

2002

John D. Hale v. Kurt Beckstead and John Does I through V : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN D. HALE,

Plaintiff/Appellant

v.

KURT BECKSTEAD and
JOHN DOES I through V,

Defendants/Appellees.

Case No. 20020196-CA

Appeal from the Fifth Judicial District Court for Washington County
The Honorable G. Rand Beacham

BRIEF OF APPELLEE

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UTAH COURT OF APPEALS
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St. George

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

ISSUES AND STANDARDS OF REVIEW

Issue. The central issue on appeal is whether a general contractor owes an independent contractor a duty of care to protect the independent contractor from an open and obvious danger existing on the general contractor's premises.

Standard of Review. A grant of summary judgment is reviewed for correctness. See Baczuk v. Salt Lake Regional Med. Ctr., 2000 UT App 225, ¶5, 8 P.3d 1037.

DETERMINATIVE LEGISLATION

There are no constitutional provisions, statutes, ordinances, rules or regulations of central importance to this appeal.

STATEMENT OF THE CASE

A. Nature of the Case. The Plaintiff, an independent contractor, was hired by the Defendant to perform work as a painter. The Defendant gave initial instruction as to how the paint was to look, however, the Defendant did not direct, control, or supervise the actual performance of the painting. While the Plaintiff was on Defendant's property for the purpose of performing his work, the Plaintiff was injured when he fell from a second floor balcony which balcony was missing guardrails. This case involves the standard of care owed by the Defendant to the Plaintiff.

B. Course of Proceedings and Disposition Below. On or about March 21, 2000, the Plaintiff filed suit against the Defendant in the Fifth Judicial District Court

for Washington County alleging negligence, premises liability, and violation of OSHA standards. The Defendant moved for summary judgment on the grounds that under Utah law, the Defendant owed not duty of care to the Plaintiff because the Plaintiff was an independent contractor and the Defendant did not control the manner or method of Plaintiff's performance. The trial court entered summary judgment for the Defendant and dismissed the Plaintiff's complaint. The Plaintiff appealed to the Utah Supreme Court. The Utah Supreme Court transferred jurisdiction of the appeal to the Utah Court of Appeals.

STATEMENT OF FACTS

In 1996, Defendant/Appellee Kurt Beckstead ("Beckstead") undertook the construction of a home located in Santa Clara, Utah. (R. 75) The home was to be the primary residence for Beckstead and his family. (R. 75.) Beckstead acted as his own general contractor in the construction of the home. (R. 75, 101.)

Beckstead hired an independent contractor, Plaintiff/Appellant John D. Hale ("Hale"), to paint Beckstead's home. (R. 101). While Beckstead bought the paint and generally told Hale how the paint should look, Beckstead did not control the manner in which Hale was to paint the home. (R. 101.)

Hale entered Beckstead's home solely for the purpose of painting the same. (R. 101.) Because the home was under construction, the guardrails that would normally be in place were not yet installed on the second floor balcony of the home. (R. 101.) Any danger posed by the missing guardrails was an open and obvious danger. (R. 102.) While inside the home and in the course of performing his work,

despite the open and obvious nature of the danger posed by the exposed balcony, Hale stepped off the balcony and fell to the first level of the home. (R. 101.)

On March 21, 2000, Hale filed a complaint against Beckstead in the Fifth District Court for Washington County, alleging negligence, violation of the Occupational and Safety Health Act (OSHA), and premises liability. (R. 1-6.)

Beckstead moved for summary judgment arguing that Hale was an independent contractor and as such Beckstead owed no duty to Hale, thereby precluding any recovery under a theory of negligence. (R. 58, 63.) Beckstead also argued that the OSHA violations asserted by Hale in his complaint did not apply as there is no private right of action for violations of OSHA. (R. 71.)

Hale opposed Beckstead's motion arguing there were insufficient facts and evidence under which the trial court could enter summary judgment for Beckstead, and that he was injured as a result of Beckstead's failure to install guardrails on the second floor, not as a result of the performance of work for which he was hired. (R. 85-87.)

The trial court granted Beckstead's motion and entered summary judgment for Beckstead. The trial court found that Hale "fell while on [Beckstead's] premises as a business visitor or invitee, that [Beckstead] did not control or direct the manner of [Hale's] work, and that any danger posed to [Hale] by the condition of [Beckstead's] partially completed home was open and obvious to [Hale]." (R. 101.) Applying the law to these findings, the trial court held that "[Beckstead] had no duty of care towards [Hale] concerning the manner or method of [Hale's] work performance and

the condition of [Beckstead's] property was not such that [Beckstead] would be subject to liability to [Hale] . . .” (R. 102.)

Hale appeals.

SUMMARY OF ARGUMENTS

First, under Utah law, an employer of an independent contractor, who does not control the manner or method of the work performed by the independent contractor, owes no duty of care to protect or prevent injury to the independent contractor and therefore cannot be held liable for such injuries.

In the instant case, Beckstead employed Hale as an independent contractor and did not control the manner or method of the work performed by Hale. Therefore, Beckstead owed no duty of care to protect Hale or to prevent the injury which was suffered by Hale in the course of Hale's performance of his duties.

Second, Hale's argument as to the application of OSHA standards to the standard of care owed by Beckstead to Hale is raised for the first time on appeal and therefore should not be considered on appeal by this Court. Furthermore, to the extent Hale asserts that the OSHA regulations create the standard of care owed by Beckstead, the same are irrelevant because Beckstead cannot be held to a standard of care where does not have a duty of care.

ARGUMENT

I. THERE IS NO DISPUTE AS TO ANY MATERIAL FACT ALLOWING THIS COURT TO DETERMINE WHETHER THE TRIAL COURT WAS CORRECT AS A MATTER OF LAW.

At the outset, it must be noted that on summary judgment Hale did not challenge Beckstead's assertion that Hale was an independent contractor. This assertion was made by Beckstead in his memorandum in support of motion for summary judgment and in Beckstead's supporting affidavit. (R. 62, 75; Addendum B.) In response, Hale challenged Beckstead's assertion that Hale represented he was a licensed, bonded, and insured contractor. (R. 89; Addendum C.)

Rule 4-501(2)(B) of the Utah Code of Judicial Administration provides that on a motion for summary judgment, "[a]ll material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement." Therefore, because Hale never specifically controverted Beckstead's statement that his status was that of an independent contractor, the same is deemed admitted, regardless of whether the trial court made a specific finding that Hale was an independent contractor.

Thus, for purposes of the instant appeal, the relevant, undisputed facts can be summed up as follows: (1) Hale was employed by Beckstead as an independent contractor; (2) Beckstead generally instructed Hale as to how the paint should look, but did not control the manner or method of Hale's actual performance of the task, which performance was solely in the discretion and judgment of Hale; (3) that the

danger existing on the premises was open and obvious; and (4) that Hale was injured in the course of his performance.¹

Therefore, because there is no dispute as to any material fact, this Court may determine whether summary judgment was proper as a matter of law. See Utah R. Civ. P. 56(c).

II. BECKSTEAD OWED NO DUTY OF CARE TO HALE TO PROTECT HALE FROM THE OPEN AND OBVIOUS DANGER ON THE PREMISES.

To prove negligence under Utah law, a plaintiff must show four things: “duty, breach of duty, causation, and damages.” Gerbich v. Numed, Inc., 1999 UT 37, ¶14, 977 P.2d 1205. The trial court granted Beckstead’s motion for summary judgment determining, as a matter of law, that Beckstead owed no duty to Hale. See Addendum A, at 3. Therefore, the trial court dismissed Hale’s complaint. See id.

On appeal, Hale argues that the cases relied upon by the trial court, Thompson v. Jess, 1999 UT 22, 979 P.2d 322 and Dayton v. Free, 46 Utah 277, 148 P. 408 (1914), did not apply to the facts of the instant case, thereby requiring this Court to reverse the summary judgment ruling. However, applying the facts in the instant case to the most recent case on this subject, Thompson v. Jess, it is sufficiently clear that under Utah law, Beckstead, as the employer of Hale, an independent contractor, did not owe Hale a duty of care to protect him from the danger located on the premises.

¹ With regard to Hale’s actual injury, the trial court states that Hale fell and was injured while inside the home. See Addendum A, at ¶8. However, Hale admits in his affidavit submitted in opposition to summary judgment that he “fell and was injured while working at the home.” Addendum C, Affidavit of John Hale, at ¶4.

In Thompson v. Jess, 1999 UT 22, 979 P.2d 322, the Utah Supreme Court reiterated the general rule in Utah that “the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.” Id. at ¶ 13 (quoting Restatement (Second) of Torts § 409). While the language of this rule addresses harm to third parties, a common sense application of the rule should include harm suffered by the independent contractor himself as a result of his own act or omission. See, e.g., Restatement (Second) of Torts § 409 cmt. b (stating because employer has no control over manner in which contractor performs work, contractor, not employer, has responsibility of preventing and bearing risk).

“This general rule recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor’s work is performed owes no duty of care concerning the safety of the manner or method of performance implemented.” Thompson, 1999 UT 22 at ¶13. The reason for this rule is that “where the principal employer does not control the means of accomplishing the contracted work, the contractor ‘is the proper party to be charged with the responsibility for preventing the risk [arising out of the work], and administering and distributing it.’” Id. (quoting W. Prosser & W. Keaton, *The Law of Torts* 509 (5th ed. 1984)) (alteration in original).

In Thompson, the defendant, a motel owner, contracted with a company for the purchase and delivery of pipe which she would use as a large sign post. See id. at ¶ 2. The company sent two of its employees to deliver the pipe. See id. at ¶3. The defendant told the two where she wanted the pipe installed and then asked if they would actually perform the installation. See id. The two agreed and undertook the

installation. See id. at ¶4. The extent of the defendant's involvement with the installation was in advising the two where to install the pipe. See id. The manner and method of the installation was left to the discretion and control of the two contractors. See id. During the course of the installation, one of the employees (the plaintiff) was injured. See id. ¶5.

The plaintiff sued the defendant alleging she was negligent in the control she exercised over the installation and in failing to take or require special precautions in its performance. See id. ¶7. The defendant moved for summary judgment arguing that because she did not direct or otherwise control the manner or method of installing the pipe, she owed no duty of care to either of the two contractors to ensure they installed the pipe safely. See id. The district court granted summary judgment for the defendant and the plaintiff appealed. See id. at ¶¶ 7-8.

On appeal, the Utah Supreme Court affirmed. See id. at ¶36. Although the defendant gave initial instruction to the plaintiff and his fellow contractor, it amounted to nothing more than control over the desired result, which, the court reasoned, is not sufficient to give rise to a duty of care. See id. at ¶24. The court reasoned that because the defendant did not direct, control, or supervise the actual performance of the installation, she was not an active participant in the same and therefore had no duty of care to the plaintiff to ensure the installation was performed properly. See id.²

² The doctrine of "retained control" referred to by the court in its analysis is one of two exceptions to the general rule that an employer owes an independent contractor no duty of care. The other, which the court analyzed in Thompson, is the doctrine of "peculiar risk" or "inherently dangerous work". See Thompson, 1999 UT 22 at ¶¶ 14, 27. Hale

The instant case is factually similar to Thompson insofar as in the instant case, like the defendant in Thompson, Beckstead's initial instruction to Hale as to how the paint should look was to effect a desired result. The manner and method of accomplishing that result was entirely within the discretion of Hale. Indeed, at the time Hale undertook performance of the work for Beckstead, Beckstead was out of town and therefore not in a position to exert any control or supervision over the manner or method of the work.

Furthermore, Hale's presence on Beckstead's premises was for the limited purpose of performing the work he contracted to perform, and during the course of performing that work he was injured. Therefore, applying these facts to the supreme court's reasoning in Thompson, Beckstead owed no duty of care to Hale, and therefore cannot be held liable for the injury suffered by Hale in the performance of the work for which he was contracted to perform.

Therefore, the trial court was correct in granting Beckstead's motion for summary judgment.

III. THE CASES RELIED UPON BY HALE ARE FACTUALLY DISTINGUISHABLE FROM THE INSTANT CASE AND ARE THEREFORE INAPPLICABLE.

Hale argues that Thompson does not apply to the facts in the instant case. He asserts that in the instant case, his injury occurred as a result of "a dangerous condition on the premises which was created or existed independent of the manner in which the contractor undertook his performance." (Appellant Brief, at 7.) Hale

does not argue that the peculiar risk doctrine applies to the instant case, and indeed there is no evidence in the record to suggest that Hale's performance of a residential paint job involved a peculiar risk or inherently dangerous work.

asserts that even though Beckstead did not control or direct the performance of Hale's work, Beckstead was in possession of the premises and therefore owed Hale a duty of care of that owed by land owner to an invitee. (Appellant's Brief, at 7-8.)

Hale relies on two main cases to support of his argument, Silvas v. Speros Construction Co., 594 P.2d 1029 (Ariz. Ct. App. 1979), and Laws v. Blanding City, 893 P.2d 1083 (Utah Ct. App. 1995).

In Silvas, a subcontractor on a construction site was injured when he fell through one of several different holes on the roof of a building under construction. See Silvas, 594 P.2d at 1031. The subcontractor had fallen through the hole as a result of being distracted in his attempt to avoid another one of the holes. See id. The general contractor argued that he owed no duty of care to the injured subcontractor because the subcontractor knew of the holes and appreciated the danger posed by the same. See id.

Relying on comment f to section 343A of the Restatement, the court determined that the general contractor may have had a duty of care even though the danger was known and obvious to the subcontractor, because the situation was one in which the general contractor may have had reason to suspect that the subcontractor would have been distracted or otherwise would have forgotten to protect himself from the danger. See id.

In the instant case, Hale presented no evidence, as did the subcontractor in Silvas, that he was distracted from the open and obvious danger presented by the absence of guardrails on the second floor balcony. Indeed, Hale presented no

evidence to suggest that Beckstead should have expected that Hale would suffer physical harm despite the open and obvious nature of the danger.

In Laws, the plaintiff fell from a dumping platform at a city dump and sued the city alleging his injuries were caused by the city's negligent construction and maintenance of the dump. See Laws, 893 P.2d at 1084. The plaintiff appealed a jury verdict for the city, arguing that a jury instruction failed to adequately state the law on the duty of care the city owed to the plaintiff. See id. 1084-85. The instruction was taken from section 343 of the Restatement, but failed to take into account section 343A, which the court determined, must be read in concert with 343. See id. at 1085.

Quoting from comment g of section 343A, the court stated that despite the open and obvious nature of a danger which exists on the premises, the fact that the premises have been held open to the visitor, and that he has been invited to use them, is always a factor to be considered in determining that reasonable care has been used to make the premises safe. See id. Further, the court found determinative the fact that the owner of the premises was a governmental entity/public utility which has made its premises open to the public, which public is therefore entitled to expect reasonable safety while using the premises. See id. at 1085-86.

Laws is distinguishable from the instant case insofar as Laws did not involve the use of premises by an independent contractor who had undertaken to perform work which performance was subject to his own control and discretion. Furthermore, Beckstead is certainly not a governmental entity or public utility under which the duty of care, as implied by the court in Laws, is perhaps greater than that expected of a private property owner or general contractor.

Appellee does not dispute that there is some conflict between the cases relied upon by Hale and Thompson regarding the duty of care. This conflict is due in part to case law which stands for the proposition that a workman who comes onto land to make improvements, alterations, or repairs is owed a duty of care by the landowner which is equivalent to that owed to a regular invitee. See English v. Kienke, 848 P.2d 153, 156 (Utah 1993).

The fact remains, however, that in Thompson, the most recent case addressing the duty of care owed in circumstances as are present in the instant case, the Utah Supreme Court applied section 409 of the Restatement and its exceptions as set forth above. It did not cite to or address sections 343 and 343A of the Restatement or Hale's possible status as an invitee. Therefore, because the facts in the instant case parallel those in Thompson, Thompson must be applied, and its application results in a finding that Beckstead owed Hale no duty of care.

IV. HALE'S ARGUMENTS CONCERNING THE APPLICATION OF OSHA REGULATIONS TO THE APPROPRIATE STANDARD OF CARE CANNOT BE CONSIDERED ON APPEAL BECAUSE SUCH ARGUMENTS WERE NOT RAISED BEFORE THE TRIAL COURT.

Hale argues that OSHA regulations are relevant in determining the appropriate standard of care in the instant case. In his complaint, Hale asserted that Beckstead violated OSHA regulations relating to guardrail protection for employees. Beckstead moved for summary judgment on the issue, asserting that there is no private right of action under OSHA. See Addendum B, at 11. Hale did not respond to this argument. See Addendum C. The trial court agreed, and granted summary judgment on the issue to Beckstead. See Addendum A, at 4.

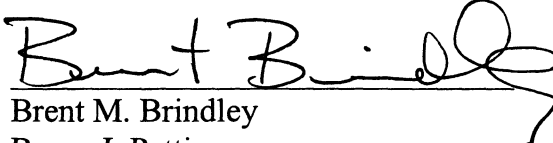
Now, for the first time on appeal, Hale asserts that his OSHA cause of action, which is clearly delineated as such in his complaint (R. 3), was not a cause of action at all, but rather the appropriate standard of care to govern this case. It is a well established rule that, absent plain error, this Court will not address issues raised for the first time on appeal. See Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996).

Should this Court reverse the trial court's grant of summary judgment, it should remand the case back to the trial court to allow it to determine the applicability of OSHA regulations in determining the standard of care. However, if this Court affirms the trial court, and rules that Beckstead did not owe Hale a duty of care, the OSHA regulations which Hale asserts set the standard of care, are irrelevant.

CONCLUSION

For the reasons set forth above, Beckstead respectfully requests that this Court affirm the trial court's grant of summary judgment in favor of Beckstead.

DATED THIS 19th day of December, 2002.


Brent M. Brindley
Bryan J. Pattison
Attorneys for Defendant/Appellee

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of December 2002, I served eight (8) copies of the foregoing **BRIEF OF APPELLEE** to the Utah Court of Appeals and two (2) copies to Aaron J. Prisbrey, by depositing copies in the U.S. Mail, postage pre-paid, addressed to:

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Tab A

BY

1. Plaintiff complains in this action of injuries he received in a fall.
2. Defendant was the owner of the property at which Plaintiff fell.

3. A home was under construction on Defendant's property, and Plaintiff was inside the partially-completed home, at the time of Plaintiff's fall.

4. Defendant was acting as his own "general contractor" for the construction of the home.

5. Defendant hired Plaintiff to paint the home.

6. Defendant told Plaintiff generally how the paint should look, and bought the paint for Plaintiff to use.

7. Defendant did not control or direct the manner in which Plaintiff was to paint the home.

8. While inside the partially-constructed home, Plaintiff inadvertently stepped off a second floor balcony and fell to the first level.

9. There is no evidence that Plaintiff had authority to enter Defendant's premises for any purpose other than to complete his contract to paint the home.

10. Defendant was not in the home when Plaintiff fell, but was out of town on an extended vacation.

There are no genuine issues as to any other material facts.¹

¹It has been the experience of this Court and others at the trial court level that the facts on which we rely are occasionally changed at the appellate court level, even to include facts which were not presented to the trial court at all. This appears to result occasionally from appellate attorneys failing to give the appellate courts a complete record of the facts as they were presented to the trial court. On a motion for summary judgment, this Court feels constrained to consider only those facts which are presented in compliance with Rule 4-501 of the Utah Rules of Judicial Administration, and it is this Court's opinion that an appellate review which extends beyond those facts is a *de novo* review rather than an appeal and, therefore, is erroneous. Consequently, this Court emphasizes that this Ruling is based on the set of facts specified above.

ANALYSIS²

Plaintiff's Complaint asserts claims titled "Negligence," "Violation of Statute, Ordinance or Safety Order," and "Premises Liability." Defendant seeks summary judgment as to each of these claims.

Plaintiff's first and third claims both fail on the issue of Defendant's duty to Plaintiff under the circumstances presented in this case. This Court is persuaded that Plaintiff fell while on Defendant's premises as a business visitor or invitee, that Defendant did not control or direct the manner of Plaintiff's work, and that any danger posed to Plaintiff by the condition of Defendant's partially completed home was open and obvious to Plaintiff. Consequently, under current law, Defendant had no duty of care toward Plaintiff concerning the manner or method of Plaintiff's work performance and the condition of Defendant's property was not such that Defendant would be subject to liability to Plaintiff under the facts of this case.³

²This Court is fully aware of the now-frequent instruction of the appellate courts for the trial courts to make a more extensive analysis in rulings such as this. *See, e.g., Gabriel v. Salt Lake City Corp.*, 2001 UT App 277, 431 Utah Adv. Rep. 7. That instruction is not always realistic, however. First, the caseloads of the trial courts continue to increase while many courts' time and resources remain stagnant; for example, the judicial resources in this district have remained the same for over 12 years in spite of the overwhelming growth in the population and case filings in the district. Second, appellate reviews of summary judgment decisions of the Utah district courts resulted in a reversal rate well over 50% in reported cases decided in the Utah appellate courts in the year 2000. In light of the huge caseloads carried by the trial courts, the time required for the drafting of a detailed ruling, which is more likely to be reversed than to be affirmed, is often too great a luxury for a trial judge to afford.

³This Court expresses no opinion as to whether the current law should change or may change upon further review by an appellate court. But see, e.g., *Kessler v. Mortenson*, 2000 UT 95, 16 P.3d 1225.

Plaintiff's second claim alleges liability based on Defendant's alleged violations of provisions of, and/or regulations under, the federal Occupational and Safety Health Act or "OSHA." Defendant has cited strong authority for his argument that OSHA does not permit a private cause of action, and Plaintiff has not cited any authority to the contrary.

CONCLUSION

There are no genuine issues of material fact before this Court, and Defendant is entitled to judgment as a matter of law, dismissing Plaintiff's complaint. Defendant's Motion is hereby granted, and Defendant's counsel is hereby directed to submit an appropriate judgment pursuant to RJA Rule 4-504.

Dated this 8 day of February, 2002.

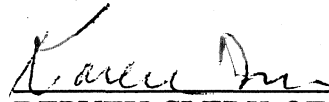

G. RAND BEACHAM, JUDGE

Certificate of Mailing or Hand Delivery

I hereby certify that on this 11 day of Feb, 2002, I provided true and correct copies of the foregoing RULING to each of the attorneys/parties named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

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Tab B

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BY 

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

JOHN D. HALE,

Plaintiff,

vs.

KURT BECKSTEAD,
and JOHN DOES I-V.,

Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Case No. 000500437

Judge G. Rand Beacham

Defendant Kurt Beckstead, by and through, Snow Nuffer, a Professional Corporation, his counsel of record, respectfully submits the following memorandum in support of his Motion for Summary Judgment.

STATEMENT OF MATERIAL FACTS¹

1. This incident arose when the Plaintiff fell while painting the interior of a home located at 1975 West Rimview Drive, Santa Clara, Washington County, Utah (hereinafter the "Home"). (Complaint ¶¶7, 12).

¹ For purposes of summary judgment, Defendant does not dispute the referenced allegations of Plaintiff's Complaint, because Defendant believes that even if true, Plaintiff has failed to state a claim. Defendant reserves the right to dispute previously denied allegations of Plaintiff's Complaint at later stages of the litigation.

2. Defendant undertook as a general contractor to build the Home at issue in this matter. (Complaint ¶ 7).

3. Defendant, in connection with building the Home hired Plaintiff as a sub-contractor for the interior painting of the Home. (Complaint ¶¶ 7, 17).

4. Plaintiff represented to Defendant that he was a licensed, bonded and insured painting contractor. It was later determined that Defendant was none of these things. (Affidavit of Kurt Beckstead ¶ 5).

5. Defendant gave Plaintiff general instructions and guidelines, but left it to the professional discretion and expertise of Plaintiff, as an independent contractor, as how to perform the task of painting the interior of the Home. (*Id.*, ¶ 7).

6. On September 20, 1996, at approximately 5:30 p.m., while painting the interior of the Home, the Plaintiff inadvertently stepped off of a second floor balcony and fell to the first level, which fall allegedly caused his injuries. (Complaint ¶¶ 7, 12).

7. At the time of this accident, Defendant was not present in the Home. In fact, Defendant was out of town on an extended family vacation. (Beckstead Affidavit, ¶ 8).

8. On March 21, 2000, Plaintiff filed the above-captioned lawsuit asserting claims for negligence, OSHA violations and premises liability. (See Complaint generally).

ARGUMENT

I.

DEFENDANT OWED NO DUTY TO PLAINTIFF

The Utah Supreme Court has established the *prima facie* elements of a negligence claim, as follows: (1) the defendant owed the plaintiff a duty; (2) there was a breach of that duty; (3) the breach was the actual and proximate cause of the injury complained of; and, (4) the defendant suffered damages. *Gerbich vs. Numed, Inc.*, 977 P.2d 1205-07 (Utah 1999); *Rocky Mountain Thrift Stores vs. Salt Lake City Corp*, 887 P.2d 848-51 (Utah 1994); *Weber vs. Springville City*, 725 P.2d 1360-63 (Utah 1986). If there was no duty owed by the defendant to the plaintiff, the negligence analysis ends and no liability attaches.

a) No Duty Owed to Independent Contractor

In Utah, the law is well established that “one who hires an independent contractor and does not participate in or control the manner in which the contractor’s work is performed *owes no duty of care* concerning the safety of the manner or method of performance implemented.” *Thompson vs. Jess*, 979 P.2d 322 (Utah 1999) (emphasis added), *see also Dayton vs. Free*, 148 P. 408 (Utah 1914) (holding that an employer or owner that does not control the work the independent contractor has no duty to provide a safe workplace to the employees of the independent contractor). The two authoritative cases in this area of the law are *Thompson*, and *Dayton*.

b) Thompson vs. Jess

As indicated above, *Thompson* stands for the proposition that a landowner owes no duty to an employee of an independent contractor where the landowner does not participate in or control the manner in which the independent contractor carries out its duties. The *Thompson* Court expounded the basis for such a rule by stating, “[t]he commonly accepted reason for this rule is that, where the principal employer does not control the means of accomplishing the contracted work, the contractor is the proper party to be charged with the responsibility for preventing the risk arising out of the work, and administering and distributing it”. *Thompson*, 979 P.2d 325, citing, W. Prosser & W. Keaton, *The Law of Torts*, §509 (5th Ed. 1984).

In *Thompson*, the plaintiff, an employee of an independent contractor hired by the defendant landowner to install a large steel post on the latter’s property, was injured when the steel post broke loose and rolled on him. *Id.* at 324. The injured employee brought a negligence action against the landowner claiming that the landowner was “negligent in the control she exercised in the installation of the pipe and in failing to take or require special precautions in the performance of the job.” *Id.* The landowner later moved for summary judgment arguing that she did not exercise control over the independent contractor on the project, and therefore, had no duty to the independent contractor’s employee. *Id.* The lower court entered summary judgment in favor of the landowner.

In reviewing the case on appeal, the Utah Supreme Court was not required to consider the no-duty to independent contractors’ rule. Conceding the application of the

no-duty rule, the employee instead asserted on appeal that the exceptions (see discussion on exceptions *infra*) applied to create a duty of care running from the landowner to the independent contractor. The *Thompson* Court examined these exceptions, but in the end affirmed the lower Court's decision that the landowner owed no duty to the independent contractor's employee.

In our case, Defendant, the landowner, hired Plaintiff, the independent contractor, to perform painting services on the inside of the Home. (Beckstead Affidavit, ¶ 4). In doing so, Defendant left it to Plaintiff's professional expertise and discretion as to how to carry out the task. (*Id.*, ¶¶ 6, 7). In fact, at the time of the accident, Defendant was out of town on vacation with his family, exercising no control over Plaintiff or over the project. (*Id.*, ¶ 8). This case is a classic example of an employer hiring an independent contractor to do a job and retaining no control or direction on how the job was to be accomplished. As such, the *Thompson* rule cited above, and the *Dayton* case, discussed *infra*, make it clear that no duty is owed to Plaintiff, as he was left to his own professional judgment and discretion on how to accomplish the painting task. (*Id.*, ¶¶ 6, 7).

c) *Dayton v. Free*

To a large extent, the *Thompson* Court relied upon the foundational case *Dayton vs. Free*, 148 P. 408 (Utah 1914), in reaching its conclusion. In *Dayton*, the plaintiff was employed by an independent contractor who was hired to build a tunnel for the landowner. The employee was injured when a "missed hole" discharged. The employee then brought a suit against the landowner for negligence and failing "to notify

or warn him of the missed hole". *Dayton*, 148 P. at 409. The landowner argued that the Plaintiff was an employee of an independent contractor, that he had no direction or control over the employee, and therefore, had no duty to him. *Id.* A jury ruled in favor of the injured employee.

On appeal, the Utah Supreme Court found that the employee was an employee of an independent contractor and not employed by the landowner. The Court held that there was no duty running from the landowner to the independent contractor's employee. The Court reasoned that since the landowner had "neither reserved or exercised direction or control on the work . . . [the landowner] owed him no duty to provide a safe place to work, or to warn or notify him . . . or to guard him against dangers incident to . . . the work." *Id.* at 401-2.

In *Dayton*, the Utah Supreme Court set forth three situations where landowner or employer may be held liable for the negligent act of an independent contractor:

The general rule that the employer of an independent contractor is not liable for an injury resulting to a third person from a tortious act committed by himself or his servants is subject to three exceptions: (1) where the injury was the direct result of the stipulated work; (2) where the work was intrinsically dangerous, and the injury was a consequence of the failure of the contractor to take the appropriate precautions; (3) where the injury was caused by the performance of an absolute duty owed by the employer to the complainant, individually, or to the class of persons to which he belongs. *Id.* at 411.

In *Dayton*, however, the Court concluded that none of these exceptions applied or attached liability to the landowner. Because of the potential applicability to the present case, the three exceptions to the general no-duty rule will be discussed in turn.

(i) Injury as the Direct Result of the Work.

The first exception to the general rule of non-liability is where the “injury was the direct result of the stipulated work.” *Id.* The *Dayton* Court explained that this exception applies “where the work which the contractor is employed to do is wrongful in itself, or if done in the ordinary manner would result in a nuisance.” *Id.* at 412. In *Dayton*, the Court ruled this exception did not apply because “the injury . . . was not a direct result of the stipulated work.” *Id.*

The same rule applies to the case at Bar. In the present case, the injury did not result from the work itself, but rather from the manner in which it was performed and the methods used, or not used, to provide fall protection. Further, for this exception to apply, *Dayton* requires that the injury complained of be the result of work which was “wrongful in itself”, painting the inside of the Home certainly does not qualify as “wrongful” or a “nuisance”. Thus, the first exception to the general rule of non-liability does not apply.

(ii) Intrinsically Dangerous.

The second exception to the general rule of no-duty is where the work is “intrinsically dangerous.”² In *Dayton*, the plaintiff argued that underground tunnel blasting was “intrinsically dangerous”, and therefore, the exception applied. The Court did not agree. In coming to its conclusion, the Court asked,

² Some courts refer to this exception as the “inherently dangerous” exception while others refer to it as the “intrinsically dangerous” exception. There is no difference between the two terms, and they will be used interchangeably throughout this memorandum.

“Dangerous to whom? Here, only to those engaged in or about the work. So is feeding a threshermachine or working at sawmilling dangerous. An inexperienced employee, unguarded against attendant dangers and attempting such work, may probably be injured. Who, if anyone, owes him duties of warning and protection? *He who employed or directed or controlled him*, or directed or controlled the threshing or sawing. Certainly not the farmer, who did no more than merely contract with the thresher to thresh his grain, or with the sawmiller to saw his timber”. *Dayton*, at 412. (Emphasis added).

In *Thompson*, see *supra*, the injured employee of the independent contractor argued on appeal that the general rule of non-liability did not apply because the placement of the steel pipe was “inherently dangerous.” *Thompson*, 979 P.2d 328. In relying on “*Dayton* and Tenth Circuit case law applying *Dayton*,” the *Thompson* Court held that the “inherently dangerous” exception has “no application to employees of independent contractors performing the work at issue . . . but rather [to] innocent third parties.” *Id* at 331. Citing *Eutsler vs. United States*, 376 F.2d 634, 636 (Tenth Circuit 1967).

The rule under *Dayton* is that if the job is dangerous “to those engaged in and about the work,” but not to innocent third parties then it does not qualify under the “inherently dangerous” exception. The *Thompson* Court took this reasoning to its logical step by holding that the “inherently dangerous” exception does not apply to injured employees of the independent contractor (and thus to the independent contractor himself), but rather it applies only to innocent third parties.

In this case, the work performed was not inherently dangerous to Plaintiff. Under the standards set forth above, Plaintiff’s task of painting the Home does not qualify as “inherently dangerous”. Further, because it was the independent contractor, not an

innocent third party that was undertaking the performance of the task, the exception does not apply. Accordingly, the second exception is not a basis to overcome the no-duty rule.

(iii) Absolute Duty.

The third and final exception is where a landowner owes an absolute duty to the employee of the independent contractor or the independent contractor individually. As set forth above, the Utah Supreme Court has already held that an owner who does not control or direct the work has no duty to provide a safe work place to the independent contractor, or the employee of the independent contractor. *Dayton*, 148 P. 408, 412. In none of the cases discussed herein has this third and final exception operated as a viable exception to the no duty rule. Nevertheless, because the Plaintiff has asserted, among other things, that he was a “business visitor” (i.e. an invitee), and that the Defendant had a duty to protect him as an invitee, this third exception will be discussed³.

The Utah Courts have adopted the Restatement’s approach to standards of care owed to an invitee. In *English vs. Kienke* 848 P.2d. 153, (Utah 1993) the Utah Supreme Court, in citing Restatement (Second) of Torts §343, stated:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- a. Knows or by exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees, and

³ Plaintiff’s does not claim there was an “absolute duty” to protect him as an invitee. In addressing Plaintiff as an invitee for purposes of this memorandum Defendant is not conceding his status as such.

b. Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

c. Fails to exercise reasonable care to protect them against the danger.

English, 848 P.2d at 156, *quoting* Restatement (Second) of Torts §343.

In the case at bar, Defendant did not owe Plaintiff a duty as an invitee because there was no “unreasonable risk of harm,” and the danger was so open and obvious that the landowner could reasonably expect that the danger would be discovered. Plaintiff was a contracted painter hired to perform painting on the inside of a home that was in the progress of being constructed. He, like any other subcontractor, enters a home under the reasonable expectation that not all of the phases of construction are complete. As a subcontractor, he has a duty to protect himself and watch-out for open and obvious dangers that might exist, and assume the risk of such dangers.

Furthermore, Defendant had every reason to assume that the Plaintiff, who had represented himself as a qualified and professional painter, would notice that the railing was not in place and work accordingly, using appropriate scaffolding and any other such equipment (i.e. a tether) to assure safety. In short, it is completely reasonable for any prudent person to assume that a professional painter would notice the railing was not in place and take measures to protect himself.

Accordingly, even if the Plaintiff was an invitee, this is a case where a duty to protect him does not apply. The “risk” of the unprotected balcony was not “unreasonable” as to a sub-contractor.

II. NO PRIVATE CAUSE OF ACTION UNDER OSHA

Plaintiff also asserts that Defendant is liable to him under the Occupational and Safety Health Act (hereafter "OSHA"). In his Complaint, Plaintiff asserts that Defendant violated 29 C.F.R. §§1926.501 and 1926.502, as they relate to guardrail protection for employees. (Complaint ¶¶ 8-15.)

OSHA is simply not applicable, and can carry no weight in the outcome of this matter. The established rule in the Tenth Circuit, as well as in the majority of other jurisdictions, is that OSHA does not "contain statutory provisions permitting a private cause of action for personal injury." *Westine vs. Gonzalas Construction Company*, 103 F.3d 145 (Tenth Cir. 1996); *Jelenic vs. Campbell Plastics*, 159 F.3d 1347 (Second Cir. 1998); 41 F.3d 547,553 (Ninth Cir. 1994); *Reis vs. National R.R. Passenger Corp.*, 960 F.2d 1156-1164 (Third Cir. 1992); *Donovan vs. Square D Co.*, 709 F.2d 335, 338-339 (Fifth Cir. 1983); *see also, Ellis vs. Chase Communications, Inc.* 63 F.3d 473-477 (Sixth Cir. 1995) (holding that the OSHA Act does not create a private right of action for violation of its terms);

Based on this rule, Plaintiff cannot maintain a private cause of action against Defendant on the alleged OSHA violation. The Tenth Circuit, has clearly established that an OSHA violation cannot serve as the basis for a private cause of action.

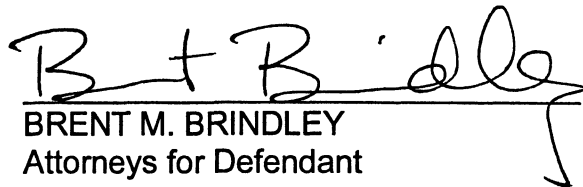
CONCLUSION

For the foregoing reasons, Defendant requests that his Motion for Summary Judgment be granted. Defendant, as landowner, owed no duty to Plaintiff. The rule in

Utah is clear, a landowner/employer owes no duty to an independent contractor when the former has not retained or exercised any control or direction over the employee or over the project itself. The limited exceptions to this no-duty rule do not apply to the present case. Further, OSHA does not provide a private cause of action. Accordingly, there being no genuine issue of material fact the Defendant is entitled to judgment as a matter of law and respectfully moves the Court for such an order.

Respectfully submitted this 20th day of July, 2001.

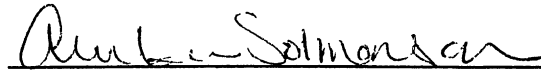
Snow Nuffer
A Professional Corporation


BRENT M. BRINDLEY
Attorneys for Defendant

MAILING CERTIFICATE

I hereby certify that on the 20th day of July, 2001, I served a copy of the foregoing **Memorandum in Support of Motion for Summary Judgment** on each of the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Aaron Prisbrey
1071 East 100 South, Bldg D, Suite 3
St. George, Utah 84770


Secretary

ORIGINAL

FILED
DISTRICT COURT

2001 JUL 20 PM 3:56

CLERK OF COURT.

BY th

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435 674-0400
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IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

JOHN D. HALE,

Plaintiff,

vs.

KURT BECKSTEAD,
and JOHN DOES I-V,

Defendant.

AFFIDAVIT OF KURT BECKSTEAD

Civil No. 000500437
Judge G. Rand Beacham

STATE OF UTAH)
)ss.
COUNTY OF WASHINGTON)

Kurt Beckstead, first being duly sworn on his oath deposes and says as follows:

1. I am competent to testify and have personal knowledge of the matters
stated in this Affidavit.

2. I am, and have been at all material times hereto, the owner of the
premises located at 1975 West Rimview Drive, Santa Clara, Washington County, Utah.

3. In the fall of 1996, I undertook, as general contractor, to construct the home located at 1975 West Rimview Drive, Santa Clara, Washington County, Utah, (herein after "Home"), to be the primary residence for me and my family.

4. I served as general contractor on the Home, and in that capacity hired Plaintiff, John D. Hale, to serve as a sub-contractor for the interior painting of the Home.

5. Plaintiff represented to me that he was licensed, bonded, insured and otherwise qualified to act as the painting sub-contractor for the Home.

6. With respect to the painting of the interior of the Home, I gave general instructions and guidelines on how I would like the painting to look, but otherwise left it to Plaintiff's professional expertise and discretion, as a painting sub-contractor, as to how to carry out and perform the painting task.

7. Plaintiff was left to his own judgment and discretion in performing and completing the interior painting of the Home, and I exercised no control over the day-to-day performance of the task.

8. On September 20, 1996, when the Plaintiff allegedly fell, I was out of town on an extended vacation with my family.

DATED this 20 day of July, 2001.

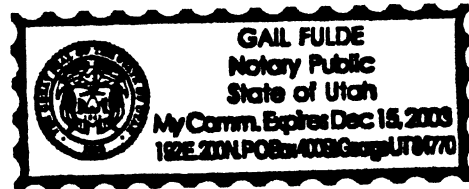

KURT BECKSTEAD

SUBSCRIBED AND SWORN TO before me this 20th day of July,

2001.

Gail Fulde

NOTARY PUBLIC
Residing at: Washington County
My Commission Expires: _____



Tab C

Aaron J. Prisbrey #6968
Attorney for Plaintiff
1071 East 100 South Bldg D Suite 3
St. George, Utah 84770
Telephone 435-673-1661

AP

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY
STATE OF UTAH

JOHN D. HALE,

Plaintiff,

v.

KURT BECKSTEAD, and JOHN DOES I
THROUGH V

Defendants,

**MEMORANDUM IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT
AND REQUEST FOR HEARING**

Case No. 000500437

COMES now the Plaintiff, John D Hale, by and through counsel Aaron J Prisbrey hereby offers this objection to Defendant's Motion for Summary Judgement.

I. DISPUTED STATEMENT OF MATERIAL FACTS

1. Paragraph 1 of the "Statement of Material Facts" alleges that, "[t]his incident arose when the Plaintiff fell while painting an interior of a home located at 1975 West Rim View Drive, Santa Clara, Washington County, Utah." and cites to the complaint at paragraph 7 and 12.

This is a clear misstatement of the complaint Paragraph of the complaint alleges as follows:

On or about September 20, 1996, Defendants did so carelessly, negligently and recklessly own, maintain, occupy, lease, supervise, control, build, erect, design and/or construct those certain premises located at or near 1975 West Rimview Drive, Santa Clara, Washington County, Utah in such a manner as to create a dangerous and hazardous condition of which Defendants knew, or in the exercise of reasonable care and diligence should have known existed in sufficient time prior to this incident to have warned or cautioned the Plaintiff and/or to have corrected and/or remedied such condition, which Defendants carelessly and negligently failed to do, such acts and/or omissions of which Defendants carelessly and negligently failed or refused to do, such acts and/or omissions of the Defendants directly and proximately resulting in injuries and damages to the Plaintiff.

Paragraph 12 indicates:

As a result of Defendant's failure to comply with 29 C.F.R. 1926.501 and 29 C.F.R. 1926.502, Plaintiff fell in excess of six feet and sustained substantial injury to his person.

There is no allegation in the complaint, and indeed no evidence, that Plaintiff's fall was the result of painting, as alleged in paragraph 1 of the Motion for Summary Judgment. Defendant's have created this "fact" out of thin air and it should be stricken in it's entirety.

2. Paragraph 3 indicates that, "Defendant, in connection with building the home hired Plaintiff as a subcontractor for the interior painting of the home." Defendant relies upon the complaint at paragraph 7 and 17 for this proposition. However, paragraph 7 provides as follows:

On or about September 20, 1996, Defendants did so carelessly, negligently and recklessly own, maintain, occupy, lease, supervise, control, build, erect, design and/or construct those certain premises located at or near 1975 West Rimview Drive, Santa Clara, Washington County, Utah in such a manner as to create a dangerous and hazardous condition of which Defendants knew, or in the exercise of reasonable care and diligence should have known existed in sufficient time prior to this incident to have warned or cautioned the Plaintiff and/or to have corrected and/or remedied such condition, which Defendants carelessly and negligently failed to do, such acts and/or omissions of which Defendants carelessly and negligently failed or refused to do, such acts and/or omissions of the Defendants directly and proximately resulting in injuries and damages to the Plaintiff.

Paragraph 17 indicates that:

On September 20, 1996, Plaintiff was a business visitor on the premises of Defendant,

having gone there at the express or implied invitation of the Defendant in connection with the mutual business between Defendant and Plaintiff.

There is no reference nor indication in the complaint as to whether Plaintiff was a subcontractor. This is simply a legal conclusion of Defendant without factual support and hence, paragraph 3 should be stricken in it's entirety.

3. Plaintiff disputes paragraph 4, that, "Plaintiff represented he was a licensed, bonded, insured painting contractor." (See Affidavit of John D. Hale at paragraph 2 filed herewith).

4. Plaintiff disputes paragraph 5 that, "Defendant gave Plaintiff general instructions and guidelines, but left it to the professional discretion and expertise of Plaintiff, as an independent contractor, as how to perform the task of painting the interior home." (See Affidavit of John D. Hale at paragraph 3 filed herewith.)

II. POINTS AND AUTHORITIES

A. BECKSTEAD HAS PROVIDED THE COURT NO FACTS TO SUPPORT IT'S CLAIM

Beckstead had not provided any facts to support it's claim. Instead, he simply sets forth "facts" which are not supported by the record. There are not proper cites to the report to support the majority of the "facts" set forth in Defendant's motion as required by Rule 4-501(2)(A). Rule 4-501(2)(A) states as follows:

The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

As such, there is nothing upon which the Court can issue its decision and Beckstead's motion should be denied.

B. BECKSTEAD'S CLAIM THAT *THOMPSON V. JESS* IS CONTROLLING IS MISPLACED

Assuming, for the sake or argument, there are facts upon which the Court can issue a decision, Defendant essentially argues that Utah law immunizes a land owner from liability whenever an independent contractor goes on the landowner's premises, irrespective of the negligence of the landowner. This is a blatant misinterpretation of the Utah Supreme Court's holding from *Thompson v. Jess* 979 P.2d 322 (Utah 1999).

Utah law, and indeed the Court in *Thompson*, determined that a landowner is immune from liability for physical harm caused to another by "an act or omission of the contractor or his servants." *Thompson* 979 P.2d at 325. (Emphasis added).

"The most commonly accepted reason for this rule is that, where the principal employer does not control the means of accomplishing the contracted work, the contractor 'is the proper party to be charged with the responsibility for presenting the risk [arising out of the work], and administering and distributing it.'" 979 P.2d at 325 citing W. Prosser and W. Keaton, *The Law of Torts* Section 509 (5th Ed. 1994). (Emphasis added).

The rule of law as set forth in *Thompson*, is quite clear. When a landowner retains an independent contractor to come onto the landowner's property for the purposes of performing a task, the landowner is not responsible for the negligent actions of the independent contractor while performing the duties for which he has been hired by the landowner.

Thompson was such a case. There, the Defendant motel landowner, Jess, hired AmeriKan Sanitation to deliver a 20 foot long 8 inch steel pipe to the motel for installation vertically over

an existing pipe stub. Two employees of AmeriKan Sanitation, Dennis Jensen and the Plaintiff, Trevor Thompson, attempted to install the 20 foot pipe over the stub and in the process the pipe was dropped on Thompson's leg which was later amputated below the knee. (Id. at 323-24). Thompson and his co-employee were negligent in performing *the tasks for which they had been hired* as independent contractors by Jess. As such, the Thompson court dismissed Thompson's claims.

Unlike *Thompson*, Hale was not injured as the result of the performance of work for which he was hired. Hale was hired to paint the home. He had absolutely no responsibility for the construction of the home including installation of rails on the second floor, which is the basis for Hale's claim. Beckstead negligently failed to install a rail on the second floor of the home. If the Court were to adopt the analysis promoted by Defendant, a landowner would be immune from all of the landowners tortuous where the Plaintiff happened to be an independent contractor.¹

CONCLUSION

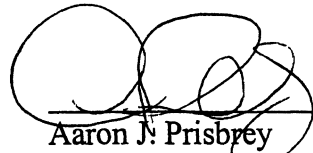
Beckstead had not provided any facts to support it's claim. Instead, he simply sets forth "facts" which are not supported by the record. As such, there is nothing upon which the Court can issue it's decision. Further, Beckstead's reliance on *Thompson* is misplaced. Utah law is fairly clear that when an independent contractor is hired to perform a specific job for a landowner, and is negligent in the performance of those duties, the landowner cannot be held

¹Under Beckstead's analysis, a homeowner could dig a pit 20 feet deep in his yard and hide it from detection. If an independent contractor fell in the hidden pit, the homeowner would be immune from liability because the Plaintiff was an independent contractor. Such a reading of *Thompson* is absurd. Hale was hired to paint. He was not hired to construct a second floor without rails.

liable for the negligence of the independent contractor in performing those duties. However, Defendant's interpretation of Utah law that would allow a landowner to escape liability for the landowner's negligent conduct is wrong.

Wherefore, Plaintiff respectfully requests that Defendant's Motion for Summary Judgment be denied or, alternatively, that a hearing be held in this matter.

DATED this 7 day of September, 2001.



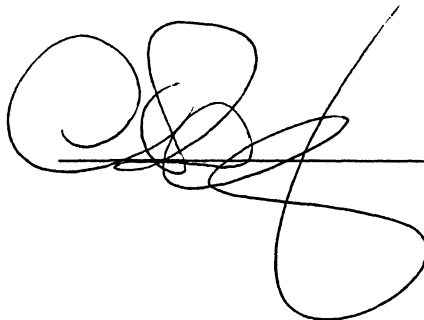
Aaron J. Prisbrey
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I deposited in the U.S. Mail, postage prepaid a true and correct copy of the foregoing instrument in the above referenced matter this 7 day of September, 2001, addressed to the following:

Steven E. Snow
Brent M. Brindley
Snow, Nuffer, Engstrom, Drake, Wade & Smart
192 East 200 North, Third Floor
P.O. Box 400
St. George, UT 84771-0400

John Hale
172 North 3980 West
Hurricane, UT 84737



Aaron J. Prisbrey #6968
Attorney for Plaintiff
1071 East 100 South, Bldg. D, Suite 3
St. George, Utah 84770
Telephone 435-673-1661

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2001 SEP - 7 PM 4:00

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY
STATE OF UTAH

JOHN D. HALE,

Plaintiff,

v.

KURT BECKSTEAD, and JOHN DOES I
THROUGH V

Defendants,

AFFIDAVIT OF JOHN D. HALE

Case No. 000500437

STATE OF UTAH

)

ss.

COUNTY OF WASHINGTON

)

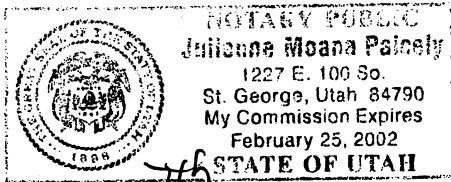
I, John D. Hale, being first duly sworn, states and alleges as follows:

1. I am the Plaintiff in the above referenced matter and have personal knowledge regarding the information contained herein.
2. That your affiant never represented to Defendant, Kurt Beckstead, that your affiant was a licensed, bonded, insured contractor.
3. That your affiant was hired by Defendant, Kurt Beckstead, to paint the interior of the home located at 1975 West Rim View Drive, Santa Clara, Utah. Defendant gave your affiant instructions on how to paint and also provided your affiant with all paint in order to perform the work.

4. On September 20, 1996, your affiant fell and was injured while working at the home, which is the subject matter of this lawsuit, located at 1975 West Rim View Drive, Santa Clara, Utah, because there was no protective rail on the second floor of the home.
5. Your affiant's accident and injuries have nothing to do with the job of painting or the manner in which the painting was performed.

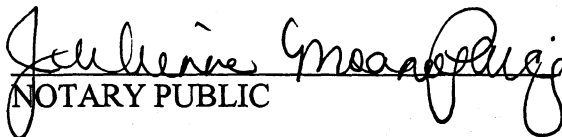
FURTHER YOUR AFFIANT SAITH NAUGHT.

DATED this 7 day of September, 2001.




John D. Hale

On the 7th day of September, 2001, personally appeared before me John D. Hale, the signer of the foregoing Affidavit of John D. Hale, who duly acknowledged to me that he executed the same.

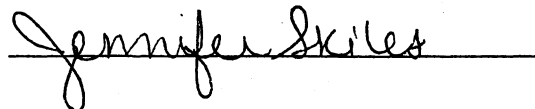

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that I caused to be deposited in the U.S. Mail a true and correct copy of the foregoing AFFIDAVIT OF JOHN D. HALE on this 7 day of September, 2001, addressed to the following:

Steven E. Snow
Brent M. Brindley
Snow, Nuffer, Engstrom, Drake, Wade & Smart
192 East 200 North, Third Floor
P.O. Box 400
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Restatement of the Law, Second, Torts, § 409

Restatement of the Law, Second, Torts
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Rules and Principles

Division 2 - Negligence

Chapter 15 - Liability of an Employer of an Independent Contractor

Restat 2d of Torts, § 409

§ 409 General Principle

Except as stated in §§ 410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

COMMENTS & ILLUSTRATIONS: Comment:

a. The words "independent contractor" are used throughout this Topic as describing any person who does work for another under conditions which are not sufficient to make him a servant of the other. It is immaterial whether the work is done gratuitously or is done for pay, or, indeed, if the latter, whether it is done under a specific contract or under a general contract of employment. As stated in the Restatement of Agency, Second, § 2, Comment *b*, an agent may be either an independent contractor or a servant while engaged in work necessary to the exercise of his functions as agent.

b. The general rule stated in this Section, as to the nonliability of an employer for physical harm caused to another by the act or omission of an independent contractor, was the original common law rule. The explanation for it most commonly given is that, since the employer has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it.

The first departure from the old common law rule was in *Bower v. Peate*, 1 Q.B.D. 321 (1876), in which an employer was held liable when the foundation of the plaintiff's building was undermined by the contractor's excavation. Since that decision, the law has progressed by the recognition of a large number of "exceptions" to the "general rule." These exceptions are stated in §§ 410-429. They are so numerous, and they have so far eroded the "general rule," that it can now be said to be "general" only in the sense that it is applied where no good reason is found for departing from it. As was said in *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 201 Minn. 500, 277 N.W. 226 (1937), "Indeed it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions."

The exceptions have developed, and have tended to be stated, very largely as particular detailed rules for particular situations, which are difficult to list completely, and few courts have attempted to state any broad principles governing them, or any very satisfactory summaries. In general, the exceptions may be said to fall into three very broad categories:

1. Negligence of the employer in selecting, instructing, or supervising the contractor.
2. Non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff.
3. Work which is specially, peculiarly, or "inherently" dangerous.

REPORTERS NOTES: This Section has been changed from the first Restatement by eliminating the cross-reference to §§ 410 to 429, which is now included under Comment *b*. Also by eliminating the word "tortious." No change in substance is intended.

Comment b: As to the English law, see Chapman, Liability for the Negligence of Independent Contractors, 50 L.Q. Rev. 71 (1934). As to the history, present status and probable future of the American law, see Morris, The Torts of an Independent Contractor, 29 Ill. L. Rev. 339 (1935); Harper, The Basis of the Immunity of an Employer of an Independent Contractor, 10 Ind. L.J. 494 (1935); Douglas, Vicarious Liability and Administration of Risk, 38 Yale L.J. 584 (1929); Steffen, Independent Contractor and the Good Life, 2 U. Chi. L. Rev. 501 (1935); Report of New York Law Revision Commission, 411-688 (1939).

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