

2002

Hale v. Beckstead : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN D. HALE

Plaintiff and Appellant,

vs.

KURT BECKSTEAD and JOHN
DOES I through V,

Defendants and Appellees.

Case No. 20020196-CA

Priority No. 15

BRIEF OF APPELLANT

APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF
DEFENDANT OF THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON
COUNTY, STATE OF UTAH, THE HONORABLE G. RAND BEACHAM

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Priority No. 15

BRIEF OF APPELLANT

APPELLATE JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to UTAH CODE ANN. § 78-2a-3(2)(j) (1998).

ISSUES FOR REVIEW AND STANDARD OF REVIEW

Issue No. 1: Did the District Court err in determining Beckstead, a general contractor, owed no duty of care to Hale, a subcontractor, when Hale had entered Beckstead's property as a business invitee and was injured as the result of a dangerous condition created and maintained by Beckstead?

Standard: Summary judgment is properly granted only when the moving party is entitled to judgment as a matter of law. This presents a question of law, reviewed for correctness and with no deference to the lower court's legal conclusions. *Doit, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 841 (Utah 1996). The existence of a legal duty is a

question of law reviewed for correctness when the facts giving rise to such duty are not in dispute. *See Trujillo v. Jenkins*, 840 P.2d 777 (Utah 1992) (determination of landowner's duty of care is question of law).

Issue No. 2: Did the District Court err in determining Hale could not rely upon Beckstead's violation of OSHA standards to show the duty Beckstead owed Hale and whether Beckstead breached that duty?

Standard: Summary judgment is properly granted only when the moving party is entitled to judgment as a matter of law. This presents a question of law, reviewed for correctness and with no deference to the lower court's legal conclusions. *Doit, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 841 (Utah 1996). The existence of a legal duty is a question of law reviewed for correctness when the facts giving rise to such duty are not in dispute. *See Trujillo v. Jenkins*, 840 P.2d 777 (Utah 1992) (determination of landowner's duty of care is question of law).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

There is no constitutional or statutory text whose interpretation is determinative in deciding the issues presented by this appeal.

STATEMENT OF THE CASE

Nature of Proceeding. This appeal is from an order granting summary judgment in favor of Beckstead and against Hale entered in the Fifth Judicial District Court, Washington County, the Honorable G. Rand Beacham presiding.

Course of Proceedings in Lower Court. Hale sued Beckstead for special and general damages arising from personal injury suffered in a fall while painting Beckstead's

residence, for which Beckstead was also the general contractor. Beckstead moved for summary judgment contending that because Hale was an independent contractor whose performance was not supervised by Beckstead, Beckstead owed Hale “no duty of care concerning the safety of the manner or method of performance implemented.” R 63.

Beckstead then expanded his argument to assert that “an employer or owner that does not control the work of the independent contractor has no duty to provide a safe workplace to the employees of the independent contractor.” R 63.

Disposition in the Lower Court. The district court granted Beckstead’s motion and dismissed Plaintiff’s complaint.

RELEVANT FACTS¹

1. Plaintiff complains in this action of injuries he received in a fall. R 100, ¶ 1.

(See also, Addendum).

2. Defendant was the owner of the property at which Plaintiff fell. R 100, ¶ 2.

(See also, Addendum).

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. R 101, ¶ 3. (See also, Addendum).

4. Defendant was acting as his own “general contractor” for the construction of the home. R 101, ¶ 4. (See also, Addendum).

5. Defendant hired Plaintiff to paint the home. R 101, ¶ 5. (See also, Addendum).

¹The first ten numbered paragraphs are verbatim reproductions of the uncontested material facts which the district court identified in support of its ruling. *See* R 100-101.

6. Defendant told Plaintiff generally how the paint should look and bought the paint for Plaintiff to use. R 101, ¶ 6. (See also, Addendum).

7. Defendant did not control or direct the manner in which Plaintiff was to paint the home. R 101, ¶ 7. (See also, Addendum).

8. While inside the partially constructed home, Plaintiff inadvertently stepped off a second floor balcony and fell to the first level. R 101, ¶ 8. (See also, Addendum).

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. R 101, ¶ 9. (See also, Addendum).

10. Defendant was not in the home when Plaintiff fell, but was out of town on an extended vacation. R 101, ¶ 10. (See also, Addendum).

11. The edge of the balcony in question was unprotected and in excess of 6 feet (1.8 m) above the lower level. R 3, ¶¶ 11-12.

12. The District Court judge granted Defendant's Motion for Summary Judgment indicating, "[t]his 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. R 101, page 3. (See also, Addendum).

SUMMARY OF ARGUMENT

The district court erred in determining Beckstead owed no duty to Hale, a business invitee. The District Court also erred in determining that Hale could not use violation of OSHA standards to determine Beckstead's duty to Hale, and whether Beckstead breached that duty.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN CONCLUDING "DEFENDANT HAD NO DUTY OF CARE TOWARD PLAINTIFF," FOR DANGEROUS CONDITIONS ON THE PREMISES CREATED AND MAINTAINED BY DEFENDANT BECKSTEAD

In the instant case, the district court interpreted Hale's complaint as attempting to advance three independent causes of action: one sounding in negligence, one in premises liability, and one based upon Beckstead's failure to comply with certain regulations promulgated by the Occupational Safety and Health Administration (OSHA). *See* R 102-103. In granting Beckstead's motion for summary judgment, the lower court segregated what it saw as three distinct claims and denied them seriatim. Applying legal principles which isolate a landowner from liability for harm caused by the negligence of an independent contractor, the lower court dismissed what it saw as separate and distinct claims for negligence and premises liability. *See* R 102. Then, relying upon 29 U.S.C. § 653(b)(4) (1985), the district court dismissed what it saw as an independent claim premised upon a violation of OSHA regulations. *See* R 103.

Hale's complaint, contrary to the District Court's Order, is intended to state a

single cause of action. *See* R. 1-8. In cases involving licensees and business invitees, a premises liability claim is, in substance, a negligence claim wherein the degree of the duty of care owed is determined by the status the claimant enjoys. *See Laws v. Blanding City*, 893 P.2d 1083 (Utah Ct. App.1995) (comparative negligence is available as a defense in a premises liability case).

The degree of the duty of care Beckstead owed Hale should have been and, indeed, was established by the court's determination that Hale's status on the subject premises was that of an invitee. R 102. However, in the course of its analysis, the district court was erroneously persuaded that Beckstead owed Hale no duty of care whatsoever. In moving for summary judgment Beckstead first noted that if he owed Hale no duty, any negligence analysis ends and no liability attaches. R 63. Clearly, the viability of Plaintiff's claim depends upon the existence of a legal duty owed by Beckstead to Hale and a breach of that duty.

Citing and quoting from *Thompson v. Jess*, 979 P.2d 322 (Utah 1999), Beckstead contended that because Hale was an independent contractor whose work was not directly supervised by Beckstead, Beckstead owed Hale "no duty of care concerning the safety of the manner or method of performance implemented." R 63. Beckstead then expanded his argument to assert that "an employer or owner that does not control the work of the independent contractor has no duty to provide a safe workplace to the employees of the independent contractor." R 63. Beckstead purported to support this contention by citing *Dayton v. Free*, 46 Utah 277, 148 P. 408 (1914).

Beckstead further touted *Thompson* and *Dayton* as "[t]he two authoritative cases in

this area of the law” (R 63) and the district court apparently agreed. In granting Beckstead’s motion for summary judgment the district court concluded that because

Defendant did not control or direct the manner of Plaintiff’s work and that [because] any danger posed to Plaintiff by the condition of Defendant’s partially completed home was open and obvious to Plaintiff. . . , 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.

R 102.

What Beckstead and the district court apparently overlooked was the fact that *Thompson* and *Dayton* both involved circumstances where the landowner surrendered control of the work undertaken by an independent contractor and a third party was injured as a result of the manner in which that independent contractor undertook **his own** performance. Neither case involved a dangerous condition on the premises which was created or existed independent of the manner in which the contractor undertook his performance. Indeed, the language of the *Thompson* opinion clearly demonstrates that the case was decided by application of the legal principles set out in Chapter 15, Topic 2 (HARM CAUSED BY NEGLIGENCE OF A CAREFULLY SELECTED INDEPENDENT CONTRACTOR) of the Restatement (Second) of Torts (1965). The district court’s reliance thereon was clearly misplaced.

The district court’s undisputed material facts include an acknowledgment that Beckstead was functioning as the “general contractor” with respect to the construction of the subject dwelling. *See* R 101, ¶ 4. While Beckstead may not have directed the performance of Hale’s work, Beckstead was clearly in possession of the subject premises

for the purposes of the legal principles outlined in Chapter 13, Topic 1 (LIABILITY OF POSSESSORS OF LAND TO PERSONS ON THE LAND) of the Restatement (Second) of Torts. Under the undisputed facts of the instance case Beckstead was clearly the “possessor” of the real property in question. *See, id.* § 328E defining “possessor.” Moreover, it is apparent that Hale was Beckstead’s “invitee.” *See English v. Kienke*, 848 P.2d 153, 156-57 (Utah 1993) (referring to the Restatement rule as “the safe workplace doctrine”).

A workman who comes upon land to make improvements, alterations or repairs thereon has been uniformly held to enjoy the status of an “invitee.” *See* Restatement (Second) of Torts § 332, comment *e.* *See also, English v. Kienke, supra; Fluor Corporation, Ltd. v. Sykes*, 3 Ariz. App. 559, 416 P.2d 610 (1966); *Daniel Const. Co. v. Holden*, 585 S.W.2d 6 (Ark. 1979); *Williamson v. Cox*, 844 S.W.2d 95 (Mo. App. 1992); *Hall v. Moveable Offshore, Inc.*, 455 F.2d 633 (5th Cir. 1972). Generally, it is said that such a workman is a “business invitee” of the general contractor. *See Silvas v. Speros Construction Co.*, 594 P.2d 1029, 122 Ariz. 333 (Ariz.App.Div.2 1979), at ¶ 20; *Daniel Const. Co. v. Holden, supra*, at ¶¶ 9 and 33. However, when the owner of the real property is acting as “general contractor” with respect to improvements being made thereon, the workman is his “invitee” within the meaning of section 343 of the Restatement. *See English v. Kienke*, 848 P.2d, at 156.

The duty Beckstead, as a possessor of land, owed Hale, as his invitee, is set forth in sections 343 and 343A of the Restatement. *See* Restatement (Second) of Torts § 343, comment *a* (1965), which states that these sections should be read together. The text of § 343 reads:

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 the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(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.

Section 343A, in relevant part, reads:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by an activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

In *Silvas v. Speros Construction Co.*, *supra*, the appellant was injured when he fell through a hole in the roof of a building under construction. The trial court directed a verdict in favor of the general contractor. On appeal, the Arizona court noted that the propriety of directing the verdict hinged upon the determination of two issues: (1) what, if any, duty the general contractor owed to the employees of a subcontractor, and (2) whether the fact that appellant knew of the existence of holes on the roof relieved the general contractor of liability.

Speros Construction Company, the general contractor for the construction of a gymnasium, subcontracted with Guy Apple for the construction of the gymnasium walls. This construction was accomplished in two phases. First the walls were constructed to a point where the roof could be installed. After the roof was installed Guy Apple returned to the job to complete the installation of a parapet. Silvas was an employee of Guy

Apple.

After completing the first stage of the construction of the walls, Guy Apple temporarily left the job and the roofing contractor installed a pre-fabricated roof in which there were a number of holes designed to accommodate air conditioning units and ducts, which were to be installed by a separate subcontractor. The holes ranged in size from two-foot square to four-foot square.

Guy Apple returned to the construction site to complete the parapet about four days after the installation of the roof was completed. Some of the holes in the roof had been covered but most had not. The foreman for Guy Apple warned the employees about the holes in the roof and told them to be very careful. Silvas himself knew the holes were there and that they were not covered.

Silvas' job was to transport bricks and mortar from a mixing site on the roof to Guy Apple's bricklayers. He noticed that when the wheelbarrow was loaded his ability to see the open holes was impaired. However, he did not complain about the danger or refuse to work. Two days after returning to construct the parapet, Silvas was pushing a loaded wheelbarrow when he fell through one of the holes in the roof and was seriously injured. Just before the accident he saw an uncovered hole to his left and pushed his wheelbarrow to the right to avoid it. The wheelbarrow obstructed his vision to the right and he stepped into another uncovered hole on his right that he had not seen.

The Arizona Court of Appeals held that the general contractor in control of premises has certain duties to the employees of a subcontractor that are usually likened to those of a possessor of land owes invitees. Accordingly, Speros owed to Guy Apple

employees the duty to keep the joint working spaces reasonably safe. Citing and quoting section 343 of the Restatement (Second) of Torts, the court rejected the general contractor's contention that it had no reason to believe that Silvas would not protect himself against the danger posed by the holes in the roof. Citing the Restatement rule, the court concluded that the fact that the injured party knew and appreciated the danger was not conclusive. The court went on to quote from comment *f* to the Restatement section.

That comment, in relevant part, reads:

There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it . . . that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. . . . It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Ultimately the Arizona court concluded that a jury question was presented as to whether the general contractor should have anticipated the harm despite Silvas' knowledge and should have taken steps to either cover or barricade the holes and that, accordingly, the trial court had erred in directing a verdict.

The Utah Court of Appeals has had occasion to consider these legal issues. In *Laws v. Blanding City*, 893 P.2d 1083 (Utah Ct. App.1995), Laws initiated an action against the defendant city, alleging he was injured as a result of the defendant's negligence in the construction and maintenance of the city dump. The jury returned a verdict for the city, concluding that the city was not guilty of any negligence. On appeal, Laws contended that the trial court had committed prejudicial error in giving a jury instruction which was taken substantially verbatim from the Restatement (Second) of Torts § 343. Laws argued that if subsection (b) of section 343 is not read in conjunction with the language of section 343A, it creates the misleading impression that if the plaintiff did not realize or protect himself against the danger, the city's duty was abrogated. The court of appeals agreed.

After quoting section 343A and accompanying comments *f* and *g*, the court concluded that the trial court had erred in giving the challenged instruction as it was an incomplete and thus misleading statement of the city's duty. Laws had the right to have his theory of the case presented to the jury in a clear and understandable way. The question of whether a reasonable person would, recognizing the danger, nevertheless encounter it, was a question for the jury. *Laws v. Blanding City*, 893 P.2d 1083 (Utah Ct. App.1995).

In the instant case, the district court erred in applying the legal principles which underlie the decision in *Thompson v. Jess* to conclude that Beckstead owed Hale no duty of care. The district court's error in this application of the law is beyond question and requires reversal of the order granting Beckstead summary judgment.

POINT II

THE PERTINENT OSHA REGULATIONS ARE RELEVANT IN DETERMINING THE APPROPRIATE STANDARD OF CARE AND WHETHER THERE WAS A BREACH OF THAT STANDARD.

Hale concedes that a violation of an OSHA regulation does not provide an independent basis of liability—does not create a cause of action where none existed before. *See* 29 U.S.C. § 653(b)(4) (1985). However, this does not mean that pertinent OSHA regulations are not relevant in determining an appropriate standard of conduct. *See Knapstad v. Smith's Management*, 774 P.2d 1, 2 (Utah Ct. App.1989).

In *Tallman v. City of Hurricane*, 985 P.2d 892 (Utah 1999), the Utah Supreme Court noted:

In determining the appropriate standard of conduct, the Restatement permits courts to adopt a standard from legislative enactments or administrative regulations which do not themselves purport to establish the standard. *See* Restatement § 285. Thus, despite UOSHA's provision prohibiting its use to affect common-law rights, duties, or liabilities of employers, the factfinder may look to UOSHA and OSHA for evidence of industry standards in certain circumstances. The Restatement provides the following guidelines for the adoption of legislative standards:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from

which the harm results.

Restatement § 286. OSHA and UOSHA explicitly purport to protect the safety and health of workers at work.

Tallman was a worker injured on the job, thus satisfying clauses (a) and (b) of Restatement § 286. OSHA has specifically required that trenches over 5 feet in depth and dug in unstable rock have trench protection to prevent workers from being injured in cave-ins. UOSHA has adopted these standards. Tallman worked in a trench that was deeper than 5 feet and was apparently dug in unstable soil without trench protection. The trench caved in and killed him; therefore, this case implicates clauses (c) and (d) as well. Thus, in this case we may adopt OSHA and UOSHA regulations *as evidence of the standard of reasonable care in the industry*. Because OSHA standards are so widely known, understood, and followed, they constitute a legitimate source for the standard of reasonable care, and we hereby approve their use as evidence of such.

Id., at ¶¶ 21-22. Emphasis added, citations omitted. *Cf. Srader v. Pecos Construction Co.*, 71 N.M. 320, 378 P.2d 364 (1963) (general contractor's duty to roofer's helper determined by reference to provision of city building code).

Section 1926.501 of Title 29, Code of Federal Regulations, in effect at the time of the subject accident, establishes standards concerning the circumstances in which fall protection systems are required and 29 C.F.R. §1926.502 establishes the criteria to which such systems must conform. Subsection 1926.501(b)(1) requires fall protection for persons working on or near a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level.

In establishing the criteria to which such fall protection systems must conform, subsection 1926.502(b) provides:

(1) Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1 m) plus or minus 3 inches (8 cm) above the walking/working level. When conditions warrant, the height of the top edge

may exceed the 45-inch height, provided the guardrail system meets all other criteria of this paragraph. . . .

(3) Guardrail systems shall be capable of withstanding, without failure, a force of at least 200 pounds . . . applied within 2 inches (5.1 cm) of the top edge, in any outward or downward direction, at any point along the top edge.

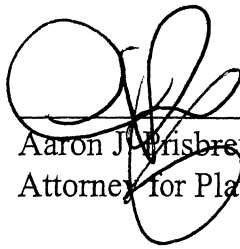
(4) When the 200 pound . . . test load specified in paragraph (b)(3) of this section is applied in a downward direction, the top edge of the guardrail shall not deflect to a height less than 39 inches (1.0 m) above the walking/working level.

In the instant case, Beckstead clearly owed Hale the duty to keep the joint working spaces reasonably safe. Evidence that Beckstead failed to comply with pertinent OSHA regulations, while not creating a cause of action where none existed before, is relevant in demonstrating that Beckstead failed to adhere to the standards of reasonable care generally accepted in the industry and therefore breached the duty he owed Hale.

CONCLUSION

The district court's determination that Beckstead, the general contractor, owed no duty to Hale, the subcontractor, a business invitee, for a dangerous condition created and maintained by Beckstead, is erroneous and contrary to Utah law. Further, the district court's determination that Hale cannot use Beckstead's violation of OSHA standards to show duty and breach by Beckstead is erroneous and contrary to Utah law. Based upon the forgoing it is respectfully submitted that the order granting Beckstead summary judgment be reversed and the case remanded for trial; with instruction to the district court that Hale may show Beckstead's duty and breach through Beckstead's violation of OSHA standards.

DATED this 4 day of November, 2002.



Aaron J. Prisbrey
Attorney for Plaintiff and Appellant

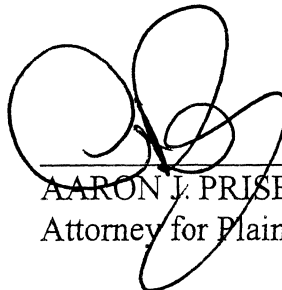
CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of November, 2002, the original and seven copies of the foregoing BRIEF OF APPELLANT were mailed, postage prepaid, as follows:

Utah Court of Appeals
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84111-0230

I further certify that on the 4 day of November, 2002, two copies of the foregoing BRIEF OF APPELLANT were mailed, postage prepaid, as follows:

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AARON J. PRISBREY
Attorney for Plaintiff and Appellant

ADDENDUM

FILED
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**RULING ON MOTION FOR
SUMMARY JUDGMENT**
Civil No. 000500437
Judge G. Rand Beacham

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:

Aaron J. Prisbrey
Attorney for Plaintiff

Brent M. Brindley
Robert Lamb
Attorneys for Defendant



DEPUTY CLERK OF COURT