

1962

# Wallace L. Rosander v. Rex A. Larsen : Brief of Plaintiff-Appellant

Utah Supreme Court

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Plaintiff-Appellant; George M. McMillan;

Defendant-Respondent; L. E. Midgley;

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

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**WALLACE L. ROSANDER**, ark. Supreme Court, Utah  
*Plaintiff-Appellant*,  
vs.  
**REX A. LARSEN**,  
*Defendant-Respondent*.

ED  
3 - 1962  
Case No.  
9672

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**Brief of Plaintiff-Appellant**

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**APPEAL FROM THE DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY**

**HONORABLE RAY VAN COTT, JR.  
DISTRICT JUDGE**

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**APPEARANCES**

**Plaintiff-Appellant:**

**George M. McMillan  
1020 Kearns Building  
Salt Lake City, Utah**

**Defendant-Respondent:**

**L. E. Midgley  
1012 Boston Building  
Salt Lake City, Utah**

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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WALLACE L. ROSANDER,  
*Plaintiff-Appellant,*

vs.

REX A. LARSEN,  
*Defendant-Respondent.*

} Case No.  
9672

---

Brief of Plaintiff-Appellant

---

APPEAL FROM THE DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY

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STATEMENT OF THE CASE

Plaintiff's amended complaint asserted liability in the alternative on three causes of action:

(a) On the first cause of action that plaintiff was a business invitee and sustained injuries as the result of defendant's negligence;

(b) In the second cause of action that plaintiff

was a licensee other than business invitee and that his injuries were the proximate result of defendant's negligence;

(c) That the plaintiff was an employee of the defendant and that defendant failed to provide Workmen's Compensation Insurance in plaintiff's behalf as required by Section 35-1-46, Utah Code Annotated, and that plaintiff was entitled to relief for his injuries sustained as such employee pursuant to the provisions of Section 35-1-57, Utah Code Annotated, 1953.

## DISPOSITION IN LOWER COURT

The trial judge required the plaintiff to elect between the three causes of action. When plaintiff elected to stand upon the third cause of action the judge entered an order dismissing the complaint on the ground that the plaintiff was not an employee of defendant as a matter of law. Judgment was entered dismissing the complaint without a hearing on the merits.

## RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant respectfully requests that upon appeal the judgment of the District Court be reversed and that the case be remanded for trial with instructions to proceed to trial on the amended complaint, and that no election of remedies be required until after satisfaction of judgment on one of the three alternative claims for relief.

## STATEMENT OF FACTS

The plaintiff's original complaint asserted that he was a business invitee of the defendant. He came into a building being constructed by the defendant at Lot 14 SPRING HAVEN SUBDIVISION in Salt Lake County (R-1, para. 2 and 4). The plaintiff asserted that the defendant was negligent "in failing to cover a stairwell on the second story of the aforesaid building, failing to provide a safe passageway for the plaintiff, failing to notify plaintiff of dangerous and unsafe conditions on the aforesaid premises which were known to the defendant and his agents and employees, or in the exercise of reasonable care could have been ascertained by them, and failing to notify the plaintiff of unsafe and dangerous conditions upon said premises." Defendant's answer contains a motion to dismiss for failure to state a cause of action, and denies any negligence. As an affirmative defense, defendant alleged "That the plaintiff was an employee of defendant at the time and place of said accident and was in the course and scope of employment at said time and that plaintiff's recourse is limited to benefits, if any, under the provisions of the Workmen's Compensation Act." (R. 6, par. 1.) Defendant also interposed the defense of contributory negligence and assumption of risk (Ibid. 2-3).

In response to requests for admissions by the defendant, plaintiff asserted that he was engaged in working on the building at the time of the accident as a subcontractor (R. 7, para. 1(e) ). It also appears in the request for admissions and in the pre-trial conference

held before Judge Stewart M. Hanson on April 26 that the plaintiff and his wife owned as joint tenants the land known as Lot 24 SPRING HAVEN SUB-DIVISION, and that plaintiff had entered into a written contract with the defendant for the construction of a dwelling on that property. Plaintiff was somewhat experienced in the building business. He and the defendant had an oral agreement whereby the plaintiff could employ a subcontractor in lieu of any subcontractor employed by the defendant, or plaintiff could do a certain part of the work and he would be credited with any savings effected by work which he performed himself or the difference between the price given to the defendant by plaintiff subcontractor and the subcontractor which otherwise would have been used by the defendant (R. 7, 8, 13). At the time of the accident in question, plaintiff was attempting to climb one of the walls to assist in fastening the rafters. He reached for a rafter to support himself. While having the appearance of being fixed solidly in place, the rafter in question was not fastened and as a result, plaintiff fell through an open stairway and incurred the injuries of which he complained (R. 13). Plaintiff asserted that the defendant was negligent in failing to disclose the unsafe condition or hidden defect and in failing to have a covering over the stairway and allowing the same to remain open and in an unsafe condition (R. 14). At the original pre-trial conference the trial court framed the following issues:

“1. What was the relationship between plaintiff and defendant?



2. If the relationship is and was that of a business invitee then was the defendant negligent?
3. Was the plaintiff contributorily negligent?
4. Did the plaintiff assume the risk?
5. If the plaintiff is entitled to recover, what damages is he entitled to?" (R. 14-15).

At the time of this pre-trial defendant also advised the court that he wished to assert his first defense to the effect that the complaint failed to state a claim for relief. The parties were given leave to file briefs on that matter and the motion was taken under advisement. On May 29, 1961, Judge Hanson filed a memorandum decision entering a summary judgment for the defendant and vacating the trial date (R. 18). The judge subsequently indicated that the motion for summary judgment was granted upon the ground that "it was the court's conclusion that at most plaintiff was an employee of the defendant" and that in any event plaintiff was guilty of contributory negligence as a matter of law (R. 24). Plaintiff moved the court for an order to vacate the order granting summary judgment and granting leave to file an amended complaint. This motion was granted on June 20, 1961 (R. 25, 30). It does not appear from the record that any answer to the amended complaint was ever filed. However, the case came before Judge Ray VanCott, Jr. for pre-trial on March 19, 1962 on the amended complaint. On motion of the defendant, Judge Van Cott required the plaintiff to make an election as to which of the three causes of action he would stand upon. While objecting

to the motion, plaintiff elected to stand upon the third cause. At that point defendant's attorney moved to dismiss the third cause of action. The court granted the motion upon the grounds that the agreement between the parties whereby plaintiff would have the right to make savings in the building by finding subcontractors to work at a lower rate on particular parts of the project, or that plaintiff could perform parts of the work himself, created a situation whereby "there is no duty owed to this man by that defendant, and there is no showing of any negligence on the part of the defendant" (R. 33).

It is important to observe that at no time was the plaintiff offered any opportunity to make a showing with respect to defendant's negligence or to file any affidavits or otherwise present any facts with respect to applicable customs or practices. Plaintiff was required to elect between three legal theories without having any opportunity to present the facts to the court or to have any determination as to the inferences which may be drawn from any of the relevant facts. The action of Judge Van Cott was on the pleadings and prior pre-trial order. The record contains an affidavit of the plaintiff to the effect that plaintiff's "presence on said premises had no connection with the fact that he was the fee title owner of said premises, and his only object in going to said premises was to do work on the home pursuant to said contract . . . and he took no action whatever to exercise control over said premises, which control had theretofore been relinquished to defendant Rex A. Larsen under a written contract dated August

18, 1959, in which said defendant began the general contract for the construction of a house on said premises and assumed control over said premises” (R. 16).

## ARGUMENT

### POINT I.

THE COURT ERRED IN REQUIRING PLAINTIFF TO MAKE AN ELECTION AS AMONG THE THREE CAUSES OF ACTION IN HIS AMENDED COMPLAINT.

Pursuant to an order of the court dated July 10, 1961 (R. 30) plaintiff filed an amended complaint in three alternative causes of action. The first cause of action alleged that plaintiff was a business invitee of the defendant and that the plaintiff's injuries were the result of the defendant's negligence in “failing to cover a stairwell on the second story of the . . . building, failing to provide a safe passageway for the plaintiff, (and) failing to notify plaintiff of dangerous and unsafe conditions upon the said premises which were known to the defendant and his agents and employees, or in the exercise of reasonable care could have been ascertained by them, and failing to notify the plaintiff of unsafe and dangerous conditions.” (R. 26.) The second cause of action was on the theory that plaintiff was on the premises with the permission and consent of the defendant and that defendant was negligent in failing to notify the plaintiff of known defects. The third cause

of action asserted that plaintiff was an employee of defendant and that the defendant failed to carry Workmen's Compensation as required by Section 35-1-46 of the Utah Code and that liability was predicated upon the provisions of Section 35-1-57, U.C.A. 1953. Over the plaintiff's objections, the court granted defendant's motion to require an election (R. 33). Requiring an election at this stage of the case constituted prejudicial error and was in direct violation of the provisions of Rules 8(a) and 8(e) of the Rules of Civil Procedure.

The pertinent provisions of Rule 8 are:

“(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. *Relief in the alternative or of several different types may be demanded.*

\* \* \*

“(e) Pleading to be Concise and Direct; Consistency. (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. *When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative*

*statements.* A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11."

The Utah cases have repeatedly held that the Utah rules were to be applied substantially in the same manner and with the same affect as the substantially simliar Federal rules. *Blackham v. Snelgrove* (1955) 3 Ut. (2d) 157, 280 P. (2d) 453. Rule 8(e) is applied by the Utah Code in *Hjorth v. Wittenburg* (1952) 121 Ut. 324, 241 P. (2d) 907.

The common law background of Rule 8 and particularly 8(e) is discussed at 2 *Moore's Federal Practice*, Second Edition, paragraph 8.31, pg. 1702, 1703. At page 1704 Professor More says: "A pleading may present alternative statements of the facts or alternative legal theories." Many examples are given at pages 1704 and 1705. A later collection of the cases in point appears in the 1961 cumulative supplement for these same sections.

Professor Moore points out that to require an election of causes of action would defeat the very purposes which the rule was designed to correct. At Section 8.32 (pg. 1707 *ibid*) Professor Moore states:

"An alternative or hypothetical pleading by its very nature is inconsistent. This, however, is not a valid objection to it under Rule 8(e) and for good measure the rule goes on to provide that a party may state separate claims for defenses

regardless of the consistency and whether based upon legal or equitable grounds or both. Whether or not a party pleads one claim alternatively or hypothetically in a single count or pleads the claim formally as separate claims in two or more counts is largely one of jurisdiction . . . the consistency may lie either in the statement of the facts or in the legal theories adopted, and the party will not be required to elect upon which theory he will proceed since this would defeat the usual purpose of allowing inconsistent pleading.”

Many cases under the federal rules have explicitly held that no election is required of inconsistent causes of action. A complete review of all of the cases decided under Rule 8(e) would unduly lengthen this brief. Reference is made here to only a few illustrative cases. In *Senter v. B. F. Goodrich Co.* (U.S. D. C. Colo. 1955) 127 F.S. 705, plaintiff claimed that the defendant was liable on the theory of negligence in one cause of action and in a second cause of action asserted liability for breach of warranty on the sale of tires. The court refused to require an election and entertain evidence relevant to both issues. In its opinion the court said:

“A defendant cannot compel a plaintiff to choose at his peril the theory upon which he intends to rely and thereby possibly defeat a recovery where two consistent, concurrent or cumulative theories can be urged with prejudice to the defendant’s ability to defend. If an actionable wrong has taken place recovery is to be granted regardless of theory and relief must not be denied through the vehicle of a forced election.”

In notes 4 and 5 on the same page the court said:

“Where remedies are not inconsistent, but are alternative and concurrent, there is no bar until one of them has been prosecuted to judgment, unless plaintiff has gained an advantage or defendant has suffered a disadvantage. *State v. Compton*, Tex. Civ. App. 174, S.W. 2d 977, affirmed 1944, 142 Tex. 494, 179 S.W. 2d, 501. Also, cf. *Tallent v. Fox*, 1940, 24 Tenn. App. 96, 141 S.W. 2d 485, where court held that plaintiff in suing for breach of warranty in original warrant, based on delivery of diseased hogs which had been represented to be sound, had not elected his remedy so as to prohibit amending warrant by adding counts for breach of contract, and fraud and deceit, since counts added by amendment were not repugnant or antagonistic. See also *De Hart v. Allen*, 1942, 49 Ca. App. 2d, 639, 122 P. 2d 273, wherein the court held that the doctrine of election of remedies rests on the principle of estoppel, and there can be no estoppel unless the two remedies are inconsistent and repugnant, and unless unfair or unjust detriment would result from the exercise of both.

“Even apart from the liberal spirit imbued in the federal rules the doctrine of election of remedies should be applied only to actions taken by same litigant which are necessarily inconsistent, and such doctrine being a severe one should generally, not be extended. *Petillo v. Stein*, 1945, 184 Md. 644, 42 A. 2d 675.”

In *Bernstein v. United States* (CCA 10, 1958) 256 F(2d) 697 at 706, Judge Murrah, speaking for a unanimous court, held:

“Whatever may be said for the common law



doctrine of election of remedies before the advent of the Federal Rules of Civil Procedure, we are certain there is no room for its application under applicable rules of procedure, according to which every pleading is a simple, concise statement of the operative facts on which relief can be granted on any sustainable legal theory 'regardless of consistency, and whether based on legal or on equitable grounds or on both'; Rule 8(e) (1) (2) F.R. Civ. P., and where the prayer or demand for relief is no part of the claim and the dimensions of the lawsuit are measured by what is proven. *Western Machinery Co. v. Consolidated Uranium Mines* 10 Cir., 247 F. 2d 685; *Gins v. Mauser Plumbing Supply Co.*, 2 Cir., 148 F. 2d 974. When the complaint is judged in the context of the philosophy of these modern procedural concepts, we are convinced that the election of remedies is inapplicable here."

The Fourth Circuit applied the same rule in *Montgomery Ward v. Freeman* (CCA 4, 1952) 199 F. (2d) 720.

Rule 8 has particular application in the case at bar. At the first pre-trial conference held on April 26, 1961, Judge Stewart M. Hanson outlined the issues as follows:

"1. What was the relationship between plaintiff and defendant?

"2. If the relationship is and was that of a business invitee then was the defendant negligent?

"3. Was the plaintiff contributorily negligent?

"4. Did the plaintiff assume the risk?



“5. If the plaintiff is entitled to recover, what damage is he entitled to?”

The court observed that the defendant had filed a motion to dismiss the complaint and the court took the motion under advisement (R. 15). Judge Hanson subsequently granted the motion to dismiss on the original complaint concluding that “at most the plaintiff was an employee of the defendant.” It is to be observed that Judge Hanson set aside his order dismissing the complaint expressly for the purpose of permitting the plaintiff to file an amended complaint in alternative causes of action (*ibid*). We have in this case the anomaly of the first district judge who heard the case ruling that the plaintiff was an employee of defendant without hearing the evidence, and then a second district judge ruling that as a matter of law and without hearing the evidence plaintiff was not an employee. It is submitted that this is precisely the kind of a situation which Rule 8(e) was supposed to remedy. Plaintiff has been denied a hearing on the merits, not because either of the three causes of action was insufficient in itself, but because Judge Van Cott took it upon himself to rule first that plaintiff had to elect at his peril as to whether he was (a) a business invitee, or (b) simply a permissive occupant of the premises, or (c) whether he was an employee. After having required an election, the judge then ruled as a matter of law that plaintiff could not be an employee thereby denying him an opportunity whatever to present relevant facts to the court. It is submitted that Judge Van Cott’s ruling in the case at bar is in direct opposition

to the purpose and intent of Rule 8(a) and 8(e) and is flat contradiction of the leading authorities on the application of these rules.

## POINT II.

### THE COURT ERRED IN RULING THAT THE DEFENDANT OWED TO THE PLAINTIFF NO DUTY.

The plaintiff was on the premises in question in one of three possible legal relationships to the defendant:

- (a) He was a business invitee; or
- (b) He was a licensee, or
- (c) He was an employee of defendant.

The liability predicated upon each of these various causes of action was pleaded in the three alternative causes of action. In *Wimmer v. Bamberger R.R. Co. et al.* (1947) 111 Ut. 444, 182 P. (2d) 119, this court adopted the definitions and distinctions of the *Restatement on Torts* between the liability of possessor of property to gratuitous licensees and business invitees. A licensee is defined as "a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission. A gratuitous licensee is defined as "any licensee other than a business visitor as defined in Section 332." Gratuitous licensees are persons "whose presence upon the the land is solely for the licensees own purposes in which the possessor

has no interest, either business or social, and to whom the privilege of entering is extended as a mere favor by express consent or by general or local custom." *Restatement on Torts*, Sections 330-331. A business visitor is "a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them" (*Ibid* Section 332). In commenting upon various classes of business visitors, the editors of the Restatement state in Comment (a) to Section 332:

"Thus, a delivery man of a provisions store, while delivering goods to a residence is a business visitor of the possessor thereof, so to is a workman who comes to make alterations or repairs on the land used for such purposes."

Comments (f) and (g) to Section 332 of the Restatement are as follows:

"f. Members of possessor's household. A member of the possessor's family, although ordinarily a bare licensee (see Sec. 331, Comment a), is a business visitor if he pays board or gives other valuable consideration for his residence upon the possessor's land.

"g. Servants. A servant, whether an industrial employee or a domestic servant, is a business visitor. If he is an industrial employee, the purpose of his entry is directly connected with the business which the possessor conducts upon the land. If he is a domestic servant, he enters the land for a business purpose of his own which concerns the affairs of the possessor, in that it is incidental to the possessors residential and social use of the land.

“The relation of master and servant has certain peculiarities which have given to the servant a somewhat different degree of protection than that which is given to other classes of business visitors. . . .”

The distinction between the liability of possessors of land to gratuitous licensees and business visitors is discussed in Comment (a) to Section 343 of the *Restatement*:

“There is only one particular in which one who holds his land open for the reception of business visitors is under a greater duty in respect to its physical condition than a possessor who holds his land open to the visits of a gratuitous licensee. The possessor has no financial interest in the entry of a gratuitous licensee; and, therefore, such a licensee is entitled to expect nothing more than an honest disclosure of the dangers which are known to the possessor. On the other hand, the visit of a business visitor is or may be financially beneficial to the possessor. Such a visitor is entitled to expect that the possessor will take reasonable care to discover the actual condition of the premises and either make them safe or warn him of dangerous conditions. As stated in Section 342, a possessor owes to a bare licensee only the duty to exercise reasonable care to disclose to him dangerous defects which are known to him and are likely to be undiscovered by the licensee. Toward the business visitor, the possessor owes the additional duty to exercise reasonable care to make the land safe for the reception of his visitor, or, at the least, to ascertain the actual condition of the land so that by warning the visitor thereon, he may give the visitor an

opportunity to decide intelligently whether or not to accept the invitation or permission.

In *Wimmer v. Bamberger Co. et al.*, supra, this court applied the *Restatement* distinction to hold that: "A workman who goes upon the land to make alterations or repairs is a business visitor." The court in that case held that a carpenter employed by an independent contractor to insulate walls and ceilings of a railroad shop was a business visitor and the railroad owed to him a duty to exercise reasonable care to make the property safe or to ascertain the actual condition of the property and to warn the visitor.

If the plaintiff in the case at bar was only a gratuitous licensee, then the defendant owed a duty to exercise reasonable care to disclose to him the dangerous condition of the rafter which was known to defendant and likely to be undiscovered by the plaintiff. Such was the theory of plaintiff's second cause of action. If the plaintiff was a business visitor, then he had an affirmative duty to discover the actual condition of the premises and either make them safe or warn the plaintiff of these dangerous conditions.

The holding of the trial court that the defendant "had no duty to the plaintiff" is palpably and obviously erroneous.

The substance of the third cause of action was that plaintiff was an employee of the defendant but that defendant had failed and neglected to carry Workmen's Compensation Insurance or otherwise satisfy the provi-

sions of Section 35-1-46, U.C.A. 1953 with respect to plaintiff. The Third cause of action was filed under 35-1-57, U.C.A. 1953 which provides in pertinent part as follows:

“Employers who shall fail to comply with the provisions of Section 35-1-46 . . . shall be liable in a civil action to their employees for damages suffered by reason of personal injuries arising out of or in the course of employment caused by the wrongful act, negligence or default of the employer or any of the employer’s officers, agents or employees . . . In any such action the defendant shall not avail himself of any of the following defenses: The defense of the fellow-servant ruling, the defense of assumption of risk, or the defense of contributory negligence. Proof of the injury shall constitute prima facie evidence of the negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in such injury . . .”

It does not appear from the record that the defendant ever answered plaintiff’s amended complaint. However, in answer to the plaintiff’s original complaint the defendant alleged as an affirmative defense “that plaintiff was an employee of the defendant at the time and place of said accident and was in the course and scope of his employment at said time and that plaintiff’s recourse is limited to benefits, if any, under the provisions of the Workmen’s Compensation Act” (R. 6). Thus the relationship of employer-employee is admitted by the defendant. The application of Section 35-1-57 is patent. Our statute provides that proof of the injury constitutes

evidence of negligence on the part of the employer. The burden is upon the employer to show freedom from negligence and there appears to be no other defense. We do not reach the question as to whether the "prima facia evidence of negligence" provided by the statute is procedural or substantive or is a "rebuttable presumption of law" as was considered by the court in *Buhler v. Maddison* (1949) 105 Ut. 39, 140 P. (2d) 933, subsequent opinions at 109 Ut. 245, 166 P. (2d) 205; opinion on rehearing 109 Ut. 267, 176 P. (2d) 118. Defendant offered no evidence to rebutt the presumption. The court ignored the defendant's own claim that the plaintiff was an employee and entirely by-passed the statute to enter judgment against the plaintiff without any opportunity whatever for a hearing on the merits.

The rulings of the district judge in the case at bar clearly and obviously deny plaintiff his day in court on the merits of his alternative pleading. Each of the three causes of action viewed separately states a valid claim for relief against the defendant. The arbitrary dismissal of the complaint without any opportunity whatever to present evidence in support of any of the legal theories pleaded is a shocking abuse of judicial power.

### POINT III.

THE FACT THAT PLAINTIFF WAS  
A CO-OWNER OF THE PREMISES DOES

## NOT BAR RECOVERY FOR DEFENDANT'S NEGLIGENCE.

The record in this case is that plaintiff and his wife were owners of the land upon which a dwelling was being constructed "and that the defendant was in possession of the dwelling as such as general contractor . . ." (R. 7). As one of the owners of the land plaintiff entered into an agreement with defendant as general contractor for the construction of the premises. The defendant had made estimates as to costs of various items involved in the construction. One of the provisions of the agreement was in the event the plaintiff was able to effect savings as to these various items by obtaining another subcontractor at a lower amount than defendant's estimates or by plaintiff doing part of the work himself, the amount of such savings was to be credited to the plaintiff (R. 7, 8). This arrangement was noted in the pre-trial order of Judge Hanson dated April 26, 1961 (R. 13). The purpose of the plaintiff's visit to the premises on the date of the injury had nothing to do with the fact that plaintiff was the owner of the premises and the uncontradicted record in the case is that plaintiff "took no action whatsoever to exercise control over such premises, which control had theretofore been relinquished to defendant Rex A. Larsen under a written contract dated August 18, 1958 in which said defendant became the general contractor for the construction of a house on said premises and assumed control over said premises." The plaintiff's business on the premises at the time and place of the accident was either as a business



invitee or a gratuitous licensee or an employee of the defendant. Certainly the plaintiff was not a trespasser. On any of the three theories pleaded in the plaintiff's amended complaint, plaintiff was entitled *as a minimum* to present evidence on the question of negligence.

Even if it be conceded, however, for the purpose of argument, that the plaintiff's interests as owner cannot be separated from any other business relationships to the defendant, the fact that he is owner does not absolve the defendant from any duty to exercise reasonable care toward the plaintiff in the same manner and to the same degree that the defendant owes the same duty to any other person. The Restatement of the law of torts explicitly states that the liability to a business invitee arises because of the possession of the property. "A *possessor* of land is subject to a liability . . ." according to Section 343 of the Restatement (emphasis supplied). And the comments to the Restatement clearly establish that the reason for the rule is that the possessor has within his control relevant conditions of safety upon the property. Who has a more legitimate interest in visiting premises where construction is under way by a general contractor than the owner of the premises? Suppose Mr. A as owner enters into a contract with Mr. B for the construction of a dwelling, the contract specifying the quality of material, size of rooms and various and sundry other matters concerning the completion of the unit. The contractor obviously has complete control over the condition of the premises during the time of construction but the owner certainly would

be entitled to enter upon the premises at reasonable times to determine whether the contract was being completed in accordance with the applicable specifications. Suppose the contractor negligently leaves a thin piece of sheeting across an area in the floor where the owner might be expected to pass upon his inspection tour, and upon such a visit the owner steps upon the sheeting, breaking it with his feet and is injured in the resulting fall. Would anyone contend that the owner was not a business invitee within the rule and allow recovery against the contractor? Such was *Negra v. L. Lion and Sons Co.* (Cal. Ct. App. 1951) 227 P (2d) 916 where it was expressly held that negligence of the contractor or his employees gives rise to a cause of action for personal injury to the owner of the premises. The reason for the contractor's liability is that he has supervision and control over the entire building during its construction and where he negligently creates a condition he is primarily responsible for the consequences which follow. *Pastorelli v. Associated Employer, Inc.* (D.C.R.I. 1959) 176 F.Supp. 158; *Smith v. Wilson* (1958) 325 P (2d) 421. Section 387 of the *Restatement on Torts* explicitly states:

“An independent contractor or servant to whom the owner or possessor of land turns over the entire charge thereof is subject to the same liability for harm caused to others within or outside the land by his failure to exercise reasonable care to maintain the land in safe repair as though he were the possessor of the land.”

The fact that the plaintiff had the right to go on

the premises and perform certain work upon the building does not mean that the contractor in charge of the premises owes no duty of reasonable care to him. It is well settled that a subcontractor is a business invitee of the contractor. In *Dingman v. A. F. Mattock Co.* (Sup. Ct. Cal., 1940) 15 Cal (2d) 622, 104 P (2d) 26, the subcontractor was injured when scantling which had been placed across an open stairwell broke as the subcontractor attempted to assent from one level to another. It was held that the subcontractor was a business invitee of the general contractor where he was required to enter the very part of the building where the accident occurred.

*KUPTZ v. Ralph Sollitt & Sons Construction Co.* (CCA 5, 1937) 88 F (2d) 532, cert. den. 302 U.S. 696, 82 L.Ed. 537, 58 S. Ct. 14 holds that an electrical subcontractor's foreman was an invitee and the general building contractor owed a duty to keep the premises in safe condition. *Mecham v. Gordon* 307 Mass. 59, 28 N.E. (2d) 759 holds that an employee of the owner of the premises may recover on the business invitee theory against a general contractor installing a vault and door.

In *Glenn v. Gibbons & Reed Company* (1954) 1 Ut. (2d) 308, 265 P (2d) 1013, this court held that the bailor of a large shovel was in the position of a business invitee upon property in the control of a contractor. The court said:

“We need not delve into the difficult questions involved in an implied invitation, for here Newman received an express invitation to go upon the

land of the defendant by virtue of his contract with the defendant to shovel gravel for their mutual business advantage. Therefore Newman was a business invitee upon the property and the company owed him the duty of conducting its known dangerous activities with reasonable care for his safety. Restatement of Torts, Sec. 346. This, of course, is equally applicable to the equipment which he brought upon the land in furtherance of his contract with the defendant."

In *Donahoo v. Kress House Moving Corporation* (1944) 147 P (2d) 637; subsequent opinion (1944) 153 P (2d) 349, 25 Cal. (2d) 237, the plaintiffs were occupants of the premises in question as tenants. A house moving contractor permitted them to live in the house and to remain on the premises during the removal of the house to the rear of the lot. The court held that the defendant owed to the plaintiffs a duty as invitees and was required to provide reasonably safe passageway for ingress and egress to and from the house and guard openings or evacuation made by the defendants as contractors on the premises. The theory of the case was that the plaintiffs were agents of the owners and as such the defendants owed a duty to them as business invitees.

The authorities clearly establish the proposition that a contractor owes a duty of care to the owner of the premises on the same theory upon which the duty arises in other instances where the business invitee doctrine is applicable. No case has been found where a court ruled that the owner of premises which were in the possession of a general contractor was deprived of his cause of

action against the contractor simply because he was owner. It is certainly possible that in a given instance a person who owned a particular piece of property upon which construction work was in progress could be an employee of the contractor. In that event there is no reason why the ordinary legal relations between employers and employees would not be applicable between the persons involved insofar as employment relationships were concerned. In the case at bar, insofar as the district court's ruling denied plaintiff's recovery because of his co-ownership in the property, it was grossly erroneous.

## SUMMARY AND CONCLUSION

The amended complaint stated three alternative legal theories upon which liability could be predicated. Each one of these theories was sufficient in and of itself upon which to base a judgment against the defendant. The court erred in requiring the plaintiff to elect one of the theories to the exclusion of the others prior to a hearing on the merits. The court erred further in determining that no judgment could be predicated on the third cause of action. The judgment of the district court should be reversed with instructions to proceed to trial and submit the case to the jury upon all three causes of action. If the jury should return a verdict for the plaintiff upon all three causes of action, then, of course, satisfaction of the judgment on one of the

causes would act as a bar to enforcement on the other two. Until the facts are determined, however, there is no occasion to require the plaintiff to make an election.

Respectfully submitted,

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