.2(a) (West Supp. 1993), Mills v. MMM Carpets, Inc., 1 Cal. Rptr. 2d 813, 814 (Ct. App. 1991) (including immune employers), review dismissed, 10 Cal. Rptr. 2d 635 (1992); Hawaii, Haw. Rev. Stat. § 663-31(b)(2) (1988), Espaniola v. Cawdrey Mars Joint Venture, 707 P.2d 365, 373 (Haw. 1985) (same); Idaho, Idaho Code § 6-802 (1990), Pocatello Indus. Park v. Steel W. Inc., 621 P.2d 399, 403 & n.4 (Idaho 1980), Barringer v. State, 727 P.2d 1222, 1224 (Idaho 1986) (same); Oklahoma, Okla. Stat. Ann. tit. 23, § 13 (1987), Bode v. Clark Equip. Co., 719 P.2d 824, 826-27 (Okla. 1986) (same); Wyoming, Wyo. Stat. § 1-1-109 (1991), Burton v. Fisher Controls Co., 723 P.2d 1214, 1221 (Wyo. 1986) (including settling tort-feasors).

The following states retain joint and several liability but allow the consideration of nonparty negligence for the limited purpose of determining whether all or none of the total fault can be attributed to the nonparty. Alaska, Alaska Stat. § 09.17.080 (1991), Lake v. Construction Mach., Inc., 787 P.2d 1027, 1028, 1031 (Alaska 1990) (including immune employers); Montana, Mont. Code Ann. § 27-1-703(4) (1991) (expressly excluding immune employers).

In contrast, only two states flatly refuse to allow a jury to consider the fault of nonparties in apportionment. Nevada, Nev. Rev. Stat. Ann. § 41.141.2(b)(2) (1986), Warmbrodt v. Blanchard, 692 P.2d 1282, 1286 (Nev. 1984); Oregon, Or. R. Civ. P. §§ 18.470, -.480 (1991), Mills v. Brown, 735 P.2d 603, 605 (Or. 1987).

STEWART, Justice (Dissenting):

The majority opinion holds that an immune non-defendant should be included in the apportionment of fault to defendants under the Liability Reform Act. I submit that the majority, in direct defiance of the specific language of the Act and its legislative history, completely reverses the intended effect of the Act as to how fault should be apportioned when one of the parties whose negligence contributed to the plaintiff's injuries is immune from liability.

In 1973, the Utah Legislature adopted the Comparative Negligence Act, which abolished contributory negligence as an absolute bar to an action but left intact the doctrine of joint

and several liability. 1973 Utah Laws ch. 209. The Liability Reform Act, adopted in 1986, carried forward several provisions from the Comparative Negligence Act but dispensed with joint and several liability. 1986 Utah Laws ch. 199. Under the Act, fault is to be apportioned to each party, with each party bearing liability for its apportioned fault. No party is liable for fault apportioned to another party. Utah Code Ann. § 78-27-40.

The central issue in this lawsuit is how the Legislature intended to apportion the fault of a person immune from liability (a non-party) who is one of multiple tort-feasors causing a plaintiff's injuries. The Legislature specifically addressed and resolved that issue. The Act expressly provides that fault shall not be allocated to a party immune from liability. Section 78-27-39 states:

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

(Emphasis added.) Thus, fault is to be attributed only to "each person seeking recovery and to each defendant." The Act then defines the word "defendant" to specifically exclude persons who are immune from liability. Section 78-27-37 states:

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.

(Emphasis added.) This section makes clear that the term defendant does not include negligent persons who are immune from liability. In short, the Legislature contemplated the issue at hand and expressly provided that fault is to be allocated only among non-immune parties to a lawsuit, even though an immune person may be partly responsible for the plaintiff's injuries.

Two other sections in the Act not only reinforce, but compel the same conclusion. Section 78-27-41 states that either a plaintiff or a defendant who is a party to the litigation

may join as parties any defendants who may have caused or contributed to the injury or damages for which recovery is sought, for the purpose of having determined their respective proportions of fault.

(Emphasis added.) In connection with that section, § 78-27-39 requires special verdicts, when requested, for determining the fault attributed to "each person seeking recovery and to each defendant." Both the joinder and special verdict provisions are specifically designed to provide the necessary mechanism for attributing fault only to non-immune defendants (as defined by the Act) and to plaintiffs. Thus, immune persons may not be joined in an action, § 78-27-41, nor may fault be attributed to them. § 78-27-39. The majority's self-devised requirement that the fault of an immune party must be ascertained simply flouts these provisions.

The purpose of joinder is to determine the non-immune defendants' "respective proportions of fault." § 78-27-41. The "fault" to be allocated is defined by § 78-27-37(2) as any "actionable breach of legal duty . . . causing or contributing to injury or damages . . ." (Emphasis added.) Because an immune party's negligence is not an "actionable breach of legal duty," that negligence cannot be apportioned. In short, an immune party, such as plaintiff's employer in this action, has not engaged in an "actionable breach of legal duty" and simply is not subject to the special verdict apportionment procedure under the statute.

The Legislature could not have been more explicit and consistent in providing exactly how and to whom fault should be allocated. Indeed, the Legislature expressly rejected the position the majority adopts. Senate Bill 64, which became the Act in issue, initially provided:

The trial court may, and when requested by any party shall, direct the jury, if any, to find separate jury verdicts determining the total amount of damage sustained and the 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.) The Senate committee report shows that the italicized phrase was purposefully deleted. Left in, that phrase would have done exactly what the majority does today. The majority nevertheless dismisses this compelling piece of legislative history on the transparent ground that it is not clear why the language was deleted.

The Legislature consciously adopted a policy that excluded the negligence of non-immune persons from the fault apportionment process. Asserting that it would be unfair to make defendants bear the fault of an immune party, the majority simply sets aside the judgment of the Legislature as expressed in the explicit statutory language and imposes its own policy. What the

majority fails to recognize is that the policy adopted by the Legislature divides the fault of an immune party among both plaintiffs and defendants. The policy adopted by the majority, on the other hand, loads that fault entirely onto a plaintiff.

The legislative policy is neither irrational nor inequitable. Practically speaking, a jury would naturally be inclined to allocate the fault of an immune person among both plaintiffs and defendants. If a plaintiff is 20% at fault, each of two named defendants is 30% at fault, and an immune person is 20% at fault, the Legislature could reasonably assume that a jury would allocate the immune person's 20% fault among the plaintiff and the defendants, probably according to their respective percentages of "actionable fault." Thus, there is no reason to assume, as the majority does, that the immune person's fault will be attributed solely to defendants under Utah's comparative negligence scheme.

The majority position will necessarily result in the entire amount of an immune person's fault being deducted from a plaintiff's damages. The blatant inequity of that position is especially acute when an immune employer's insurance company claims all or part of a plaintiff's recovery by way of subrogation under the Workers' Compensation Act.

The majority rejects clear and consistent statutory language and its compelling legislative history with the extraordinary argument that "failing to include immune employers in the apportionment violates the main purpose of the Act by improperly subjecting the remaining defendants to liability in excess of their proportion of fault." I see nothing improper in the legislative scheme. The fact is that it is for the Legislature--not this Court--to decide how to deal with the fault of an immune party in a multi-defendant comparative negligence case.

While it is true that the Act abolishes joint and several liability, that was not its sole purpose. The Act also provides the manner in which fault should be allocated in comparative negligence cases and how the universe of actionable fault should be apportioned when one party is immune. As noted, even a plaintiff may be held responsible for a part of an immune person's negligence under the provisions of the Act. Defining the universe of fault, as the Legislature has done, is not, at bottom, an issue of joint and several liability. Rather, the process turns on the concepts underlying proximate cause.

The existence of fault has always depended upon whether the negligence of a party had a substantial causative connection to a plaintiff's injuries. Because the law requires only a substantial causative connection, a defendant or defendants may be held legally responsible for causing an injury, even though there are some actual causes for which the defendant or

defendants are not responsible. But if a defendant's negligence is not a substantial cause of the plaintiff's injuries, then no liability may attach to that defendant. For this reason, proximate cause is defined in terms of substantial causative factors. That point is critical in the policy the Legislature adopted. If an immune person's negligence is great enough, a jury would be obliged to find that the named non-immune defendants did not proximately cause the injury, even if they were negligent, and thus deny the plaintiff any recovery. But if the immune person's negligence is not that great, a jury will have to determine the relative proportion of actionable fault attributable to the plaintiffs and the named defendants. In this process, the universe of fault to which the plaintiff and the defendants contributed is the universe of actionable fault.

The damage the majority does to the legislative scheme and to a plaintiff's rights is exacerbated by the provision in the Workers' Compensation Act that gives an employer (whose fault may have contributed to a plaintiff's injuries) a lien against the plaintiff's damage recovery for benefits paid out of workers' compensation. Thus, not only is the plaintiff made responsible for the employer's proportionate share of fault, but he must also reimburse his employer out of his diminished recovery for any workers' compensation benefits received. This is not only unjust and inequitable, but might well be unconstitutional.

Howe, Associate Chief Justice, does not participate herein.

APPENDIX B

Order Extending Time to File Petition for Rehearing

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IN THE SUPREME COURT OF THE STATE OF UTAH


KENNETH RAY SULLIVAN,)	
)	
Plaintiff/Certified)	No. 910482
Plaintiff,)	
)	
v.)	87-C-330G
)	Priority 12
)	
UNION PACIFIC RAILROAD COMPANY;)	
a Utah corporation, TRACKMOBILE,)	ORDER EXTENDING TIME
INC., a Georgia corporation,)	TO FILE PETITION FOR
formerly known as Whiting Corp.,)	REHEARING
THE 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.)	

Pursuant to the ex-parte motion of Kenneth Sullivan and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Sullivan may have to and including May 20, 1993 to file his petition for rehearing in the above-captioned matter.

DATED this 5 day of May, 1993.

BY THE COURT:


 Utah Supreme Court Justice

The Court, after review of the bases of the Workers' Compensation Fund of Utah's Motion to Appear as Amicus Curiae in the above appeal, grants the Motion.

Dated this 5 day of May, 1993.

BY THE COURT

A handwritten signature in cursive script, appearing to read "Richard C. Howe", written over a horizontal line.

JUSTICE.

APPENDIX C

Utah Code § 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 Eng'g, 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 renter'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*, 813 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(h).

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. Brinkerhoff 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 D

Utah Code § 35-1-62

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.

History: L. 1917, ch. 100, § 72; C.L. 1917, § 3133; L. 1921, ch. 100, § 1; R.S. 1933, 42-1-58; L. 1939, ch. 51, § 1; C. 1943, 42-1-58; L. 1945, ch. 65, § 1; 1971, ch. 76, § 3; 1973, ch. 67, § 7; 1975, ch. 101, § 3.

APPENDIX E

Order of Certification

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 Victoria K. Kidman, 5302
 STRONG & HANNI
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 Sixth Floor Boston Building
 9 Exchange Place
 Salt Lake City, Utah 84111
 Telephone: (801) 532-7080

FILED IN UNITED STATES DISTRICT
 COURT, DISTRICT OF UTAH

OCT 07 1991

MARKUS B. ZIMMER, 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 Scouler 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.

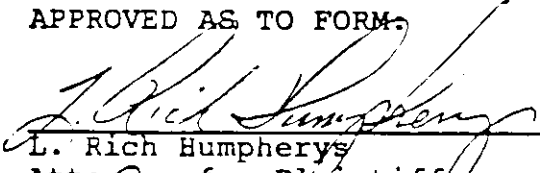
DATED this 4th day of October, 1991.


BY THE COURT:

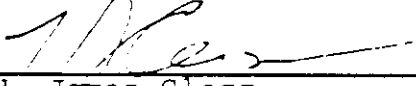


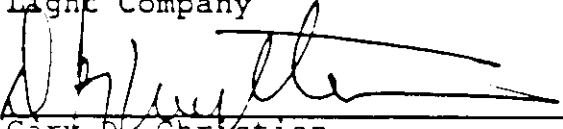
Thomas J. Greene
U.S. District Court Judge

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.
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APPENDIX F

Affidavits

CALLISTER, DUNCAN & NEBEKER
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Dennis V. Lloyd #1984
Attorney at Law
392 East 6400 South
Salt Lake City, Utah 84107
Telephone: (801) 288-8060

Attorneys for Amicus Curiae Workers Compensation Fund of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

KENNETH RAY SULLIVAN,)
)
Plaintiff,)
)
vs.)
)
SCOULAR GRAIN COMPANY OF)
UTAH; UNION PACIFIC RAILROAD)
COMPANY, a UTAH CORPORATION;)
THE SCOULAR COMPANY, ROBERT)
O'BLOCK, and GORDON OLCH,)
dba FREEPORT CENTER)
ASSOCIATES; TRACKMOBILE,)
INC., a GEORGIA CORPORATION,)
FORMERLY KNOWN AS WHITING)
CORP.; THE DENVER AND RIO)
GRANDE WESTERN RAILROAD)
COMPANY, A SHORT LINE)
RAILROAD COMPANY, a DELAWARE)
CORPORATION; OREGON SHORT)
LINE RAILROAD COMPANY, a)
UTAH CORPORATION; UTAH POWER)
& LIGHT COMPANY, A UTAH)
CORPORATION; and G.W. VAN)
KEPPEL COMPANY, a MISSOURI)
CORPORATION,)
)
Defendants.)

AFFIDAVIT OF SENATOR
HAVEN J. BARLOW, SPONSOR OF
S.B. 64, 1986 UTAH
LEGISLATURE a/k/a LIABILITY
REFORM ACT OF 1986

Utah Supreme Court No.
910482

* * * * *

Senator Haven J. Barlow, being first duly sworn, deposes and states the following to be true to his personal knowledge:

1. During the 1986 session of the Utah Legislature I was and I am currently a duly elected Senator serving in the Senate of the State of Utah.

2. I was principal sponsor of Senate Bill 64 (hereinafter S.B. 64"), a proposed Liability Reform Act. After my bill's initial version was drafted and circulated among legislators and interested parties, I became aware that the State Insurance Fund (now known as the Workers Compensation Fund of Utah, hereinafter "WCF") and others had serious concerns about the affect the proposed legislation would have on the Workers' Compensation Act of Utah (Sections 35-1-1 et seq. U.C.A.). We did not want to disturb in any manner the present procedures and operation of the WCF or Utah's workers' compensation system.

3. The concern with the original versions of S.B. 64 as expressed to me by those parties was that the language might disturb or could alter the procedures of the workers' compensation system in several ways.

4. After my study of the situation, I became convinced that S.B. 64 should be amended to avoid any potential that it would increase the cost of or alter the workers' compensation system as it had existed theretofore.

5. Therefore, after further discussions with interested parties and other legislators, S.B. 64 was amended to address those concerns. As part of those changes, the term "defendant" was then

limited by definition to "...those not immune from suit." (Section 78-27-37 U.C.A.).

6. To leave no doubt of the relationship of the Liability Reform Act of 1986 to the Workers Compensation Act, S.B. 64 included as proposed Section 78-27-43 U.C.A. the language that nothing in the Act was to "...affect or impair...the exclusive remedy provisions of Title 35, Chapter 1."

7. S.B. 64 was then passed into law with little floor debate.

8. The 1986 Legislature intended to do away with joint and several liability that had previously been the law in Utah. The Legislature perceived joint and several liability to be an unfair spreading of the responsibility for negligently caused injuries.

9. It is my opinion that the Legislature intended that employers be excluded from any fault comparison so as not to alter the Workers' Compensation Act because their responsibility for their injured employees was already provided for in the Act. The Legislature did not want to do anything that would affect the balance between injured workers' and employers' rights as contained in the Workers' Compensation Act of Utah. Specifically, the Legislature did not want to affect the "exclusive remedy" protection of Section 35-1-60 U.C.A., the cost to employers of providing no fault workers' compensation benefits for their employees, or the subrogation right of Section 35-1-62, U.C.A.

10. At this time, I have no recollection of any floor debate or discussions among legislators which would demonstrate any legislative intent regarding S.B. 64 contrary to that which I have stated in this affidavit.

SENATOR HAVEN *J. BARLOW*

On the 19th day of May, 1993, personally appeared before me Senator Haven Barlow, the signer of the above instrument, and duly acknowledged to me that he executed the same.

Dennis V. Floyd
NOTARY PUBLIC

7-20-95

NOTARY PUBLIC
DENNIS V. LLOYD
1321 Rebecca Circle
Salt Lake City, Utah 84117
My Commission Expires 7/20/95
STATE OF UTAH

DENNIS V. LLOYD #1984
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Attorneys for Amicus Curiae Workers Compensation Fund of
Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

KENNETH RAY SULLIVAN,,)	AFFIDAVIT OF FORMER
)	REPRESENTATIVE,
Plaintiffs,)	JACK DEMANN REGARDING
)	S.B. 64, 1986 UTAH
vs.)	LEGISLATURE a/k/a THE
)	LIABILITY REFORM ACT OF
)	1986
SCOULAR GRAIN COMPANY OF)	
UTAH; UNION PACIFIC RAILROAD)	
COMPANY, a Utah Corporation;)	Utah Supreme Court No.
THE SCOULAR COMPANY, ROBERT)	910482
O'BLOCK AND GORDON OLCH, dba)	
FREEPORT CENTER ASSOCIATES;)	
TRACKMOBILE, INC., a Georgia)	
Corporation, Formerly Known)	
as WHITING CORP.; THE DENVER)	
AND RIO GRANDE WESTERN)	
RAILROAD COMPANY, A SHORT)	
LINE RAILROAD COMPANY, a)	
Delaware Corporation; OREGON)	
SHORT LINE RAILROAD COMPANY,)	
a Utah Corporation; UTAH)	
POWER & LIGHT COMPANY, a)	
Utah Corporation; and G.W.)	
VAN KEPPEL COMPANY, a)	
Missouri Corporation,,)	
)	
Defendants.)	

* * * * *

Jack DeMann, being first duly sworn, deposes and states the following to be true to his personal knowledge:

1. During the 1986 session of the Utah Legislature, I was a duly elected Representative serving in the House of Representatives.

2. I recall Senate Bill 64 (hereinafter "S.B. 64"), the Liability Reform Act of 1986 (hereinafter the "Act") passed during the 1986 Legislative Session. I served as that Act's House Sponsor.

3. In passing the Act, the Legislature did not intend to affect Utah's workers' compensation system in any way whatsoever.

4. I have reviewed the affidavits dated the 19th day of May 1993 of Senator Haven J. Barlow and former Senator Paul Rogers concerning the intent of the 1986 Legislature in passing the Act. From my personal knowledge I concur that my intent and that of the House of Representatives at the time of passage of S.B. 64 was as stated in those affidavits.

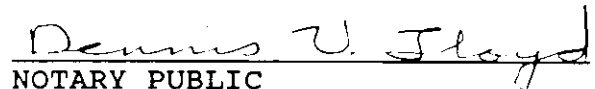
5. To the best of my knowledge, no representative expressed any intent for the language of S.B. 64 different than that which I have stated herein nor different than that

stated by Senator Barlow and former Senator Paul Rogers in their affidavits.


Jack DeMann

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On the 19th day of May, 1993, personally appeared before me Former Representative Jack DeMann, the signer of the above instrument, and duly acknowledged to me that he executed the same.


NOTARY PUBLIC

My Commission Expires:

7-20-95

Residing at: S.L.C. UT



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Attorneys for Amicus Curiae Workers Compensation Fund of
Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

KENNETH RAY SULLIVAN,,)	AFFIDAVIT OF FORMER
)	SENATOR Paul Rogers, A
Plaintiffs,)	SPONSOR OF S.B. 64, 1986
)	UTAH LEGISLATURE a/k/a
vs.)	THE LIABILITY REFORM ACT
)	OF 1986
SCOULAR GRAIN COMPANY OF)	
UTAH; UNION PACIFIC RAILROAD)	Utah Supreme Court No.
COMPANY, a Utah Corporation;)	910482
THE SCOULAR COMPANY, ROBERT)	
O'BLOCK AND GORDON OLCH, dba)	
FREEPORT CENTER ASSOCIATES;)	
TRACKMOBILE, INC., a Georgia)	
Corporation, Formerly Known)	
as WHITING CORP.; THE DENVER)	
AND RIO GRANDE WESTERN)	
RAILROAD COMPANY, A SHORT)	
LINE RAILROAD COMPANY, a)	
Delaware Corporation; OREGON)	
SHORT LINE RAILROAD COMPANY,)	
a Utah Corporation; UTAH)	
POWER & LIGHT COMPANY, a)	
Utah Corporation; and G.W.)	
VAN KEPPEL COMPANY, a)	
Missouri Corporation,,)	
)	
Defendants.)	

* * * * *

Former Senator Paul Rogers, being first duly sworn, deposes and states the following to be true to his personal knowledge:

1. During the 1986 session of the Utah Legislature I was a duly elected Senator serving in the Senate of the State of Utah. I am currently under contract with the Workers' Compensation Fund of Utah (hereinafter the "Fund") as a consultant regarding legislative matters which affect the workers compensation system and the Fund's operations.

2. I was a sponsor of Senate Bill 64 (hereinafter "S.B. 64"), the Liability Reform Act of 1986 (hereinafter the "Act").

3. I am familiar with the amendments that were made to S.B. 64.

4. I have reviewed the affidavit dated the 19th day of May, 1993, of Senator Haven J. Barlow concerning the intent of the 1986 Legislature (hereinafter the "Legislature") in passing the Act. From my personal knowledge I concur that my intent and that of the 1986 Legislature was as stated by Senator Barlow.

5. Also, I have read the Supreme Court of Utah's decision in the case of Sullivan vs. Scoular Grain Company of Utah, et al., Utah Supreme Court No. 910482. The majority opinion therein determined a legislative intent contrary to my intent as a sponsor of the legislation and contrary to the intent of the Legislature. It was never the

6. To the best of my knowledge, no legislator expressed any intent for the language of S.B. 64 different than that which I have stated herein nor different than that stated by Senator Barlow in his affidavit.

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

- 3 -

instrument, and duly acknowledged to me that he executed the same.

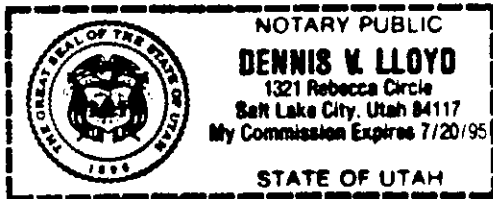
My Commission Expires:

7-20-95

Dennis V. Lloyd
NOTARY PUBLIC

Residing at: SLC, ut

81484-1



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Attorneys for Amicus Curiae Workers Compensation Fund of
Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

KENNETH RAY SULLIVAN,,)	AFFIDAVIT OF SENATOR
)	ARNOLD CHRISTENSEN,
Plaintiffs,)	REGARDING S.B. 64, 1986
)	UTAH LEGISLATURE a/k/a
vs.)	THE LIABILITY REFORM ACT
)	OF 1986
SCOULAR GRAIN COMPANY OF)	
UTAH; UNION PACIFIC RAILROAD)	Utah Supreme Court No.
COMPANY, a Utah Corporation;)	910482
THE SCOULAR COMPANY, ROBERT)	
O'BLOCK AND GORDON OLCH, dba)	
FREEPORT CENTER ASSOCIATES;)	
TRACKMOBILE, INC., a Georgia)	
Corporation, Formerly Known)	
as WHITING CORP.; THE DENVER)	
AND RIO GRANDE WESTERN)	
RAILROAD COMPANY, A SHORT)	
LINE RAILROAD COMPANY, a)	
Delaware Corporation; OREGON)	
SHORT LINE RAILROAD COMPANY,)	
a Utah Corporation; UTAH)	
POWER & LIGHT COMPANY, a)	
Utah Corporation; and G.W.)	
VAN KEPPEL COMPANY, a)	
Missouri Corporation,,)	
)	
Defendants.)	

* * * * *

Senator Arnold Christensen, being first duly sworn,
deposes and states the following to be true to his personal
knowledge:

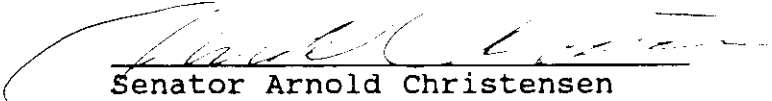
1. During the 1986 session of the Utah Legislature I
was and currently am a duly elected Senator serving in the
Utah State Legislature and functioning in the office of
Senate President.

2. I recall Senate Bill 64 (hereinafter "S.B. 64"),
the Liability Reform Act of 1986 (hereinafter the "Act")
passed during the 1986 Legislative Session.

3. In passing the Act, the Legislature did not intend
to affect Utah's workers' compensation system in any way
whatsoever.

4. Specifically the Legislature did not intend to do
anything that would in any way affect or call in question
the "Exclusive Remedy Protection" afforded employers by UCA
Section 35-1-60, or add to the cost borne by employers of
providing no-fault workers' compensation benefits to their
employees.

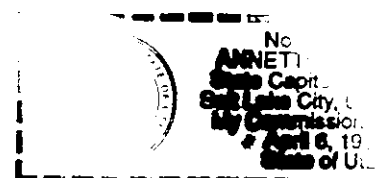
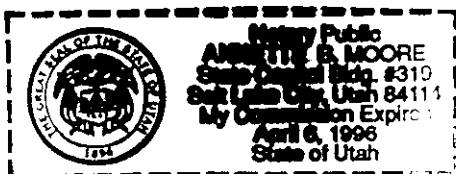
5. To the best of my knowledge, no legislator
expressed any intent for the language of S.B. 64 different
than that which I have stated herein.


Senator Arnold Christensen

STATE OF UTAH

COUNTY OF SALT LAKE

)
:ss.
)



On the 19th day of May, 1993, personally appeared
before me Senator Arnold Christensen the signer of the above
instrument, and duly acknowledged to me that he executed the
same.

My Commission Expires:

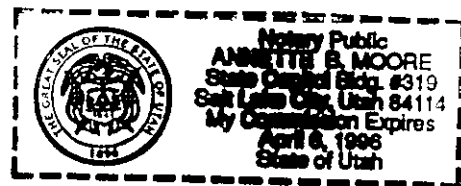
4/6/96

Annette B. Moore
NOTARY PUBLIC

Residing at: 119 Randall
SLC, ut.

81484-1

B:\REPRESENT.APF



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Attorneys for Amicus Curiae Workers Compensation Fund of
Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

KENNETH RAY SULLIVAN,,)	AFFIDAVIT OF SENATOR
)	STEPHEN J. REES,
Plaintiffs,)	REGARDING S.B. 64, 1986
)	UTAH LEGISLATURE a/k/a
vs.)	THE LIABILITY REFORM ACT
)	OF 1986
SCOULAR GRAIN COMPANY OF)	
UTAH; UNION PACIFIC RAILROAD)	Utah Supreme Court No.
COMPANY, a Utah Corporation;)	910482
THE SCOULAR COMPANY, ROBERT)	
O'BLOCK AND GORDON OLCH, dba)	
FREEPORT CENTER ASSOCIATES;)	
TRACKMOBILE, INC., a Georgia)	
Corporation, Formerly Known)	
as WHITING CORP.; THE DENVER)	
AND RIO GRANDE WESTERN)	
RAILROAD COMPANY, A SHORT)	
LINE RAILROAD COMPANY, a)	
Delaware Corporation; OREGON)	
SHORT LINE RAILROAD COMPANY,)	
a Utah Corporation; UTAH)	
POWER & LIGHT COMPANY, a)	
Utah Corporation; and G.W.)	
VAN KEPPEL COMPANY, a)	
Missouri Corporation,,)	
)	
Defendants.)	

* * * * *

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Attorneys for Amicus Curiae Workers Compensation Fund of
Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

KENNETH RAY SULLIVAN,,)	AFFIDAVIT OF SENATOR
)	ELDON A. MONEY
Plaintiffs,)	REGARDING S.B. 64, 1986
)	UTAH LEGISLATURE a/k/a
vs.)	THE LIABILITY REFORM ACT
)	OF 1986
SCOULAR GRAIN COMPANY OF)	
UTAH; UNION PACIFIC RAILROAD)	Utah Supreme Court No.
COMPANY, a Utah Corporation;)	910482
THE SCOULAR COMPANY, ROBERT)	
O'BLOCK AND GORDON OLCH, dba)	
FREEPORT CENTER ASSOCIATES;)	
TRACKMOBILE, INC., a Georgia)	
Corporation, Formerly Known)	
as WHITING CORP.; THE DENVER)	
AND RIO GRANDE WESTERN)	
RAILROAD COMPANY, A SHORT)	
LINE RAILROAD COMPANY, a)	
Delaware Corporation; OREGON)	
SHORT LINE RAILROAD COMPANY,)	
a Utah Corporation; UTAH)	
POWER & LIGHT COMPANY, a)	
Utah Corporation; and G.W.)	
VAN KEPPEL COMPANY, a)	
Missouri Corporation,,)	
)	
Defendants.)	

* * * * *

Senator Eldon A. Money, being first duly sworn, deposes and states the following to be true to his personal knowledge:

1. During the 1986 session of the Utah Legislature I was and I am currently a duly elected member of the Utah Legislature.

2. I recall Senate Bill 64 (hereinafter "S.B. 64"), the Liability Reform Act of 1986 (hereinafter the "Act") passed during the 1986 Legislative Session.

3. In passing the Act, the Legislature did not intend to affect Utah's workers' compensation system in any way whatsoever.

Eldon A. Money
Senator Eldon A. Money

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

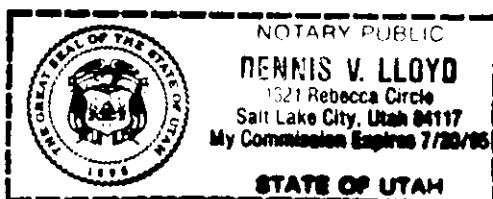
On the 19th day of May, 1993, personally appeared before me Senator Eldon A. Money, the signer of the above instrument, and duly acknowledged to me that he executed the same.

Dennis V. Lloyd
NOTARY PUBLIC

My Commission Expires:

Residing at: S.L.C., UT.

7-20-95



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Attorneys for Amicus Curiae Workers Compensation Fund of
Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

KENNETH RAY SULLIVAN,,)	AFFIDAVIT OF SENATOR
)	BLAZE D. WHARTON,
Plaintiffs,)	REGARDING S.B. 64, 1986
)	UTAH LEGISLATURE a/k/a
vs.)	THE LIABILITY REFORM ACT
)	OF 1986
SCOULAR GRAIN COMPANY OF)	
UTAH; UNION PACIFIC RAILROAD)	Utah Supreme Court No.
COMPANY, a Utah Corporation;)	910482
THE SCOULAR COMPANY, ROBERT)	
O'BLOCK AND GORDON OLCH, dba)	
FREEPORT CENTER ASSOCIATES;)	
TRACKMOBILE, INC., a Georgia)	
Corporation, Formerly Known)	
as WHITING CORP.; THE DENVER)	
AND RIO GRANDE WESTERN)	
RAILROAD COMPANY, A SHORT)	
LINE RAILROAD COMPANY, a)	
Delaware Corporation; OREGON)	
SHORT LINE RAILROAD COMPANY,)	
a Utah Corporation; UTAH)	
POWER & LIGHT COMPANY, a)	
Utah Corporation; and G.W.)	
VAN KEPPEL COMPANY, a)	
Missouri Corporation,,)	
)	
Defendants.)	

* * * * *

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Salt Lake City, Utah 84107
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JAMES R. BLACK #0357
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Salt Lake City, Utah 84133
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Attorneys for Amicus Curiae Workers Compensation Fund of
Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

KENNETH RAY SULLIVAN,,)	AFFIDAVIT OF
)	REPRESENTATIVE JAMES
Plaintiffs,)	YARDLEY REGARDING S.B.
)	64, 1986 UTAH
vs.)	LEGISLATURE a/k/a THE
)	LIABILITY REFORM ACT OF
)	1986
SCOULAR GRAIN COMPANY OF)	
UTAH; UNION PACIFIC RAILROAD)	
COMPANY, a Utah Corporation;)	Utah Supreme Court No.
THE SCOULAR COMPANY, ROBERT)	910482
O'BLOCK AND GORDON OLCH, dba)	
FREEPORT CENTER ASSOCIATES;)	
TRACKMOBILE, INC., a Georgia)	
Corporation, Formerly Known)	
as WHITING CORP.; THE DENVER)	
AND RIO GRANDE WESTERN)	
RAILROAD COMPANY, A SHORT)	
LINE RAILROAD COMPANY, a)	
Delaware Corporation; OREGON)	
SHORT LINE RAILROAD COMPANY,)	
a Utah Corporation; UTAH)	
POWER & LIGHT COMPANY, a)	
Utah Corporation; and G.W.)	
VAN KEPPEL COMPANY, a)	
Missouri Corporation,,)	
)	
Defendants.)	

* * * * *

Representative James Yardley, being first duly sworn, deposes and states the following to be true to his personal knowledge:

1. During the 1986 session of the Utah Legislature I was a duly elected Representative serving in the House of Representatives of the State of Utah. I have continued serving in that capacity to this day.

2. I recall clearly Senate Bill 64 (hereinafter "S.B. 64"), the Liability Reform Act of 1986 (hereinafter the "Act").

3. I am familiar with the final version of S.B. 64 which eventually came to the floor of the House of Representatives for passage.


4. I have reviewed the affidavits dated the 19th day of May 1993 of Senator Haven J. Barlow and former Senator Paul Rogers concerning the intent of the 1986 Legislature (hereinafter the "Legislature") in passing the Act. From my personal knowledge I concur that my intent and that of the House of Representatives at the time of passage of S.B. 64 was as stated in those affidavits.

5. The intent of the Legislature was that the workers compensation system was not to be affected in any way whatsoever.

6. To the best of my knowledge, no representative expressed any intent for the language of S.B. 64 different than that which I have stated herein or different than that

James F. Yardley
Representative James Yardley

Dennis U. Floyd
NOTARY PUBLIC


 NOTARY PUBLIC
DENNIS V. LLOYD
 1321 Rebecca Circle
 Salt Lake City, Utah 84117
 My Commission Expires 7/20/95
 STATE OF UTAH

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Salt Lake City, Utah 84133
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Attorneys for Amicus Curiae Workers Compensation Fund of
Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

KENNETH RAY SULLIVAN,,)
)
Plaintiffs,)

vs.)

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

Defendants.)

AFFIDAVIT OF

Senator

John P. Halmgren

REGARDING S.B. 64, 1986

UTAH LEGISLATURE a/k/a

THE LIABILITY REFORM ACT
OF 1986

Utah Supreme Court No.
910482

* * * * *

Senator John P. Halmgren, being first duly sworn, deposes and states the following to be true to his personal knowledge:

1. During the 1986 session of the Utah Legislature I was and I am currently a duly elected member of the Utah Legislature.

2. I recall Senate Bill 64 (hereinafter "S.B. 64"), the Liability Reform Act of 1986 (hereinafter the "Act") passed during the 1986 Legislative Session.

3. In passing the Act, the Legislature did not intend to affect Utah's workers' compensation system in any way whatsoever.

John P. Halmgren

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

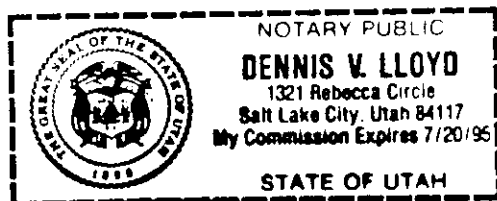
On the 19th day of May, 1993, personally appeared before me Senator John P. Halmgren, the signer of the above instrument, and duly acknowledged to me that he executed the same.

Dennis V. Lloyd
NOTARY PUBLIC

My Commission Expires:

Residing at: S.L.C. UT

7-20-95



DENNIS V. LLOYD #1984
GENERAL COUNSEL
WORKERS COMPENSATION FUND OF UTAH
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CALLISTER, DUNCAN & NEBEKER
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800 Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

Attorneys for Amicus Curiae Workers Compensation Fund of
Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

KENNETH RAY SULLIVAN,,)	AFFIDAVIT OF
)	<u>Representative</u>
Plaintiffs,)	<u>Brent H. Goodfellow</u>
)	REGARDING S.B. 64, 1986
vs.)	UTAH LEGISLATURE a/k/a
)	THE LIABILITY REFORM ACT
)	OF 1986
SCOULAR GRAIN COMPANY OF)	
UTAH; UNION PACIFIC RAILROAD)	Utah Supreme Court No.
COMPANY, a Utah Corporation;)	910482
THE SCOULAR COMPANY, ROBERT)	
O'BLOCK AND GORDON OLCH, dba)	
FREEPORT CENTER ASSOCIATES;)	
TRACKMOBILE, INC., a Georgia)	
Corporation, Formerly Known)	
as WHITING CORP.; THE DENVER)	
AND RIO GRANDE WESTERN)	
RAILROAD COMPANY, A SHORT)	
LINE RAILROAD COMPANY, a)	
Delaware Corporation; OREGON)	
SHORT LINE RAILROAD COMPANY,)	
a Utah Corporation; UTAH)	
POWER & LIGHT COMPANY, a)	
Utah Corporation; and G.W.)	
VAN KEPPEL COMPANY, a)	
Missouri Corporation,,)	
)	
Defendants.)	

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