

1991

Kenneth Ray Sullivan v. 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 Utah Corporation; Utah Power and Light Company, a Utah Corporation; and G.W. Van Keppel Company, a Missouri Corporation. Amicus Brief

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DOCKET NO. 910482

UTAH SUPREME COURT

BRIEF

IN THE UTAH SUPREME COURT

* * * * *

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.

UTAH SUPREME COURT NO.
910482

Priority No. 12

* * * * *

WORKERS' COMPENSATION FUND OF UTAH'S
AMICUS CURIAE BRIEF IN SUPPORT OF
PETITION FOR REHEARING

(COMPLETE LIST OF PARTIES AND THEIR COUNSEL WITHIN)

FILED

MAY 20 1993

CLERK SUPREME COURT
UTAH

IN THE UTAH SUPREME COURT

* * * * *

KENNETH RAY SULLIVAN,)	
	)	UTAH SUPREME COURT NO.
Plaintiff,	)	910482
)	
vs.	)	Priority No. 12
)	
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.)	

* * * * *

WORKERS' COMPENSATION FUND OF UTAH'S
AMICUS CURIAE BRIEF IN SUPPORT OF
PETITION FOR REHEARING

(COMPLETE LIST OF PARTIES AND THEIR COUNSEL WITHIN)

IN THE UTAH SUPREME COURT

* * * * *

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,
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GRANDE WESTERN RAILROAD
COMPANY, A SHORT LINE
RAILROAD COMPANY, a Delaware
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LINE RAILROAD COMPANY, a
Utah Corporation; UTAH POWER
& LIGHT COMPANY, A Utah
Corporation; and G.W. VAN
KEPPEL COMPANY, a Missouri
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UTAH SUPREME COURT NO.
910482

Priority No. 12

* * * * *

WORKERS' COMPENSATION FUND OF UTAH'S
AMICUS CURIAE BRIEF IN SUPPORT OF
PETITION FOR REHEARING

(COMPLETE LIST OF PARTIES AND THEIR COUNSEL WITHIN)

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IDENTITY OF AMICUS CURIAE
WORKERS' COMPENSATION FUND OF UTAH

The Court has granted the motion of the Workers' Compensation Fund of Utah to appear as amicus curiae for the purposes of supporting plaintiff Kenneth Sullivan's Petition for Rehearing. Section 35-1-46 U.C.A. requires all employers in the State to secure payment of workers compensation benefits by purchasing private insurance, qualifying as a "self-insured" or by obtaining insurance from the Workers' Compensation Fund of Utah. (Hereinafter "WCF") WCF is a "...nonprofit, self-supporting, quasi-public corporation..." [Section 35-3-3(1)(a) U.C.A.] whose purpose is to "...insure Utah employers against liability for compensation based on job-related accidental injuries and occupational diseases; and...assure payment of this compensation to Utah employees who are entitled to it..." [Section 35-3-2(1)(b)(i) and (ii)]. WCF is charged by its enabling legislation to "...provide workers' compensation insurance at an actuarially sound price..." [Section 35-3-4(1) U.C.A.] WCF provides workers' compensation coverage for in excess of 25,000 Utah employers or approximately 85 percent of the gross number of employers in the State of Utah. Those 25,000 employers employ approximately 260,000 Utah workers. (See affidavit of Rodney C. Smith, Vice

President, Workers' Compensation Fund of Utah, Appendix 1 hereto.) Because of the breadth of its involvement with the Workers' Compensation Act of Utah [Section 35-1-1 et seq.] and the Occupational Disease Act of Utah [Section 35-2-1 et seq.], WCF believes its input may be of assistance to the Court in determining whether to grant Kenneth Ray Sullivan's Petition for Rehearing.

WCF has further interest in the outcome of the Supreme Court's decision herein. It is the workers' compensation insurance carrier for the third-party defendant, CCC&T, in the case of *Brown vs. Bowman & Kemp Steel and Supply Company, Inc., et al. vs. CCC&T, Inc.*, Supreme Court No. 910082 which was consolidated with Sullivan for oral argument. WCF has provided the defense for CCC&T, Inc. as is required by its policy of insurance.

WCF's concern with the Sullivan opinion is essentially two-fold:

1. This Court has not had the opportunity to adequately review the intent of the 1986 Legislature from members of the legislature. Most particularly the intent of S.B. 64's principal sponsor, Senator Haven J. Barlow and Co-Sponsor former Senator Paul Rogers as well as others. That information is provided by affidavits attached hereto.

2. The majority did not address constitutional issues which materially impact the balancing of rights between employers and employees as contained in the Workers Compensation Act of Utah §§35-1-1 et seq. U.C.A. which will likely result in challenges to the "exclusive remedy provision" of §35-1-60 U.C.A., the subrogation rights of employers and their insurance carriers contained in §35-1-62 U.C.A. and the Workers Compensation Act in its entirety. There are seven years worth of cases now pending at the trial court level in which such issues have been and will be raised with many more to come before the Utah Legislature can take any action as suggested in Sullivan. This Court should use its discretion to order those issues fully briefed now to avoid the explosion of litigation which will undoubtedly result by leaving those issues open.

STATEMENT OF THE ISSUES

The Court is referred to IDENTITY OF AMICUS CURIAE immediately preceding and the brief of plaintiff Sullivan in support of the Petition for Rehearing filed contemporaneously herewith.

STANDARD OF REVIEW

Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, the Court has within its discretion to grant a

Petition for Rehearing if the Court ...has overlooked or misapprehended...points of law or fact..."

DETERMINATIVE STATUTES AND CONSTITUTIONAL SECTIONS

Utah Workers' Compensation Act Sections 35-1-1 et seq.

U.C.A. (Appendix 2)

1. Section 35-1-60 U.C.A. **Exclusive remedy against employer, or officer, agent or employee...**
2. Section 35-1-62 U.C.A. **Third-party and Subrogation rights.**

Utah Liability Reform Act Sections 78-27-37 to 78-27-43
U.C.A. (1986) (Appendix 3)

Constitution of the State of Utah

1. Article I, Section 11 - **Open Courts.**
2. Article I, Section 24 - **Uniform Operation of Laws**
3. Article XVI, Section 5 - **Injuries Resulting in Death.**

STATEMENT OF THE CASE

Refer to Sullivan's brief in support of Petition for Rehearing. Also, see the Court's summary of same in its decision in *Sullivan v. Scoular Grain et al.*, 211 U.A.R. 8 (April 22, 1993). (Appendix 4)

SUMMARY OF WORKERS COMPENSATION FUND ARGUMENT

See IDENTITY OF AMICUS CURIAE hereinabove where a summary of the arguments is included.

ARGUMENT

1. THE SUPREME COURT OF UTAH SHOULD GRANT A REHEARING IN LIGHT OF THE CLEAR PRONOUNCEMENT OF LEGISLATIVE INTENT CONTAINED IN THE LANGUAGE OF THE TORT REFORM ACT OF 1986 AND THE AFFIDAVITS OF SPONSORS OF THE LIABILITY REFORM ACT OF 1986.

The Workers Compensation Fund refers the Court to Sullivan's brief herein and also the brief of third-party defendant CCC&T in the case of *Brown vs. Bowman & Kemp et al.*, Supreme Court No. 910082 which is still pending a decision. The Fund asks the Court to reexamine the issue of Legislative intent in light of the information provided herein.

S.B. 64, the Liability Reform Act of 1986 was presented by Representative Jack F. DeMann as the House Sponsor.

Representative DeMann explained to his colleagues:

...The reason we have a substitute bill is because originally S.B. 64 attempted to change more of the laws than joint and severable [sic]¹ ...[T]hrough seven hours of Senate Committee hearings the proponents of the bill made several accommodations to the plaintiffs' bar...The point that I am making or trying to make at this time is that concessions have been made...

Representative DeMann emphasizes by affidavit that the Legislature did not intend to affect Utah's workers' compensation system in any way whatsoever. (See Appendix 5,

¹. Representative DeMann's use of the term *severable* is meant to be several.

Affidavit of Representative Jack F. DeMann; and Appendix 6, Excerpt of Taped Floor Debates, Utah House of Representatives, February 26, 1986, General Session.)

Senate sponsors of the Liability Reform Act of 1986 (codified as §§78-27-37 through 78-27-43 U.C.A., 1986) amplify on what was discussed during the seven hours of debate in the Senate and express the clear intent of the 1986 State Legislature that employers conduct was not to be compared to that of "defendants" and injured employees seeking a third-party recovery:

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 permit comparison of an employer's "fault" in arriving at verdicts in third-party lawsuits.

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."

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.

(Affidavit of Senator Haven J. Barlow attached as Appendix 7) (Emphasis added.)

Co-sponsor for S.B. 64, former Senator Paul Rogers², echoes Senator Barlow's statement;

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

². Former Senator Rogers has a contract with the Workers' Compensation Fund of Utah to assist the Fund in matters dealing with the 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 intent of the Legislature for the injured employee to bear the burden of the employer's conduct alone by having the third-party damages reduced by the employer's proportionate "fault" and then requiring the injured worker to reimburse the employer the full amount of the subrogation allowed by Section 35-1-62 U.C.A. of the Workers Compensation Act of Utah. Rather, the amendments which became a part of the Act were designed to make it clear that the employer's conduct was not to be compared to that of the injured employee and the defendant(s) in a civil lawsuit. The employer's responsibility for all their injured employees was provided for by their participation in the no-fault workers compensation system.

(Affidavit of former Senator Paul Rogers, Appendix 8)

(Emphasis added.) (See also the affidavits of the following legislators: Senator Arnold Christensen, current President of the Senate; Senator Stephan J. Rees; Senator Eldon A. Money; Senator Blaze D. Wharton; Representative James Yardley; Senator John P. Holmgren; and Representative Brent H. Goodfellow; Appendix 9.) (See also Affidavit of Dennis V. Lloyd from Brown, *supra.*, Appendix 10)

It is not sufficient to leave it to the legislature to correct any deficiency or inaccuracy in the Court's interpretation of legislative intent, as the *Sullivan* majority suggested regarding the inequities attending application of the reimbursement provisions of the Workers' Compensation Act in conjunction with this interpretation of the Liability Reform Act of 1986. See *Sullivan*, 211 U.A.R. 8, 12 (April 22, 1993). There can be no legislative remedy to Mr. Sullivan in this case, as any action by the legislature will come too late to assist him.

Similarly, since any legislative correction of this error will most likely have prospective application only, it will provide no remedy to the myriad of plaintiffs whose cases have accrued in the seven years since the enactment of the Liability Reform Act of 1986. The hundreds or possibly thousands of cases presently pending, accrued or yet to arise will be adversely affected by this decision without benefit of the correction when the legislature acts to reaffirm the legislative intent misconstrued by the majority herein.

The Worker's Compensation Fund urges this Court to reexamine its interpretation of the legislative intent behind the 1986 Act, and to modify its decision to conform to the legislative intent so unambiguously stated.

2. THE UTAH SUPREME COURT SHOULD GRANT A REHEARING TO CONSIDER THE CONSTITUTIONAL ISSUES IT DID NOT ADDRESS IN ITS OPINION EXPRESSED HEREIN BECAUSE: CONSTITUTIONAL ISSUES WERE RAISED BY THE PARTIES; CONFUSION AND UNNECESSARY LITIGATION AT THE TRIAL COURT LEVEL WILL BE AVOIDED; AND SO AS NOT TO UPSET THE CONSTITUTIONAL BALANCE OF THE WORKERS COMPENSATION ACT OF UTAH.

The majority in *Sullivan* does not address any constitutional issues. The Court will recall at oral argument leave was granted the parties to supplement the briefing. In basically an outline form, the parties presented argument regarding constitutional issues.

The Utah defense bar is already advising its clients that *Sullivan* is a landmark decision in which the workers' compensation will be materially altered either judicially or legislatively. (See letter dated April 28, 1993 from Tim Dalton Dunn and Kendall P. Hatch to their clients, Appendix 11) Virtually every tort liability case originating from a work-related injury stimulates the constitutional issues we can only outline herein. The Fund urges the Court to assist the trial courts of Utah to avoid the delays and the burdensome litigation costs the parties in all such cases will incur.

The Workers Compensation Act of Utah provides a fundamental balancing of rights between employers and employees. (See Appendix 12, Workers' Compensation Act, A

careful Balancing of Constitutional Rights) Each gave up the right of a civil trial by jury to adjudicate their respective rights. The replacement for each is the Workers' Compensation Act of Utah. The Utah Act like those throughout the United States went through a refining process to establish a constitutional *quid pro quo*. See discussions on constitutionality contained in *Industrial Commission of Utah v. Daly Mining Co.*, 172 P. 301 (Utah 1918); *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 44 S. Ct. 153, 68 L. Ed. 366, (1923); and *Cudahy Packing Co. v. Industrial Comm'n*, 60 Utah 161, 207 P. 148, 28 A.L.R. 1394 (1922), *aff'd*, 263 U.S. 418, 44 S. Ct. 153, 68 L. Ed. 366 (1923). The *Sullivan* decision materially changes that balance. Among other things, the changes include:

1. **FAIRNESS.** It is myopic to require the determination of an employer's fault in the third party civil litigation which is commenced by an injured worker. Such a result focuses on issues of fairness within only of two competing legal sub-systems, this is from the perspective of third party defendants in a civil action. To truly focus on the appropriate administration of justice, the Supreme Court must step back and consider the equilibrium which the Utah Legislature has established between workers compensation as an entitlement system for an

industrial injury and civil litigation as a mechanism to obtain redress for negligent conduct. The Legislature of the State of Utah determines and correlates such issues of equity between competing legal systems. Thus, legislative intent is key and the Court should make every effort to rule in such a way as to promote the smooth administration of not one but both systems. In that light, Justice Stewart's dissenting opinion is clearly the correct view of the issue.

2. **CONSTITUTIONAL BALANCING.** The heretofore equitable balance of rights and remedies of Utah's workers compensation system will be damaged by the *Sullivan* majority opinion as:

A. The *quid pro quo* received by workers will be changed...recoveries in third party litigation will be reduced because of the employer's negligence, yet the same employer still enjoys a full statutory lien which will create a "chilling effect" on injured employees bringing legitimate cases;

B. The *quid pro quo* received by employers will be changed...in third party matters employers will be routinely joined or feel compelled to join as defendants and subjected to a process where the determination of their percentage of fault is mandated. To maximize their subrogation recovery

and to protect their reputation, defense costs must be incurred.

C. Heretofore predictable administrative practices and legal principles which promote the efficient and effective operation of Utah's no fault workers compensation system will be called into question...

--There will be an effort to amend Section 35-1-62 U.C.A. as per Justice Durham's discussion the majority opinion.

--There will be an incentive for injured employees to attempt to breach the exclusive remedy of workers compensation as the employee's third party recoveries will be reduced and a determination of employer fault will be mandated in third party litigation.

--The once nonadversarial relationship of employer and employee while the employer is actually the "trustee" of the employee's cause of action against third parties will be turned into a massive conflict of interest the employer will be torn between defending itself and representing the interests of the injured employee against third parties.

The Court of Appeals has been called upon in recent years to determine issues concerning the Constitutionality of statutes of repose and of limitation contained in the Workers Compensation Act of Utah, §§35-1-1 et seq. U.C.A.

and the related Occupational Disease Act of Utah, §§35-2-1 et seq. See *Wrolstad v. Industrial Commission*, 795 P.2d 1138 (Utah App. 1990); *Velarde v. Bd. of Review of Indus. Com'n*, 831 P.2d 123 (Utah App. 1992; *Avis v. Board of Review*, 194 Utah Adv. Rep 57 (Utah App. 1992); *Middlestadt v. Industrial Commission*, 210 Utah Adv. Rep. 47 (Utah App. 1993); *Hales v. Industrial Commission*, Utah Adv. Rep. 16 (Utah App. 1993). In each instance, the Court of Appeals discussed the role of the Open Courts provision of the Utah Constitution in the Workers' Compensation Act context³ and applied the test enunciated by this Court in *Berry v. Beech Aircraft Corporation*, 717 P.2d 670 at 680 (Utah 1985):

First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different.

³. Utah Constitution, Article I, Section 11 - Open Courts

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have a remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

(Emphasis Added)

The Court should apply the *Beech* two prong test to the statutes affected herein.

Further, Utah Constitution, Article I, Section 24, Uniform operation of laws⁴ and Utah Constitution Article XVI, Section 5 - Injuries resulting in death⁵ - must ultimately be examined as well. The Court should remember:

The plain language of Article XVI, §5 ... compel[s] the conclusion that [a] ...[s]tatute is unconstitutional insofar as it purports to bar the heirs of a [deceased person] ... killed as a result of ...[another's] ... negligence from bringing a wrongful death action against the [alleged tortfeasor] ... The constitutional provision was directed at preventing the Legislature from abolishing a right of action for wrongful death, whether in a wholesale or piecemeal fashion.

Malan v. Lewis, 693 P.2d 661 at 667 (Utah 1984) (Guest Statute) as cited in *Berry v. Beech Aircraft*, 717 P.2d 670 at 683-685 Utah 1985)

⁴. "All laws of a general nature shall have uniform operation."

⁵. The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.

The standard enunciated by Justice Zimmerman in *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1988) (at pg. 368) that the more important the constitutional right infringed upon, the greater the burden is on the proponents of the limitation to show its constitutionality must be applied to this case.

...The burden then is upon the proponents of the legislation's validity to demonstrate that its restrictions on those rights are carefully drawn and supported by weighty considerations.

The constitutional issues were introduced in this action by defendants. Having opened those issues for consideration, defendants now claim Sullivan and the Fund as *amicus curiae* should be precluded from discussing the constitutional issues.

Even if the defendants had not opened the area of constitutional examination of the Liability Reform Act, the Court should use its discretion to have such arguments fully briefed because this case presents *exceptional circumstances*. [See, *State v. Archambeau*, 820 P.2d 920 (Utah App. 1991) and the cases cited therein.] That is especially true when this matter comes to the Court not as a final determination of all of the issues presented but rather from a certification from the Federal District Court of rather narrowly defined issues.

CONCLUSION

The Workers' Compensation Fund of Utah as *Amicus Curiae* requests the Supreme Court to grant Sullivan's Petition for Rehearing. There are essentially two bases for this request. First, the Court did not have the opportunity to fully examine evidence of the 1986 Utah Legislature's actual intent regarding the Liability Reform Act of 1986. There was extensive discussion regarding concerns the plaintiff's bar of the State had with the original language in S.B. 64. The affidavits of the legislators attached hereto make it clear that those concerns were resolved by making sure that employers' conduct is not to be compared with that of the plaintiff and nonemployers.

Second, the Fund believes this Court should directly address the constitutional issues raised or inferred in *Sullivan* and the companion cases of *Brown, supra.* and *Jodi Dahl vs. Kerbs et al.*, Utah Supreme Court No. 910372 which were consolidated for oral argument. Those issues have a material bearing on the constitutional *quid pro quo* balance of the Workers' Compensation Act. The trial courts need this Court's direction to avoid needless delay and costs to the parties.

DATED this 20th day of May, 1993

CALLISTER, DUNCAN & NEBEKER

By: James R. Black
James R. Black

WORKERS COMPENSATION FUND OF UTAH

By: Dennis V. Lloyd
Dennis V. Lloyd, General Counsel
Attorneys for Workers Compensation
Fund of Utah

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of May, 1993, I mailed four true and correct copies of the above Brief of Workers Compensation Fund of Utah, postage prepaid to:

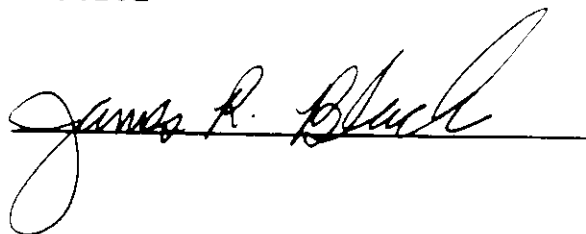
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Salt Lake City, Utah 84101

A handwritten signature in cursive script, reading "James R. Black", is written over a horizontal line.

Tab 1

APPENDIX 1

Affidavit of Rodney C. Smith

Workers Compensation Fund of Utah

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

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH RAY SULLIVAN,

Plaintiff,

V.

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.

[illegible]

**AFFIDAVIT OF
RODNEY C. SMITH
IN SUPPORT OF WORKERS
COMPENSATION FUND OF
UTAH'S MOTION TO APPEAR
AS AMICUS CURIAE**

Utah Supreme Court No. 910482

Comes now the Affiant, Rodney C. Smith, being first duly sworn, deposes and says:

1. Affiant has been employed by the Workers Compensation Fund of Utah, hereafter WCF, for over ten years and currently serves as Vice President.

2. Affiant by reason of his capacity as Vice President and in the normal course of his duties has personal knowledge of the WCF's operations, as well as statistical data related to such operations, and WCF's legislative interactions.

3. WCF provides worker's compensation insurance coverage for approximately 25,000 Utah employers or about 85 percent of the total number of employers in Utah.

4. WCF covers some 260,000 workers employed by the Fund's 25,000 insured policyholders.

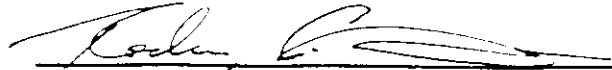
5. Affiant has personal knowledge that the effective operation of Utah's workers' compensation system relies on a delicate balancing of rights between employers and employees. A major component of that equation is the quid pro quo exchanged by employers and employees whereby an employer provides statutorily mandated benefit entitlements to injured employees in exchange for exclusive remedy protection from civil suit.

6. Any judicial decision which discusses the wisdom, viability, or operation of the exclusive remedy simultaneously impacts the very foundation of Utah's workers' compensation system. By allowing an employer's negligence to enter into the determination of third party civil liability and by further calling into question the equity of an employer's subsequent lien right under UCA 35-1-62, the Supreme Court has set the stage for a needless disruption of the historical equilibrium of Utah's workers' compensation system.

7. Any major change in the workers' compensation system either judicially or legislatively raises the probability of an increase in insurance premium rates or a reduction in benefit entitlements with the ultimate potential of a collapse of the system whereby


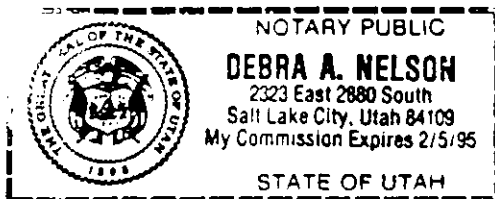
employees will once again be able to sue their employers civilly when a workplace injury occurs.

Dated this 4th day of May, 1993.



Rodney C. Smith
Vice President
Workers Compensation Fund of Utah

Subscribed and sworn to before me this 4th day of May, 1993.



Notary Public

Residing at Salt Lake County

My commission expires 2/5/95

Tab 2

APPENDIX 2

Section 35-1-60 U.C.A.

and

Section 35-1-62 U.C.A.

NOTES TO DECISIONS

Notice and opportunity to be heard.

This section inferentially at least includes that the commission shall give notice and an opportunity to be heard to all persons whose rights may be affected by its award. Therefore,

commission, whose award has been annulled, cannot amend its findings of facts without giving employer notice and an opportunity to be heard. *Denver & R.G.W.R.R. v. Industrial Comm'n*, 74 Utah 316, 279 P. 612, 1929.

COLLATERAL REFERENCES

C.J.S. — 100 C.J.S. Workmen's Compensation § 638

Key Numbers. — Workers' Compensation — 1765

35-1-60. Exclusive remedy against employer, or officer, agent or employee — Occupational disease excepted.

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. Nothing in this section, however, shall prevent an employee or his dependents from filing a claim with the industrial commission of Utah for compensation in those cases within the provisions of the Utah Occupational Disease Disability Act, as amended.

History: L. 1917, ch. 100, § 76; C.L. 1917, § 3132; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-57; L. 1949, ch. 52, § 1.

Cross-References. — Employment of children: § 34-23-1 et seq.

Utah Occupational Disease Disability Law, § 35-2-1 et seq.

Meaning of "this act". — See the note under the same catchline following § 35-1-46.

NOTES TO DECISIONS

ANALYSIS

Compulsory.
Effect of no-fault insurance
Employer
Exclusiveness of remedy
— Minor engaged in hazardous employment
Farmers and domestics.
Hospital charges.
Indemnification agreement between employer and third party.
Indemnity agreement.
Intentional tort.
Joint venture.

Liability to third parties
 Nature and adequacy of act
 Negligent injury by employee of same employer
 Occupational disease
 Statutory employer
 Staff and control
 Subcontractor's employee
 Termination of employee
 Unlawful injury of employee

Compulsory.

Utah Workmen's Compensation Act is compulsory and not elective. *Lovato v. Beatrice Foods*, 22 Utah 2d 371, 453 P.2d 692 (1969).

Effect of no-fault insurance.

The No-Fault Insurance Act, former §§ 41-41.1 et seq., did not supersede or nullify the Workmen's Compensation Act's exclusive remedy provision as applied to injuries from motor vehicle accidents suffered in the course of employment. *IML Freight, Inc. v. Ottosen*, 538 P.2d 296 (Utah 1975).

Employer.

Worker was employee of cable television company, its subsidiary, and its limited partner for purposes of the exclusive remedy provisions of the Utah Workmen's Compensation Act where the cable television company, as part of its management style, grouped all employees together under its direct control and where the worker's time sheets and checks were managed by the cable television company. *Freund v. Utah Power & Light*, 625 F. Supp. 272 (D. Utah 1985).

Exclusiveness of remedy.

Under this section when the injury is caused by the negligent act of the employer, no willful misconduct being claimed, the injured employee or, when the injury causes death, his dependents, must be content to accept the compensation provided by the act. *Halling v. Industrial Comm'n*, 71 Utah 112, 263 P. 78 (1927).

Since the enactment of the Workmen's Compensation Act in 1917, the exclusive remedy of an employee who is injured in the course of his employment is the right to recover the compensation provided for in the act. §§ 35-1-1 et seq. *Murray v. Wasatch Grading Co.*, 73 Utah 430, 274 P. 940 (1929); *Ortega v. Salt Lake Wet Wash Laundry*, 108 Utah 1, 156 P.2d 885 (1945).

Employee of railroad was not precluded from filing claim for compensation by application filed under Federal Employers' Liability Act on ground of election since employee did not have two remedies but only one; if injury was incurred while he was engaged in interstate commerce, his remedy was under Federal Employers' Liability Act and if not, it was under

state act. *Utah Idaho Cent. R.R. v. Industrial Comm'n*, 84 Utah 364, 35 P.2d 842, 94 A.L.R. 1423 (1934).

This section abrogates employee's common-law right to sue employer for injuries suffered while in course of employment, except where employer is not subject to this act or common-law remedy; if employee is expressly reserved. *Masien v. United States Smelting, Ref. & Mining Co.*, 113 Utah 101, 191 P.2d 612, appeal dismissed, 335 U.S. 866, 69 S. Ct. 138, 93 L. Ed. 411 (1948).

This section makes it clear that this chapter is the exclusive vehicle for recovery of compensation for injury or death, against the employer and other employees to the exclusion of any and all other civil liability whatsoever, at common law or otherwise, and that it bars all next of kin or dependents, or anyone else, from using any other means of recovery against employers and others named in and covered by the Act, than the Act itself. *Morrill v. J & M Constr. Co.*, 635 P.2d 58 (Utah 1981).

— Minor engaged in hazardous employment.

Even if a minor employee is injured while engaged in hazardous employment in violation of § 34-23.2, prohibiting the employment of minors in hazardous occupations, the minor's exclusive remedy is through this chapter, and the minor cannot void her employment contract and sue in tort. *Bingham v. Lagoon Corp.*, 707 P.2d 678 (Utah 1985).

Farmers and domestics.

Farm laborers and domestic servants, in the event of an accident or injury, are entitled to pursue their common-law remedies in an action against the employer because they are excepted from the act by §§ 35-1-42 and 35-1-43. *Murray v. Strike*, 76 Utah 118, 287 P. 922 (1930).

Hospital charges.

The only power given the Industrial Commission by the workers' compensation statutes over hospital charges for services rendered to injured employees is the right to refuse to pay that part of them which is excessive in amount or for care which was not reasonably necessary. Industrial Commission does not have the power and authority to set maximum rates

ployer and general contractor was a third person not in the same employment. *Smith v. Alfred Brown Co.*, 27 Utah 2d 155, 493 P.2d 994 (1972).

This section does not forbid or render invalid a clause in a construction subcontract by which the subcontractor agreed to indemnify the prime contractor and save him harmless for all liability arising out of the injury or death of an employee of subcontractor, where such clause existed and decedent workman's administrator sued prime contractor for wrongful death of decedent and recovered; therefore, decedent's employer is required to reimburse prime contractor covered by workmen's compensation as provided in such indemnity clause. *Titan Steel Corp. v. Walton*, 365 F.2d 542 (10th Cir. 1966).

Tort liability of employer.

— "Dual capacity" doctrine.

Utah law does not recognize as an exception to the exclusive remedy provisions of the Worker's Compensation Act, the so-called "dual capacity" doctrine under which an employer, shielded from tort liability by the act, may become liable in tort if he occupies, in addition to his capacity as employer, a second ca-

capacity that confers on him an obligation independent of those imposed on him as an employer. *Worthen v. Kennecott Corp.*, 780 F.2d 856 (10th Cir. 1985).

An employee cannot hold his employer liable in tort for injuries resulting from the employer's maintenance of unsafe premises, on the reasoning that the employer occupies a separate capacity and owes separate duties to his employees as an owner of the premises, since the employer's duty to maintain a safe workplace is inseparable from the employer's general duties as an employer toward his employees. *Bingham v. Lagoon Corp.*, 707 P.2d 678 (Utah 1985).

The dual capacity doctrine did not apply to a products liability claim brought on behalf of a decedent who was killed when he was pulled into a large screw-auger manufactured by defendant while decedent was working on his employer's premises, where the employer had not assumed a separate and distinct obligation toward his employee other than as employer. *Stewart v. CMI Corp.*, 740 P.2d 1340 (Utah 1987).

Cited in *Smith v. Atlantic Richfield Co.*, 814 F.2d 1481 (10th Cir. 1987).

COLLATERAL REFERENCES

Brigham Young Law Review. — Utah Allows Contribution Against Co-tortfeasor Despite Immunity from District Suit. *Bishop v. Nielsen*, 1982 B.Y.U.L. Rev. 429.

C.J.S. — 101 C.J.S. Workmen's Compensation § 918.

A.L.R. — Insured's receipt of or right to workmen's compensation benefits as affecting recovery under accident, hospital, or medical expense policy, 40 A.L.R.3d 1012.

Workers' compensation law as precluding

employee's suit against employer for third person's criminal attack, 49 A.L.R.4th 926.

Workers' compensation act as precluding tort action for injury to or death of employee's unborn child, 55 A.L.R.4th 792.

Willful, wanton, or reckless conduct of coemployee as ground of liability despite bar of workers' compensation law, 57 A.L.R.4th 888.

Key Numbers. — Workers' Compensation — 2084.

35-1-61. Repealed.

Repeals. — Section 35-1-61 (C. 1943, Supp., 42-1-57-10, enacted by L. 1945, ch. 65, § 2), relating to injuries to or death of illegally em-

ployed minor, was repealed by Laws 1971, ch. 76, § 11.

- Action plan
- Allocation
- Assignment
- Construct
- Costs and
- Dispersions
- Medical
- Modeling
- Population
- Electoral
- Intentional
- Just went
- N. depend
- Headings
- Remarks
- 1000000
- Name and
- Settlement
- 1000000
- State ins.
- State inst.
- Third-party
- Unit

Action against

Applicable
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[illegible]

- (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.

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NOTES TO DECISIONS

ANALYSIS

Action against tort-feasor prior to compensation award
 Applicability of section
 Assignment of cause of action
 Construction of statute
 Costs and attorney fees
 Death benefit of recovery
 Medical expenses
 "Dual capacity" doctrine
 Election of remedies
 Intentional injury by fellow employee
 Joint venture
 Nondependent heirs
 Pleadings
 Reimbursement
 State compensation
 Same employment
 Settlements
 Approval of commission
 State insurance fund
 Subrogation
 Third party liability
 Cited

Action against tort-feasor prior to compensation award.

Fact that workmen's compensation claimant settled with third-party tort-feasor for sum larger than any compensation award she could have received, before filing compensation claim, did not relieve compensation insurer of duty to pay claimant award reflecting its proportionate share of attorney's fees. *Graham v. Industrial Comm'n*, 26 Utah 2d 424, 491 P.2d 221 (1971).

Applicability of section.

This section applies only to suits against tortfeasors who are not employers or deemed to be statutory employers. *Larue v. W-Energy, Inc.*, 663 F. Supp. 395 (D. Utah 1987).

Assignment of cause of action.

If action had been commenced against a third person to recover for the injuries or death of applicant, such action must first have been assigned to state insurance fund as a condition precedent to application under Workmen's Compensation Act. *Robinson v. Industrial Comm'n*, 72 Utah 293, 269 P. 513 (1928).

Where employee was killed in course of his employment by wrongful act of third person, and widow chose to claim compensation under the Workmen's Compensation Act, but her minor child chose to sue under former section, in which action widow declined to join, as assignment of cause of action by widow to employer was sufficient; an assignment by the minor was not necessary. An assignment was necessary only when compensation was

claimed from the employer or his insurance carrier. *Brannard's Cottonwood Dairy v. Industrial Comm'n*, 80 Utah 159, 14 P.2d 212, 88 A.L.R. 659 (1935).

It was a condition precedent to the employee's right to claim compensation from his employer, where he was injured by negligence of someone not his employer, that he should assign his action for damages against the wrongdoer. *Industrial Comm'n v. Wasatch Grading Co.*, 80 Utah 223, 14 P.2d 988 (1932).

Construction of statute.

This section covers both active and passive negligence. *Johanson v. Cudahy Packing Co.*, 107 Utah 114, 152 P.2d 98 (1944).

Where state insurance fund paid compensation to injured person, the insurance carrier has a cause of action where the injury was caused by third person; but this does not mean that it had the only cause of action since this section also gives the injured person a cause of action against the third person. *Rogalski v. Phillips Petroleum Co.*, 3 Utah 2d 293, 282 P.2d 304 (1955).

Costs and attorney fees.

State supreme court decisions that permit reasonable attorney fees to be deducted from that portion of recovery gained to reimburse state insurance fund do not apply retroactively to fees determined in reliance on the former rule. *Draper v. Travelers Ins. Co.*, 429 F.2d 44 (10th Cir. 1970); *Williams v. Utah State Dept. of Fin.*, 23 Utah 2d 438, 464 P.2d 596 (1970).

Although insurer was entitled to reimburse-

ment of payment made to injured employee who subsequently recovered from third party. Equitable considerations required it to pay its proportionate share of attorney's fees incurred by injured employee in obtaining payment against third party. *Worthen v. Spurliff & Andrews, Inc.*, 19 Utah 2d 80, 426 P.2d 223 (1967).

State insurance fund Workers' Compensation Fund was required to bear its pro rata share of reasonable attorney fees incurred by claimant in obtaining settlement with third party inasmuch as defendant insurance fund was relieved from burden of paying award to claimant. *Prettiman v. Utah State Dep't of Fin.*, 27 Utah 2d 333, 496 P.2d 89 (1972).

Where an injured person who has collected workmen's compensation sues third-party tortfeasor, both the injured person and the subrogated insurance carrier bear their proportionate share of costs and attorney fees incurred in obtaining recovery in tort suit. Language added to Subdivision 2 by the 1971 amendment was intended to eliminate prior uncertainty and make it clear that insurer should bear its proportionate share, and insurer cannot avoid its share of expenses by hiring its own counsel and notifying injured person of that fact. *Lanier v. Pyne*, 29 Utah 2d 249, 508 P.2d 38 (1973).

Disbursement of recovery.

—Medical expenses.

Commission properly interpreted the phrase "any obligation" in Subsection 3 to include medical expenses. *Taylor v. Industrial Comm'n.*, 743 P.2d 1183 Utah 1987.

"Dual capacity" doctrine.

Utah law does not recognize as an exception to the exclusive remedy provisions of the Workers' Compensation Act the so-called "dual capacity" doctrine under which an employer, shielded from tort liability by the act, may become liable in tort if he occupies, in addition to his capacity as employer, a second capacity that confers on him an obligation independent of those imposed on him as an employer. *Worthen v. Kennecott Corp.*, 780 F.2d 856 10th Cir. 1985.

An employee cannot hold his employer liable in tort for injuries resulting from the employer's maintenance of unsafe premises, on the reasoning that the employer occupies a separate capacity and owes separate duties to his employees as an owner of the premises, since the employer's duty to maintain a safe work place is inseparable from the employer's general duties as an employer toward his employees. *Bingham v. Lagoon Corp.*, 707 P.2d 678 Utah 1985.

Election of remedies.

Where city policeman was injured by third

person, and city paid policeman compensation in form of wages, action by policeman against third person which was dismissed with prejudice, commenced prior to assignment of case of action to city, was not an election of remedy. Policeman's subsequent claim for compensation from city. *Salt Lake City v. Industrial Comm'n.*, 81 Utah 213, 17 P.2d 204 (1942).

Employee of railroad was not precluded from filing claim for compensation by application filed under Federal Employers' Liability Act on ground of election since employee did not have two remedies but only one, if injury was incurred while he was engaged in interstate commerce his remedy was under Federal Employers' Liability Act; if not, it was under state act. *Utah Idaho Cent. R.R. v. Industrial Comm'n.*, 54 Utah 364, 35 P.2d 542, 34 A.L.R. 1423 (1933).

In a case in which fireman was killed by collapse of a ladder while in the performance of his duty, his dependents could exercise their right to elect under terms of this section to pursue their remedy against third-party wrongdoer. *Hamilton v. Commission of Fin.*, 108 Utah 574, 162 P.2d 758 (1945).

Intentional injury by fellow employee.

One who is injured by the intentional act of a fellow employee may seek recovery for damages as provided for in this section. *Bryan v. Utah Int'l.*, 533 P.2d 892 Utah 1975.

Joint venture.

Construction company obtained contract to construct diversion tunnel at dam and entered into agreement with corporation by which the two organizations would unite their efforts to complete such construction and share in profits or losses from the enterprise. Miner, hired by the construction company, who was injured while working on the tunnel, and who obtained workmen's compensation benefits, could not sue corporation for alleged negligence of corporate employees since the two companies were regarded as the employing unit. The employees of both companies were engaged in the same employment. *Cook v. Peter Kiewit Sons Co.*, 15 Utah 2d 20, 386 P.2d 616 (1963).

Nondependent heirs.

Legislature did not intend to divest the right of heirs to damages under the wrongful death statute if they are nondependents and received no compensation benefits. *Oliveras v. Caribou-Four Corners, Inc.*, 598 P.2d 1320 Utah 1979.

Pleadings.

Complaint by assignee should allege payment of the award. *Johanson v. Cudahy Packing Co.*, 101 Utah 219, 120 P.2d 281 (1941).

Complaint was sufficient to state a cause of action for negligence in action by dependents of a truck driver who was killed when he backed a truck into some high tension electric wires

action to recover a loan made to defendant by a third company when said defendant had not repaid from deceased employee. *Johnson v. Canyon Packing Co.*, 197 Utah 114, 152 P.2d 65 (1944).

Reimbursement.

State insurance fund (Workers' Compensation Fund) is entitled to be reimbursed not only for what has been paid to the injured employee or his dependents out of the fund, but also for any additional sums that it was legally obligated to pay. *Industrial Comm'n v. Wasatch Grading Co.*, 80 Utah 223, 14 P.2d 988 (1932).

Injured employee's settlement and release with his private insurance carrier, under uninsured motorist coverage, did not affect claim of state insurance fund. Workers' Compensation Fund, against third party tortfeasor, and injured employee was not required to reimburse plaintiff for workmen's compensation benefits paid. *Union Southeast Farm Co. v. Barrett*, 24 Utah 2d 24, 465 P.2d 346 (1970).

Third party was not entitled to have amount of judgment awarded injured employee reduced by amount of workmen's compensation benefits paid to employee; third party's contentions that employer also was negligent, that insurance company stood in shoes of employer and consequently that insurer should not recover amount of compensation paid injured employee rejected. *Texaco, Inc. v. Pruitt*, 396 F.2d 237 (10th Cir. 1968).

The purpose of the right of reimbursement established by this section is only to prevent double recovery by the employee or his or her dependents. *Allstate Ins. Co. v. Bliss*, 725 P.2d 1330 (Utah 1986).

—Compensation.

"Compensation" within the meaning of this section, is limited to amounts claimed by the employee or the dependents. *Allstate Ins. Co. v. Bliss*, 725 P.2d 1330 (Utah 1986).

The fixed payment made under § 35-1-68(2) at, when it is determined that a deceased employee had no dependents, is not "compensation" within the meaning of this section, and where the decedent's parents sued the tortfeasor and its insurer, the insurance fund could neither invade the parents' recovery nor pursue a separate claim against the insurer in order to recover the amount paid into the Second Injury Fund. *Allstate Ins. Co. v. Bliss*, 725 P.2d 1330 (Utah 1986).

Same employment.

Neither subcontractor placing timbers in dome of large building nor materialmen supplying scaffolding for use in construction was engaged "in the same employment" as employee of general construction contractor for building within meaning of this section. *Peter*

vs. Fowler, 27 Utah 2d 173, 465 P.2d 447 (1970).

Employee of electrical subcontractor was, in the same employment as general contractor who not entitled to maintain action under this section where general contractor maintained right to supervision or control over and actively supervising general contractor's operations, directing the sequence of work to be done, instructing, making changes in the work to be done and ordering work stoppages; decedent's only remedy was under Workmen's Compensation Act. *Adamson v. Oakland Constr. Co.*, 29 Utah 2d 286, 508 P.2d 895 (1973).

Where decedent employee of general contractor was electrocuted, allegedly through negligence of subcontractor, in accident occurring prior to 1975 amendment of this section, subcontractor was in same employment as decedent under § 35-1-42, and heirs were precluded from maintaining wrongful death action against it by provisions of § 35-1-60. *Shube v. Wasatch Elec. Co.*, 546 P.2d 896 (Utah 1976).

Where plaintiff's decedent and another were fellow employees at time of accident, this section prohibited action by plaintiff against the fellow employee and similarly prohibited the defendant from joining the fellow employee as a joint tortfeasor for purposes of contribution. *Philips v. Union Pac. R.R.*, 614 P.2d 153 (Utah 1980).

Settlements.

—Approval of commission.

This section does not require that the commission approve employee-initiated settlements. The commission is required to approve employer-initiated settlements in order to protect the interest of the employee and prevent the employer from entering into a settlement that places the employer's welfare above that of the employee. That concern is not present when it is the employee who settles the suit. *Taylor v. Industrial Comm'n*, 743 P.2d 1183 (Utah 1987).

State insurance fund.

State insurance fund (Workers' Compensation Fund) had no right to recover for compensation benefits paid out of that part of a wrongful death recovery due to heirs who had received no workmen's compensation benefits. *Oliveras v. Caribou-Four Corners, Inc.*, 565 P.2d 1320 (Utah 1979).

Subrogation.

Where employee's original injury was aggravated by physician's malpractice, insurance carrier was subrogated to employee's action against the physician; but if a greater amount was recovered than that paid employee in compensation, the employee was entitled to it.

Baker v. Wenden, 35 Utah 109, 79 P.2d 77 (1938).

Third-party liability.

Fact that defendant owned no stockpile did not make defendant a possessor of the land and thereby liable as third party under this section for death of contractor's employee caused by unsafe condition of stockpile. *Stevens v. Colorado Fuel & Iron*, 24 Utah 2d 214, 469 P.2d 3 (1970).

Employee of a masonry subcontractor whose work was subject to the control of the general contractor was an employee of general contractor for purposes of this section and was not entitled to recover in tort against the general contractor. *Smith v. Alfred Brown Co.*, 27 Utah 2d 155, 493 P.2d 994 (1972).

Cited in *Smith v. Atlantic Richfield Co.*, 814 F.2d 1481 (9th Cir. 1987).

COLLATERAL REFERENCES

C.J.S. — 101 C.J.S. Workmen's Compensation § 983 et seq.

A.L.R. — Uninsured motorist coverage: validity and effect of policy provision purporting to reduce coverage by amount paid under workmen's compensation law, 24 A.L.R.3d 1369.

Right to maintain malpractice suit against injured employees attending physician not withstanding receipt of workmen's compensation award, 28 A.L.R.3d 1066.

Key Numbers. — Workers' Compensation — 2158

35-1-63. Judgments in favor of commission — Preference.

All judgments obtained in any action prosecuted by the commission or by the state under the authority of this title shall have the same preference against the assets of the employer as claims for taxes.

History: L. 1917, ch. 100, § 74; C.L. 1917, § 3135; R.S. 1933 & C. 1943, 42-1-59.

NOTES TO DECISIONS

Extent of preference.

Judgment meeting requirements of this section is only given a preference equal to the preference of tax claims in distribution of assets and is not given same status as a tax lien; accordingly, judgment of Industrial Commission

for insurance premium is not entitled to be paid out of proceeds of sale of mortgaged real estate ahead of prior mortgagee. *Local Realty Co. v. Steele*, 30 Utah 468, 62 P.2d 558 (1936).

COLLATERAL REFERENCES

C.J.S. — 100 C.J.S. Workmen's Compensation § 638.

Key Numbers. — Workers' Compensation — 1765.

35-1-64. Compensation — None for first three days after injury unless disability extended.

No compensation shall be allowed for the first three days after the injury is received, except the disbursements hereinafter authorized for medical, nurse and hospital services, and for medicines and funeral expenses, provided, however, if the period of total temporary disability lasts more than fourteen days, compensation shall also be payable for the first three days after the injury is received.

Tab 3

APPENDIX 3

Utah Liability Reform Act of 1986 aka Senate Bill 64

Sections 78-27-37 to 78-27-43 U.C.A.

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, which provided for diminishment of damages and assumption of risk, and reenacts the above section.

NOTES TO DECISIONS

Cited in *Deats v. Commercial Sav. Bank*, 746 P.2d 1190 (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. 1956, 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-

[illegible]

Last clear chance.

[illegible]

Open and obvious danger

By establishing a "no-fault" no-fault system, the Legislature has eliminated the fault rule as an absolute bar to an injured person's recovery. Dunham v. State, 150 P.3d 1017, 1018, 36 Utah 2d 499, 500 (1964).

Unit method of determining negligence.

In a medical malpractice action, the "Hill" method is determined by the standard of care, whereby each defendant is compared against the standard of care in favor of the plaintiff. The standard of care is the negligence of all the defendants. The standard of care is making the comparison against the Mountain Health Plan of the State of New York. (Jan 1984)

Wrongful death.

The 1973 legislation that created the non-law contributory negligence defense made comparative negligence the governing tort principle and not overruled the old law construing the term "wrongful death" statute as not requiring a negligent conduct of the decedent. *State v. Salt Lake County*, 784 P.2d 1111, 1113 (Utah, 1990).

Cited in Warren v. Henrich, 609 P.2d 871, 875
Supp. 365 D Utah 1987; American Oil & Gas
Inc. v. Kirtan, McQuinn & Co., 609 P.2d 871,
874 Utah Ct App 1980.

Utah Law Review. — Note. A Primer on Damages Under the Utah Wrongful Death and Survival Statutes. 1974 Utah L. Rev. 519

In Products Liability Cases, 188, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005

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Damage Apportionment in Accounting Malpractice Actions: The Role of Comparative Fault. 1990 BYUL 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 1216.

Comparative negligence doctrine applied to actions based on strict liability in tort. 37 A.L.R.4th 633.

Effect of adoption of comparative negligence rules on assumption of risk and contributory negligence. 16 A.L.R.4th 709.

Commercial renters' 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 297.

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 1198.

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 enacted by Laws 1973, ch. 209, § 3, relating to contribution among joint tortfeasors, and reenacts the above section.

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. 299, § 4, relating to settlement by a joint tortfeasor, and reenacts the above section.

Cross-References. — Contribution and reimbursement, Rules of Civil Procedure, Rule 68. Joint Obligations, § 1541, 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 3, 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. *Stahl v. Brinkerhoff-Sigma Dental Co.*, 658 P.2d 1157, Utah 1983.

Plaintiff's minor child as joint tortfeasor.

Where plaintiff was awarded judgment in action against a defendant for property loss sustained as the result of a collision between automobiles, one owned and operated by the minor defendant and the minor defendant's father, plaintiff, and where the father and son jointly contributed to the property loss sustained by plaintiff, the minor defendant was a joint tortfeasor and liable to the defendant. *Bishop v. Nielsen*, 742 P.2d 964, Utah 1987.

Workers' compensation.

Employer cannot be a joint tortfeasor in an injury to his employee covered by the Workers' Compensation Act. *Harmon v. Elec. Inc.*, 552 P.2d 117, Utah 1976; *Harmon v. Union Pac. R.R.*, 614 P.2d 117, Utah 1980.

Cited in *Warren v. Honda Motor Co.*, 743 P.2d 365, D. Utah 1987.

COLLATERAL REFERENCES

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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 to recover for injury to recover indemnity from medical attendant aggravating injury by causing new injury in course of treatment, 12 A.L.R.4th 231.

Products liability, seller's right to indemnity from manufacturer, 79 A.L.R.4th 275.

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.

History: C. 1953, 78-27-43, enacted by L. 1986, ch. 199, § 7.

Repeals and Reenactments. — Laws 1986, ch. 199, § 7 repeals former § 78-27-43, as enacted by Laws 1973, ch. 209, § 7, relating to release of joint tortfeasors and contribution, and reenacts the above section.

Severability Clauses. — Laws 1986, ch.

199, § 9 provided: "If any provision of §§ 78-27-37 through 78-27-43, or the application of any provisions of those sections to any person or circumstance, is held invalid, the remaining provisions of those sections shall have given effect without the invalid provision or application."

COLLATERAL REFERENCES

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 indemnify from manufacturer, 74 A.L.R.4th 275.

78-27-44. Personal injury judgments — Interest authorized.

(1) In all actions brought to recover damages for personal injuries sustained by any person, resulting from or occasioned by the tort of any other person, corporation, association, or partnership, whether by negligence or wilful intent of that other person, corporation, association, or partnership, and whether that injury shall have resulted fatally or otherwise, the plaintiff in the complaint may claim interest on the special damages actually incurred from the date of the occurrence of the act giving rise to the cause of action.

(2) It is the duty of the court, in entering judgment for plaintiff in that action, to add to the amount of special damages actually incurred that are assessed by the verdict of the jury, or found by the court, interest on that amount calculated at the legal rate, as defined in Section 15-1-1, from the date of the occurrence of the act giving rise to the cause of action to the date of entering the judgment, and to include it in that judgment.

(3) As used in this section, "special damages actually incurred" does not include damages for future medical expenses, loss of future wages, or loss of future earning capacity.

History: L. 1975, ch. 97, § 1; 1991, ch. 123, § 1.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, subdivided the section; substituted "damages actually incurred" for "damages alleged" in Subsection

(1); substituted "special damages actually incurred that are assessed by the verdict of the jury, or found by the court, interest on that amount calculated at the legal rate, as defined in Section 15-1-1" for "8% per annum" in Subsection (2); added Subsection (3), and made changes in phraseology.

NOTES TO DECISIONS

ANALYSIS

Date for computing interest.
Special damages

Date for computing interest.

Where cause of action occurred in September, 1973, interest at 8% would be computed from then notwithstanding this section did not become effective until May 13, 1975, since section explicitly directs all future judgments to add interest computed from the time of the act

giving rise to the cause of action. Intent is that the date of the act giving rise to the action is in all cases the date used in computing the period of interest. *Stagg*, 596 P.2d 1037, Utah 1979.

Special damages.

Special damages on which the judgment of interest is recoverable are limited to those that arise in the period between the act giving rise to the cause of action and entry of judgment in plaintiff's favor. *Gleaves*, 1991-1, 1000 P.2d 1000.

Tab 4

APPENDIX 4

Sullivan v. Scoular Grain Company of Utah, et al., 211 U.A.R. 8
(April 22, 1993)

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; Utah
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
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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.

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 Scouler 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 Secular 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 Secular 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 Secular parties. Thus, the jury should consider acts or omissions by the Secular 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.

C. 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 Scouler 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.

. . . .

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, § 2.100, 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 443, 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. 1982) (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.

Tab 5

APPENDIX 5

Affidavit of Representative Jack F. DeMann
House Sponsor of S.B. 64

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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 FORMER
	)	REPRESENTATIVE,
Plaintiffs,	)	JACK DEMANN REGARDING
	)	S.B. 64, 1986 UTAH
vs.	)	LEGISLATURE a/k/a THE
	)	LIABILITY REFORM ACT OF
SCOULAR GRAIN COMPANY OF	)	1986
UTAH; UNION PACIFIC RAILROAD)	
COMPANY, a Utah Corporation;	)	Utah Supreme Court No.
THE SCOULAR COMPANY, ROBERT	)	910482
O'BLOCK AND GORDON OLCH, dba)	
FREEMPORT 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.

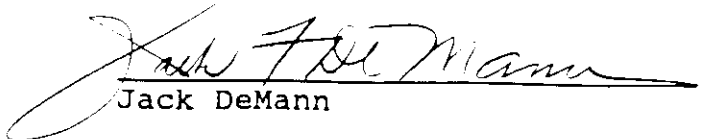
2. I recall Senate Bill 64 (hereinafter "S.B. 64"), the Liability Reform Act of 1986 (hereinafter the "Act") passed during the 1986 Legislative Session. I served as that Act's House Sponsor.

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

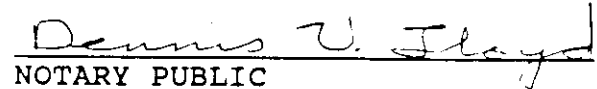
)

:ss.

COUNTY OF SALT LAKE

)

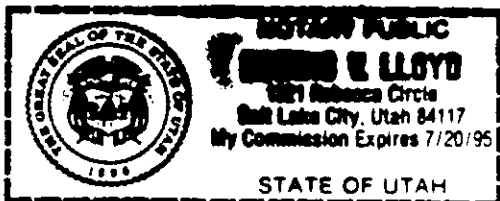
On the 19th day of May, 1993, personally appeared before me Former Representative Jack DeMann, the signer of the above instrument, and duly acknowledged to me that he executed the same.


NOTARY PUBLIC

My Commission Expires:

7-20-95

Residing at: SLC UT



Tab 6

APPENDIX 6

Excerpt of taped floor debates

Utah House of Representatives

February 26, 1986

General Session

EXCERPT OF TAPED FLOOR DEBATES
UTAH HOUSE OF REPRESENTATIVES
FEBRUARY 26, 1986-GENERAL SESSION

Custodian: This is a recording of the floor debates in the Utah House of Representatives for substitute Senate Bill 64 of 1986 General Session. This is taken from the records of the 46th Legislature House of Representatives, day 45, February 26, 1986 records 18 and 19.

House Clerk: Substitute Senate Bill No. 64, Liability Reform Act, by Haven J. Barlow, Jack M. Bangerter, C.E. Petersen, Paul Rogers, Warren Pugh, Glade M. Sowards, Eldon A. Money, Donna M. Wayment, Brent C. Overson, John C. Holmgren and Wayne L. Sandberg. Be it enacted by the legislature of the State of Utah.

Speaker: Representative DeMann.

Representative Jack Demann: Thank you Mr. Speaker. Ladies and gentleman, our majority leader Glen Brown was going to handle this bill but is tied up over in conference but felt it was important enough that he did not want it circled and asked if we would please proceed and asked me to carry it for him. I am pleased to do that.

Ladies and gentlemen what this bill does is to assure that no defendant shall be liable for more than his share of plaintiffs' damages in suit. We have before you tonight a substitute bill. The reason we have a substitute bill is because originally SB 64 attempted to change more of the tort laws than just joint and severable¹. Through seven hours, I would like to emphasize that please, through seven hours of Senate Committee hearings the proponents of the bill made several accommodations to the plaintiffs' bar. These appear on page 3 of the sheet

¹sic. Representative DeMann's use of the term *severable* is obviously meant to be *several*.

which you have received at your desk and which I have here in my hands for your reference.

Prior to the substitute bill, Mr. Roger Sandack and Mr. Brent Wilcox made the following written statement: "The solution is to provide for comparing the plaintiff's fault against the defendants' collective fault. Then, once liability is established the remaining provisions of this bill would restrict the plaintiff to recovering from each defendant only its proportionate share of the judgment, thus attaining the fairness that this bill is after." Now substitute 64 engenders the concept that Mr. Sandack and Mr. Wilcox so eloquently stated. The point that I am making or trying to make at this time is that concessions have been made, the issue is joint and severable and should we keep it on the books or not.

The issues have been debated, the concessions have been made and I would like to quickly point out to you, if you will refer back to this fact sheet please, that there have in recent years been 14 other states who have either abolished or limited the joint and severable liability in their law. On the second page you will find at the top of that sheet an indication of the growing impact that this has on the State of Utah, the State government, and local governments. Would you also be aware that it has the same impact on the so called deep pocket private entities, larger and smaller businesses.

Those who support the bill are listed on the bottom of page 2 and I think that you will see that that represents 29 groups. If you will turn to page 3, it addresses why there is a substitute bill and I leave you that information. Finally, I would like to indicate to you that I think we have before us a matter of fairness. What is fair in assessing liability and I submit to you that the practice which we have had in the past which leaves a defendant who has been adjudged only to have a very small percentage of the liability, holding in fact all of the financial liability or a major share of it. With that much introduction, Mr. Speaker I would be very happy to entertain questions and of course welcome comments.

Tab 7

APPENDIX 7

Affidavit of Senator Haven J. Barlow

Principal Sponsor of S.B. 64

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

IN THE SUPREME COURT OF THE STATE OF UTAH

★ ★★ ★ ★★ ★ ★★ ★ ★★ ★

vs.

Defendants.

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.

Dated this 19th day of May, 1993.

Haven J. Barlow
SENATOR HAVEN J. BARLOW

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

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.

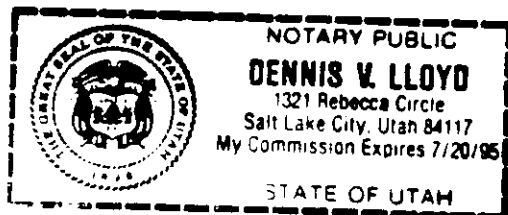
My Commission Expires:

7-20-95

Dennis V. Lloyd
NOTARY PUBLIC

Residing at: SLC, UT

81444-1



Tab 8

APPENDIX 8

Affidavit of former Senator Paul Rogers
Cosponsor of S.B. 64

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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.)	

* * * * *

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

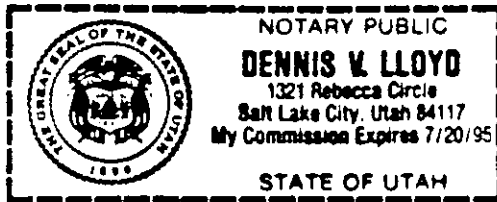
My Commission Expires:

7-20-95

Dennis W. Lloyd
NOTARY PUBLIC

Residing at: SLC UT

81484-1



Tab 9

APPENDIX 9

Affidavits of:

Senator Arnold Christensen, Current President of the Senate

Senator Stephan J. Rees

Senator Eldon A. Money

Senator Blaze D. Wharton

Representative James Yardley

Senator John P. Holmgren

Representative Brent H. Goodfellow

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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.

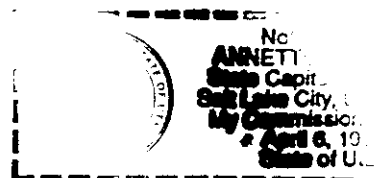
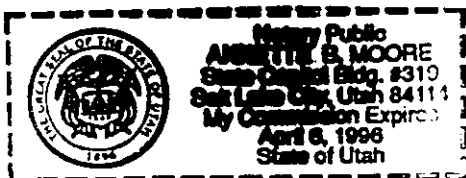
5. To the best of my knowledge, no legislator
expressed any intent for the language of S.B. 64 different
than that which I have stated herein.


Senator Arnold Christensen

STATE OF UTAH

)
:ss.
)

COUNTY OF SALT LAKE



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:

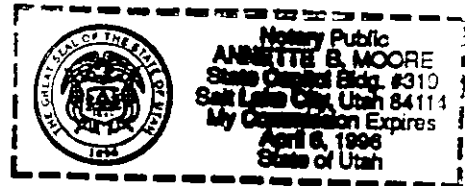
4/6/96

Annette B. Moore
NOTARY PUBLIC

Residing at: 1109 Grandall
SLC, ut.

81484-1

BNREPRESENT.AFF



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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 SENATOR
	)	STEPHEN J. REES,
Plaintiffs,	)	REGARDING S.B. 64, 1986
	)	UTAH LEGISLATURE a/k/a
vs.	)	THE LIABILITY REFORM ACT
	)	OF 1986
SCOLAR GRAIN COMPANY OF)	
UTAH; UNION PACIFIC RAILROAD	)	Utah Supreme Court No.
COMPANY, a Utah Corporation;	)	910482
THE SCOLAR COMPANY, ROBERT)	
O'BLOCK AND GORDON OLCH, dba)	
FREEMONT 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.)	

* * * * *

1. During the 1986 session of the Utah Legislature I was and I am currently a duly elected member of the Utah Legislature. In 1986 I served in the House of Representatives. Today I am a member of the Senate.

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

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

Dennis U. Floyd
NOTARY PUBLIC

Residing at: SLC, Ut.

7-20-75



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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)

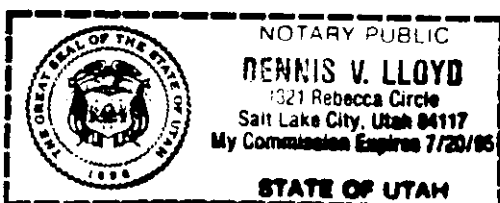
On the 19th day of May, 1993, personally appeared before me Senator Eldon A. Money, the signer of the above instrument, and duly acknowledged to me that he executed the same.

Dennis V. Lloyd
NOTARY PUBLIC

My Commission Expires:

Residing at: SLS, UT

7-20-95



DENNIS V. LLOYD #1984
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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 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)	
FREEMPORT 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.)	

* * * * *

- 2 -

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
	)	REPRESENTATIVE JAMES
Plaintiffs,	)	YARDLEY REGARDING S.B.
	)	64, 1986 UTAH
vs.	)	LEGISLATURE a/k/a THE
	)	LIABILITY REFORM ACT OF
SCOULAR GRAIN COMPANY OF	)	1986
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.

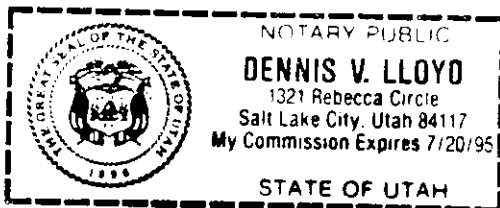
5. The intent of the Legislature was that the workers compensation system was not to be affected in any way whatsoever.

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 V. Floyd
NOTARY PUBLIC

81484-1



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
	)	<u>Senator</u>
Plaintiffs,	)	<u>John P. Helmgren</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)	
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.)	

* * * * *

Senator John P. Halbigren, 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 B. Helgeson

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

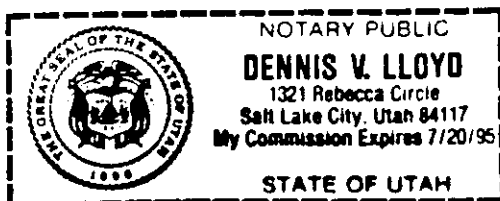
On the 19th day of May, 1993, personally appeared before me Senator John P. Holmgren, the signer of the above instrument, and duly acknowledged to me that he executed the same.

Dennis V Floyd
NOTARY PUBLIC

My Commission Expires:

Residing at: SLC, 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
	)	<u>Representative</u>
Plaintiffs,	)	<u>Brant H. Goodfellow</u>
	)	REGARDING S.B. 64, 1986
vs.	)	UTAH LEGISLATURE a/k/a
	)	THE LIABILITY REFORM ACT
SCOULAR GRAIN COMPANY OF	)	OF 1986
UTAH; UNION PACIFIC RAILROAD)	
COMPANY, a Utah Corporation;	)	Utah Supreme Court No.
THE SCOULAR COMPANY, ROBERT	)	910482
O'BLOCK AND GORDON OLCH, dba)	
FREEMPORT CENTER ASSOCIATES;)	
TRACKMOBILE, INC., a Georgia)	
Corporation, Formerly Known)	
as WHITING CORP.; THE DENVER)	
AND RIO GRANDE WESTERN)	
RAILROAD COMPANY, A SHORT)	
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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.)	

* * * * *

Tab 10

APPENDIX 10

Affidavit of Dennis V. Lloyd

From *Brown v. Bowman & Kemp Steel and Supply Company, Inc. et al.*

Utah Supreme Court No. 910082

James R. Black, #0357
Wendy B. Mosely, #4096
BLACK & MOORE
261 East Broadway, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 363-2727

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DANIEL C. BROWN,

Plaintiff,

vs.

BOYER-WASHINGTON BOULEVARD

ASSOCIATES, a Utah limited

partnership, BOWMAN & KEMP

STEEL AND SUPPLY COMPANY, INC.,

a Utah corporation; and

JACOBSEN-ROBBINS CONSTRUCTION

COMPANY, a Utah corporation,

Defendants.

JACOBSEN-ROBBINS CONSTRUCTION
COMPANY, a Utah corporation,

Third-party plaintiff,

vs.

CCCCT., a Utah corporation,
and BOWMAN & KEMP STEEL AND

SUPPLY, INC., a Utah

corporation,

Third-party Defendant.

Judge Richard B. Moffat

Civil No. C88-4665

AFFIDAVIT OF
DENNIS V. LLOYD

Dennis V. Lloyd, being first duly sworn, deposes and states
the following to be true to his personal knowledge:

1. I am currently general counsel for the Workers' Compensation Fund of Utah (WCFU) and I was manager of the legal section of WCFU, then known as the State Insurance Fund, in 1986.

2. During the 1986 session of the Utah Legislature, Senate Bill 64, a proposed Liability Reform Act, was presented for consideration. As presented, the early versions of the bill were of serious concern to WCFU.

3. WCFU opposed the original versions of S.B. 64 because of the language in them which, in the Fund's view at that time, might have permitted comparison of an employer's "fault" in arriving at verdicts in third-party lawsuits. That, in turn, might have required the Fund to defend employers in civil litigation to protect the subrogation lien rights specified in the Workers' Compensation Act of Utah (§ 35-1-62) when the employer was joined involuntarily. The increased cost of defending employers, along with the potential loss of third-party recoveries by the comparison of employer "fault," and the great potential incursion of the proposed legislation on the "exclusive remedy provision" of the Workers' Compensation Act of Utah (§ 35-1-60) would have increased the cost of workers' compensation insurance in the State of Utah.

4. WCFU withdrew its opposition to S.B. 64 when, after negotiation among interested parties and legislators, the language in proposed § 78-27-39 was changed, deleting the words "and each other person whose fault contributed," to restrict comparison of fault to persons seeking recovery and defendants, as

"defendants" is defined in § 78-27-37: those not immune from suit.

DATED this 30th day of November, 1988.

Dennis V. Lloyd
Dennis V. Lloyd

STATE OF UTAH)
 ss.
COUNTY OF SALT LAKE)

On the 30th day of November, 1988, personally appeared before me Dennis V. Lloyd, the signer of the above instrument, and duly acknowledged to me that he executed the same.

My Commission Expires:

10-15-90

Bil Barron
NOTARY PUBLIC
Residing at: Salt Lake

Tab 11

APPENDIX 11

Letter dated April 28, 1993

From Tim Dalton Dunn and Kendall P. Hatch to their clients

DUNN & DUNN

TRIAL LAWYERS

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230 SOUTH 500 EAST
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TELEPHONE (801) 521-6666
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TIM DALTON DUNN ◊◊

MARK DALTON DUNN ◊

KENDALL P. HATCH ◊

J. RAND HIRSCH ◊

GLEN T. HALE ◊◊

CARLTON R. ERICSON ◊ +

KEVIN D. SWENSON ◊

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FAX NUMBER (801) 521-9998

OF COUNSEL:

RICHARD B. CUATTO ◊◊

◊ Admitted in Utah ◊ Admitted in Hawaii + Admitted in California

April 28, 1993

TO ALL CLIENTS OF DUNN & DUNN:

We have received an advance copy of a decision by the Utah Supreme Court that will greatly impact the amounts paid by insurance carriers in the event of an adverse judgment in many personal injury cases. The case will probably be known as *Sullivan v. Scoular Grain, et al.* In that case, several defendants were named, one of whom was the plaintiff's employer. The case was originally filed in the United States District Court for Utah and sent for certification to the Utah Supreme Court.

The two certified questions the U.S. District Court asked the Utah Supreme Court to answer are:

1. Under the Utah Comparative Fault Act, Utah Code Ann §78-27-38, et. seq., can a jury apportion the fault of the plaintiff's employer 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 answers of the Utah Supreme Court are as follows:

1. 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 insures 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.

2. We also hold that an individual or entity dismissed from a case pursuant to an adjudication on the merits of the liability issue may not be included in the apportionment. 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.

Prior to the above decision, if the employer were 90% at fault and the remaining defendants were 10% at fault, the remaining defendants would pay 100% of the damages. Now the remaining defendants will only pay 10%, from which the workers compensation carrier must still be reimbursed 100% of his lien. By hypothetically applying different percentages to the several parties you will find some exceptionally interesting results. (\$100,000 in damages - plaintiff is 10% at fault, employer is 40% at fault, two tort feisor defendants are 25% at fault each - recovery \$50,000, from which the workers compensation lien must be paid.) (\$100,000 in damages - plaintiff is 20% at fault, employer is 70% at fault, two tort feisor defendants are 5% at fault each - recovery \$10,000, less the workers compensation lien.)

We see this case as presently very favorable for the defense. We foresee this case as a landmark from which later decisions will change the insurance industry considerably. We believe there will possibly be a number of decisions or legislative enactments that will or could possibly do one or all of the following:

1. Eliminate the immunity from suit of an employer.
2. Eliminate workers compensation liens.
3. Reduce workers compensation liens by the employer's percentage of fault.
4. Require attorneys representing workers compensation carriers to make an appearance in every applicable case to protect the employer's interest.
5. Eliminate the one-third payment to the plaintiff's attorney for protecting the lien rights or collecting the workers compensation lien.
6. Possibly changing the scale of payments on workers compensation cases.
7. Impacting the rates from which premiums are calculated in several lines of insurance.

The plaintiff's bar will not ignore this case. It presently reduces recovery by plaintiffs in several matters that are now pending. The case creates certain inequities which future decisions must address. (An employer is found to be 80% at fault which reduces the plaintiff's recovery to 20% of his damages, from which the party that is 80% at fault must be reimbursed.)

Justice Stewart in his dissenting opinion says that the majority opinion "is not only unjust and inequitable, but might well be unconstitutional."

We will be happy to provide a copy of the decision to you if you desire one. Just give us a call.

For those clients that write workers compensation insurance, we would also like to make you aware of House Bill No. 249 that was passed by the 1993 Legislature.

House Bill No. 249 requires insurers to print or display in comparative prominence on applications for benefits the following wording:

For your protection, Utah law requires the following to appear on this form.

Any person who knowingly presents false or fraudulent underwriting information, files or causes to be filed a false or fraudulent claim for disability compensation or medical benefits, or submits a false or fraudulent report or billing for health care fees or other professional services is guilty of a crime and may be subject to fines and confinement in state prison.

Also above the endorsement area of each check issued for workers compensation there must now appear the following wording:

Workers compensation insurance fraud is a crime punishable by Utah law.

House Bill No. 249 also defines workers compensation fraud and eliminates some of the standard prima facie elements of fraud required under other circumstances.

If you would like a copy of House Bill No. 249, please give us a call.

Yours very truly,

DUNN & DUNN



TIM DALTON DUNN



KENDALL P. HATCH

Tab 12

APPENDIX 12

WORKERS COMPENSATION ACT
A CAREFUL BALANCE OF CONSTITUTIONAL RIGHTS

s1673-1

WORKERS' COMPENSATION ACT

A CAREFUL BALANCING OF CONSTITUTIONAL RIGHTS.

<u>Employer</u>	<u>Injured Worker and/or Dependant Heirs</u>
1. Exclusive remedy §35-1-60 U.C.A. Action can only be brought in administrative proceedings.	1. A sure, predictable, though limited remedy -- because of mandatory insurance coverage.
2. Speedy resolution. No lengthy jury trial with its uncertainties. Less costly.	2. No fault system -- no reduction or elimination of benefits by comparable fault.
3. Limited, predictable fixed damages.	3. Comparatively speedy and inexpensive administrative process.
a. No pain and suffering damages.	4. Preservation of right to pursue third parties for full damages -- §35-1-62, U.C.A.
b. No projected future special damages. Damages decided and paid as they accrue.	5. Employer and employee on same side in third party cases.
4. Broad based risk spreading on industry through mandatory insurance or qualifying through bonding with Industrial Commission to be a self-insured employer.	6. All employees treated alike.
5. Right to be reimbursed from third party recoveries §35-1-62.	7. Continuing jurisdiction of the Industrial Commission to modify awards based on changes in injured employee's condition. §35-1-78 U.C.A.
a. Is "trustee" of the cause of action for injured worker or dependant heirs in death case.	
6. All employers treated alike.	