

1963

Grant Scott Haslam v. Paul Paulsen et al : Appellant's Reply to Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GRANT SCOTT HASLAM,
Plaintiff and Appellant,

vs.

PAUL PAULSEN, P. H. PAULSEN, AND BYRON PAULSEN
dba ACME CRANE RENTAL
COMPANY, HYRUM PETERSEN, THE CORPORATION OF
THE PRESIDING BISHOP OF
THE CHURCH OF JESUS
CHRIST OF LATTER-DAY
SAINTS, a corporation sole, and
FRANK COTTRELL,

Defendants and Respondents.

ED

Case No.
9938

APPELLANT'S REPLY TO RESPONDENTS' BRIEF

Appeal from an Order vacating a Verdict and Judgment and
granting a new trial in the Third Judicial District Court for
Salt Lake County, Honorable Merrill C. Faux, Judge

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INDEX

	Page
Reply to Respondents' Statement of Facts	1
Reply to Respondents' Point I	3
Reply to Respondents' Point II	5
Reply to Respondents' Point III	7
Reply to Respondents' Point V	7
Section 35-1-42 was never intended to be, nor is it, a guide to the interpretation of 35-1-62 UCA 1953	9
Plaintiff is not an employee of any of the defendants even by the employer-employee standards of 35-1-42 and 35-1-43 UCA 1953	13
The real meaning and effect of 35-1-42 UCA 1953	15
The cases cited in defendants' memorandum are not applicable to this case.	16
Reply to Respondents' Point VI	21
Reply to Respondents' Point VII	24
Reply to Respondents' Point VIII	25
Reply to Respondents' Point X	26
Conclusion	30

AUTHORITIES

Angel et al vs. Industrial Commission of Utah, 64 Utah 105	10
Beck vs. Dutchman Coalition Mines Co., 2 Utah 2d 104, 269 P 2d 867	26
Bowden vs. Denver & Rio Grande Western Railroad Co., 3 Utah 2d 444, 286 P 2d 240	27

	Page
Brown vs. Arrington Construction Co., 262 P 2d 789	16
Cloughley vs. Orange Transportation Co., 327 P 2d 369	19
Holmes vs. Nelson, 7 Utah 2d 435, 326 P 2d 722..	28
Johanson vs. Cudahy Packing Co., 107 Utah 114, 152 P 2d 98	11
McPadden vs. W. J. Halloran Co., 154 NE 2d 582..	20
Murray vs. Wasatch Grading Co., 73 Utah 430, 274 P 2d 940	17
National Farmers Union Property and Casualty Co. vs. Thompson, 4 Utah 2d 7, 286 P 2d 249	4
Plewe Construction Co. vs. Industrial Commission of Utah, 121 Utah 375	21
Pruett vs. Lininger, 356 P 2d 547	18
Rogalski vs. Phillips Petroleum Co., 3 Utah 2d 203	11
Sutton vs. Industrial Commission of Utah, 9 Utah 2d 339	20
Weber Basin Water Conservancy District vs. Nelson, 11 Utah 2d 253	24

STATUTES

Oregon Revised Statutes, 656.154	18
Utah Code Annotated, 1953	
35-1-42	10
35-1-43	15
35-1-45	15
35-1-60	16
35-1-62	9

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REPLY TO RESPONDENTS' STATEMENT OF FACTS

Respondents indicate that appellant's statement of facts are "incomplete and merely show the facts and issues as the appellant contends them to be and not as

they were necessarily viewed by the trial court". They then proceed to state the facts as they see them.

Our only comment on this is that inasmuch as the jury found the issues in appellant's favor and inasmuch as there is ample evidence to support every material fact set forth and documented in appellant's brief, appellant was and is entitled to view the evidence in a light most favorable to appellant, whereas respondents are not entitled to this privilege. And in view of the great weight of evidence in favor of appellant's view of the facts and of the paucity or complete absence of any real evidence to support the allegations of respondents where they conflict with the facts as set forth by appellant, the trial court likewise is precluded from asserting its view where that view is contrary to the jury's findings.

All through the trial and even now in their brief respondents have minimized and do now minimize plaintiff's injuries in spite of the solid and weighty evidence pertaining thereto. The jury believed plaintiff's evidence and they were not caught up in respondents' light-hearted treatment of plaintiff's damages. For example, even now defendants still talk as if they are not aware of the fact that plaintiff's pain, which is permanent, is not a result of an inflamed bursa, and that it was the inflamed bursa only which the operation was able to correct—and did correct. But the other shoulder damage is beyond repair, of which fact respondents appear to be quite unaware.

Other illustrations might be given of respondents'

refusal to see the facts as seen by the jury, but we will content ourselves with the request that the court view the evidence as related in appellant's brief, and that where there is any conflict of evidence as to material facts as set forth respectively by the parties, such facts should be resolved in favor of the appellant and as found by the jury.

REPLY TO RESPONDENTS' POINT I

There is nothing in Article 8, Section 9 of the Constitution of the State of Utah, nor in Rule 72, which would preclude this court from deciding this case at this time if the court finds that the trial court abused its discretion. Our discussion of this point is found under Point IV of appellant's brief and in our Reply to Respondents' Point IX herein. Until the trial court abuses its discretion, it may retain control of the case by a new trial order from which an appeal may not be in order. But an abuse of discretion is another matter and this court has not shrunk from giving relief from such rulings.

Respondents make a point of our failure to state in our brief that appellant's petition for an interlocutory appeal in this case was denied. In the petition we referred to the fact that we were filing an appeal, and we believe that it is a fair inference that this court denied the petition for the reason that it would have a better opportunity to consider the case more thoroughly

when reviewed under the usual appeal procedure. It did not occur to us that a reference in our appeal brief to the other procedure was of any consequence, or that thereby we would be advising the court as to something of which it was not already aware.

Respondents then quote from the case of *National Farmers Union Property and Casualty Company vs. Thompson* (1955), 4 Utah 2d 7, 286 Pac. 2d, 249, as follows:

“An order granting a new trial is different in character than an order denying one. The latter terminates the cause, while the former operates to vacate the judgment and reinstate the case as one undisposed of before the court, and over which the court retains jurisdiction.”

In the *Farmers Union* case the trial judge, after jury verdict and judgment in favor of defendant permitting defendant to retain \$2,000.00 paid him by the plaintiff insurance company for fire loss to a frame building, entered a conditional order to the effect that a new trial be granted unless the defendant, within ten days, filed his consent to reduce the amount of \$2000.00 so allowed by the jury to \$1000.00, which the judge said was the value of the building as found by him. The defendant did not consent to the reduction and moved to set aside the conditional order. Five months after the motion was argued, the trial judge vacated the order for a new trial and reinstated the judgment and restored the jury finding of \$2000.00 as the value of the building. The plaintiff insurance company then challenged

this restorative action of the court on the theory that once the trial court granted a new trial, it was powerless to vacate such an order.

But this court held that the trial court could vacate its order because it was vacating an order *granting* a new trial which was different in that factual setting from an order *denying* a new trial.

The real difference, however, upon a careful reading of the case, is that while an order granting a new trial is different from an order denying a new trial in that one must appeal from the latter if he seeks relief, this does not mean that one *may* not appeal from an order granting a new trial where, in granting the new trial, the court abused its discretion.

REPLY TO RESPONDENTS' POINT II

All that respondents say in Point II of their brief is premised upon the idea that some minor injuries suffered by appellant in 1957 had a relationship to the bursa inflammation in plaintiff's shoulder, which Dr. Pemberton corrected by surgery. To keep this problem in its proper perspective we here emphasize that the bursa injury is not the injury which has caused plaintiff's partial permanent disability. We deal with this matter under Point II of our brief on pages 35-38.

Because plaintiff, in the medical history given Dr. Pemberton, did not refer to these 1957 incidents, which

occurred well over two years prior to the January 19, 1960, accident, the respondents catalog the medical history as untrue. There is not the slightest evidence that either incident in 1957 resulted in any damage or pain whatsoever except for a day or two of discomfort at the time they occurred. Yet, unless one assumes, contrary to all the evidence in the matter, that plaintiff had pain and discomfort for over two years either intermittently or continuously up to the time of the January 19, 1960, accident, there could be no possible reason for plaintiff referring to such inconsequential events in giving a medical history of his January 19, 1960, accident.

In attempting to reduce the facts to a choice of uncertain probabilities as to the cause of the bursa inflammation, respondents observe that none of the doctors could say when plaintiff received his inflamed bursa, independent of plaintiff's statements to them. It is true that any doctor would have to rely on what the appellant said. But respondents don't want to rely on what he said and they don't want the doctors to rely on what he said. He said the 1957 incidents left no damage and no pain, that within a day or two these injuries were all healed and cleared up and that he had no pain or suffering whatsoever until the accident of January 19, 1960. The origin of plaintiff's pain was January 19, 1960, and it was therefore this accident and the pains incident thereto that he described to Dr. Pemberton. Dr. Pemberton believed this accident to be the source of plaintiff's pain, and at the time of the trial he still believed it. Dr. Pemberton not only related

the specific injury of the inflamed bursa to the January 19, 1960, accident but he found that accident to be the source of all of plaintiff's injuries in the region of his shoulder.

REPLY TO RESPONDENTS' POINT III

Our treatment of this subject is found under Point III of our brief beginning at Page 39.

We do observe, however, that here again respondents, in referring to the medical history, state that "this was found not to be true". Found by whom? Certainly not the jury. The record does not reveal it. It is found only in the minds of the respondents. And when respondents say that appellant himself personally did all the work on his home remodelling, they ignore the record. The evidence is that he helped a little, and only as much as his disabled arm and shoulder permitted, and that he did this work for the very purpose of giving his arm and shoulder the exercise necessary to redevelop and reactivate them from the disuse and atrophy resulting from the operation.

REPLY TO RESPONDENTS' POINT V

In view of the record and of the remarks of the trial judge during arguments on the motion for a new trial there can be no question that the trial judge con-

sistently rejected respondents' view that workmen's compensation was plaintiff's exclusive remedy. Nevertheless, respondents have raised the issue here, and the reply which follows is offered for this court's consideration in the event it decides to consider and pass upon respondents' Point V.

The facts of the case as they pertain to this issue are reviewed as follows:

On January 19, 1960, plaintiff was an employee of Utah Sand and Gravel Company. He was a truck driver whose job was to deliver ready-mix cement to the locations provided by his employer. The employer's establishment is located in North Salt Lake on Beck Street, where the truck receives the ready-mix. On the date in question, the plaintiff was dispatched by his employer with a load of ready-mix cement to be delivered to the L.D.S. Church at Wasatch Boulevard and 13th South, where the Church was erecting a new chapel. To assist the Church in conveying the cement from the truck to the place where it was being used for the foundation of the building, the Church had contracted with Acme Crane Rental Company to furnish a crane and a crane operator for such purpose. When the plaintiff drove upon the building site at approximately 1:00 p.m. of said day, the crane was in the process of unloading the ready-mix truck just ahead of the plaintiff's truck which consisted of the cement being poured from the truck into the crane bucket and then from the crane bucket after it had been lifted to

the point where the Church foreman or his helpers indicated the cement should be poured. After the truck ahead of him had pulled away the plaintiff then backed his truck up to the crane bucket for the purpose of unloading in the same way and manner as the previous truck.

There are thus three separate employers involved in this operation: The Church, the Acme Crane Rental Company, and the Utah Sand and Gravel Company.

In spite of the facts, respondents claim, in contemplation of the applicable statutes, that plaintiff and Acme Crane Rental Company were employees of the Church and, therefore, plaintiff's only remedy against either the Church or Acme is that which is provided by workmen's compensation. The record shows that plaintiff's counsel represents the State Insurance Fund in this case to the extent of its subrogation rights from plaintiff against respondents. (R. 186).

SECTION 35-1-42 WAS NEVER INTENDED TO BE, NOR IS IT, A GUIDE TO THE INTERPRETATION OF 35-1-62, U.C.A. 1953.

Section 35-1-62 reads in part as follows: "When any injury * * * for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee, * * * may claim compensation and the injured employee * * * may also have an action for damages against such third person."

The phrase "not in the same employment" found in the above is limited to employees of the same employer in the restrictive sense of the term and is not to be confused with the more liberal definition of employer as found in 35-1-42 as expressed in the following excerpts:

"Regularly employed in the same business, or in or about the same establishment under any contract of hire";

"The term 'regularly' as herein used shall include all employments in the usual course of the trade, business, profession or occupation of the employer, whether continuous throughout the year or for only a portion of the year";

"Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such contractor, and all persons employed by him, and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed, within the meaning of this section, employees of such original employer."

35-1-42 was enacted to prevent the evasion of the Act by many employers who parcel out, under guise of contracts, the work among many so-called contractors while retaining supervision and control of the work. It was legislation to prevent employers from defeating the Act by reducing through a subterfuge the amount of employees covered by the Act. See *Angel et al vs. Industrial Commission of Utah*, 64 Utah 105.

35-1-62 was enacted for the purpose of permitting suit against a third party tortfeasor who was not the injured party's actual employer (using the term employer here in its usual connotation and not in the more general use as defined in 35-1-42) and who had no responsibility to carry workmen's compensation for the injured party. In such a case 35-1-62 seeks to make whole the insurance company's loss as well as to retain the common law rights of suit by the injured party. Inasmuch as these two sections deal with separate and unrelated problems, it would be contrary to the rules of legislative interpretation to construe the sections as one.

On the occasions when 35-1-62 have been before this Court, it has been made plain that this section was not to be interpreted in a restrictive sense so as to defeat the legislative intent. See *Johanson vs. Cudahy Packing Co.*, 107 Utah 114, 152 Pac. 2nd 98. Also, *Rogalski vs. Phillips Petroleum Co.*, 3 Utah 2nd 203. In the latter case, the issue was raised as to whether the State Insurance Fund had to be joined as a necessary party plaintiff. In considering the matter, the court said:

“Appellant claims that U.C.A., 1953, 35-1-62, must be interpreted to give the sole right of action to the insurance carrier after the carrier has paid compensation and cites the language of the statute: ‘ * * * The employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the insured employee’. Certainly, this language does give the insurance carrier a right

*of action, but it was not meant to abrogate the language preceding this quotation which provides, 'when any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another * * * the injured employee * * * may also have an action for damages against such third person'.*" (Our emphasis).

It is instructive to note the fact situation in this case. The plaintiff was an employee of the third party's distributing agent. And the accident happened while the plaintiff was on the third party's premises washing his employer's truck which carried the third party's name, trade marks and colors, and while using the third party's truck cleaning facilities. In spite of all this chain of agency and community of interest the court emphasizes that 35-1-62 granted plaintiff the right to sue such third party. In the Johanson case, above cited, the court stated that it was not the legislative purpose in the enactment of this section to create a shield for a third party tortfeasor. It was not intended to limit or proscribe the liability of such a wrongdoer. It was designed to permit an employer or insurance carrier who pays compensation in accordance with the act to participate in the recovery had from the third party tortfeasor, the participation being limited to the amount of compensation paid, plus the cost of collecting from the wrongdoer. And the only concern of the third party is that he be effectively protected against double suit for the same wrong, that is to say, that the suit be brought in the name of the real party in interest and

that all those having an interest in the subject matter of the litigation be bound by the judgment.

PLAINTIFF IS NOT AN EMPLOYEE OF ANY OF THE DEFENDANTS EVEN BY THE EMPLOYER-EMPLOYEE STANDARDS OF 35-1-42 AND 35-1-43, U.C.A., 1953.

We wish now to apply the standards of the employer-employee relationship as defined in 35-1-42 and 35-1-43 to the plaintiff and show thereby that even under those standards, the plaintiff is not an employee of either of the defendants.

The real test as to whether a person is an employee under the standards of 35-1-42 is this: Does the employer supervise and control the employee's work as to the manner of the work or *how* it is to be performed? In the case before the court the work of mixing concrete is done at Utah Sand and Gravel yards at North Salt Lake. The plaintiff comes and goes to job sites as a truck driver as he is directed, supervised and controlled by his own employer, the Utah Sand and Gravel Company. At the defendant's job site in this case, the plaintiff's duty, as usual when delivering cement, was solely to deliver the ready-mix and then leave. What the defendants did with the cement and how they went about using it was of no concern to plaintiff. And, the Church's only concern was that the cement be up to specifications or that it conform to what was ordered. How Utah Sand and Gravel acquired the material or their manner and method of mixing it, or how they

delivered it and unloaded it into the crane bucket provided for such purpose was of no concern to the Church. All it was concerned about was that at a certain time and a certain place a certain mixture be placed in a bucket which they provided. The fact is, in this case, that there was not anyone associated with any of the defendants around to say or do or make any comment as to how plaintiff went about the job of dumping the cement into the crane bucket.

Furthermore, plaintiff qualifies as an "independent contractor" as defined in 35-1-42, which specifically relieves him of an employee relationship with either the Crane Company or the Church by the standards, extensive as they are, of that section. Representing his own employer, the Utah Sand and Gravel Company, plaintiff was "engaged only in the performance of a definite job or piece of work" in seeing that the cement that was ordered was delivered to the job. Such process of delivery was "subordinate to the employer only in effecting a result in accordance with the employer's design" and he was "independent of the employer in all that pertains to the execution of the work" and he was "not subject to the rule or control of the employer." No one among the defendants gave plaintiff or any of his fellow truck drivers at Utah Sand and Gravel any instructions, and none were in order or appropriate, for their job upon reaching the construction site was merely to dump the cement into the bucket.

In no way can it be said that plaintiff was engaged in common employment with either the employees of

the defendant, Crane Company, or the defendant, the Church. As between the Church and the Crane Company, their employees did, in fact, have a degree of closeness in their relationship. They conferred as to what they should do, and as found as a matter of law by the trial court, there was no employer-employee relationship between them just as there was none as between the plaintiff and either of the defendants.

THE REAL MEANING AND EFFECT OF 35-1-42, U.C.A. 1953.

An employer as defined in the Act must secure compensation for his employees in one of three ways as set forth in 35-1-45. That is, an employer must secure compensation for his employees as the term employee is defined in 35-1-43. 35-1-42 does not require a *subcontractor* of the employer to insure such employer's employees. The subcontractor in such a job site situation is not the "employer" and therefore does not enjoy the immunity from suit by an employee that the "employer" enjoys. The purpose of defining employer to include employees of a subcontractor as provided in 35-1-42 was to protect the compensation rights of employees. It was not intended to relieve subcontractors of their common law responsibilities. Therefore, when in 35-1-60 we read that an employee's right to compensation is his exclusive right against his employer and his employer's officers, agents or other employees, we are to give the usual or common law meaning to such terms. An employer's "officers", "agents", and "employees"

as used in 35-1-60 does not include an employer's subcontractors. Therefore, 35-1-42 prevents an injured employee on a job site, who has received compensation, from suing the principal, or prime contractor or "employer" because he is not a third party. But a subcontractor on that job may be sued by any employee including an employee directly employed by the "employer". See *Brown vs. Arrington Construction Company*, 262 Pac. 2nd 789 (Idaho). This case has an excellent discussion as to this problem. The Utah and Idaho statutes are not too dissimilar. This case, incidentally, is a case that is very similar to the facts of the case now before the court with reference to the principles of negligence. The facts of that case as they apply to the issue now under discussion are dissimilar, however, in that in the Idaho case the plaintiff was employed by the "employer" and was suing a subcontractor of the "employer" even though the employer directed the work of the subcontractor, whereas, in this case plaintiff is not an employee of the "employer" but is an employee of a business visitor who was entirely independent of the "employer". Nevertheless, the Idaho court permitted the suit, saying the subcontractor was a third party in spite of the fact that the plaintiff and defendant subcontractor were in "common employment".

THE CASES CITED IN DEFENDANTS' MEMORANDUM ARE NOT APPLICABLE TO THIS CASE.

The treatment that is given to the rights of plain-

tiffs to sue third parties after such plaintiffs have received industrial compensation vary considerably among the states, so much so that it is essential that each statute be checked carefully before citing cases to support an interpretation of a statute in another state.

The first case that respondents cite is *Murray vs. Wasatch Grading Company* (1929), 73 Utah 430, 274 P2d 940. As noted by respondents' comments the facts are clearly distinguishable from the case at bar. The defendant in that case had borrowed an employee of the Railroad Company. Although the employee's pay came from the Railroad Company, that Company was reimbursed for the wage by defendant. The plaintiff employee was doing and generally engaged in the work of defendant. The court makes this very clear when it says:

"The plaintiff when injured was working under an express contract of hire, and was engaged in the usual course of the business or occupation of the defendant. According to plaintiff's testimony, he was engaged in placing a chain around a large rock so that a team driven by one of defendant's employees could remove the same from the railroad track, when another team driven by another employee of the defendant so moved a telephone pole that it rolled against plaintiff's leg and caused the injury complained of. It was the duty of the defendant to keep the railroad track clear—that was its business or occupation. The plaintiff, at the time of his injury, was engaged in that business or occupation. Obviously, if the plaintiff had sought compensation under the Workmen's Compensation Act, the

defendant would have been without any defense under the facts as shown by this record.”

Respondent next cites the Oregon case of *Pruett vs. Lininger* (1960), 224 Ore. 614, 356 P2d 547.

Here again the plaintiff was an employee of the general contractor or “employer”. The third party defendant owned and operated the crane which also supplied the ready-mix concrete and had been hired by the general contractor. Therefore, the fact situation does not correspond with the case at bar. Under the fact situation of the *Pruett* case the Oregon statute quoted in the opinion clearly prevented the plaintiff from suing the Crane Company as a third party. The Oregon statute applicable reads in part:

O.R.S. 656.154

“(1) If the injury to a workman is due to the negligence or wrong of a third person not in the same employ, the injured workman, * * * may elect to seek a remedy against such third person. However, no action shall be brought against any such third person if he or his workman causing the injury was, at the time of the injury, on premises over which he had joint supervision and control with the employer of the injured workman and was an employer subject to O.R.S. 656.002 to 656.590.”

“(2) As used in this section, ‘premises’ means the place where the employer or his workman causing the injury, and the employer of the injured workman, are engaged in the furtherance of a common enterprise on the accomplishment of the same or related purposes in operation.”

In the Pruett case, the employer was a general bridge contractor whose employee was the plaintiff and the plaintiff brought the action against the owner of a crane being rented by the plaintiff's employer to use in pouring concrete. All were working on the same job and on the same premises when the accident occurred. The court said:

“If the third party causing the injury was negligent, a third party action will lie unless barred by O.R.S. 656.154 * * * . If the third party causing the injury was negligent, it was also covered by the workmen's compensation act, which is the situation now before the court, a third party action authorized by O.R.S. 656.154 is nevertheless available unless the two employees were engaged in the performance of component parts of an undertaking on premises occupied by the workmen of both covered employers”.

Thus, the facts of that case do not correspond with the case now before the court, and the Oregon statute specifically prevents a third party suit in that fact situation. That case is therefore dissimilar as to both the facts and the law when applied to the instant case.

The next case cited by respondents is the Idaho case of Cloughley vs. Orange Transportation Company (1958), 80 Idaho 226, 327 P2d 369. The facts in this case are dissimilar from the facts of the case at bar for the following reasons:

(1) The driver in the Idaho case was in fact loaned as a temporary employee of the “employer” and did

in fact receive directions and was controlled by and was under the supervision of the superintendent of the "employer".

(2) The temporary loaning of the driver to the "employer" was done pursuant to a custom and a rule of the carriers association approved by the ICC, which provided that where large and heavy equipment, such as was involved in that case, was loaded and unloaded, such loading or unloading was performed by the shipper or consignee as the case may be. The plaintiff in that case was an employee of the "employer" and he was suing the truck driver. We thus have a true situation of common employment which does not come within the facts and principles of the case at bar nor come within the facts and principles involved in the Idaho case of *Brown vs. Arrington Construction Company* above cited.

Respondents then refer to the Massachusetts case of *McPadden vs. W. J. Halloran Company* (1958), 338 Mass. 189, 154 NE 2d 582.

This Massachusetts case is one where the plaintiff was an employee of the same company which had employed the Stafford Iron Works to do certain "work for it". Thus, there was a true common employee situation. The Stafford Iron Works was doing work for the "employer" of the plaintiff, who was also an employee of the "employer". Such facts are clearly distinguished from the case at bar.

The next case cited by defendant is *Sutton vs.*

Industrial Commission of Utah, 9 Utah 2nd 339, where the facts are obviously not applicable to the case before the court.

The next case cited by defendant is Plewe Construction Company vs. Industrial Commission of Utah, 121 Utah 375, which is another case where the "employer" exercised supervision and control over the work done by the person seeking industrial compensation. It should be noted that all of the Utah cases cited above by defendants were cases where the party involved was seeking industrial compensation by bringing action against the Industrial Commission. Also, these cases involved an interpretation of 35-1-42. The issue in those cases generally involve the problem of whether the general contractor exercised supervision and control over an employee of a subcontractor.

Our objection to the cases cited by respondents is simply that they involve fact premises and in some instances laws which are neither similar or applicable to the facts and circumstances of the case now before the court.

REPLY TO RESPONDENTS' POINT VI

Under this point respondents examine only the first two special interrogatories and answers, and isolate them from the other special questions and answers.

Before we point out the nature of respondents' errors in their analysis of the special verdict, we wish

to comment on these special interrogatories as a whole. We believe—and we feel sure the trial judge agrees—that in a calmer and more deliberate atmosphere than was present during the formulation of these interrogatories, a better job could have been done and the jury's task could have been made easier. We believe there was, indeed, room for improvement. Nevertheless, these questions and answers, when looked at as a whole leave no doubt as to the following findings by the jury:

1. That respondents proximately caused plaintiff's injuries.
2. That plaintiff was not contributorily negligent.
3. That plaintiff was damaged in the amount of the verdict rendered.

Now as to Interrogatory 1:

“1. Was the defendant, Hyrum Peterson, negligent in the placing *or* operation of the crane immediately before *or* at the actual time of the accident in this case?
Answer: Yes.”

There is no dispute in the evidence that Peterson placed *and* operated the crane immediately before *and* at the actual time of the accident in this case. Since there was no dispute as to these matters and since the evidence is ample on all points there should be no question that the jury—all of the members thereof—answered all points in the affirmative even though the various elements were placed in the disjunctive.

The second question was:

“Did the negligence of Hyrum Petersen proximately cause, or participate in causing the accident and injury of which plaintiff complains? Answer: Yes.”

Now, as far as a judgment against Petersen and his employer is concerned it makes no difference whether his negligence was the sole cause or a concurring cause. And when the jury answered “yes” to this question, the respondents cannot avoid liability even though the jury could have had in mind that the defendant Church also proximately caused plaintiff’s injuries.

Other answers that also bring certainty to the mind that respondents are liable proximately as found by the jury are the answers to interrogatories 7a, 8, 10, and 11.

7a reads: “Under all the facts and circumstances of this case, was plaintiff Haslam guilty of negligence? Answer: No.”

8 reads: “If, in your answers to this point you have found that defendant Petersen or plaintiff Haslam was guilty of negligence which proximately caused or contributed to the injury plaintiff received, would the accident not have happened except for said negligence? (Put a cross in the box that fits your answer).”

The answer was: “Yes, it would not have happened”. Thus, with Haslam excluded as a contributing party to the negligence, Petersen alone, along with his employer, is left as the one who proximately caused plaintiff’s injuries.

Then with the further action of rendering a verdict in a sum certain against respondents and in favor of the plaintiff as found in answers 10 and 11, there is no room for doubt, not even, we believe, in the minds of respondents.

We think it appropriate here to quote from a statement of this court in *Weber Basin Water Conservancy District vs. Nelson*, 11 Utah 2d 253:

“Presumptions and intendments cannot be indulged in to establish a contradiction or inconsistency in the findings or answers of a jury to special interrogatories, the presumption being always to the contrary.”

Finally we register objection to respondents' statement that one of the reasons the court granted a new trial was because it believed it had erred in the wording of the interrogatories. This, we believe, is not only an incorrect assumption but is contrary to anything in the record and is not premised upon any expression by the trial judge off the record in the presence of counsel for appellant.

REPLY TO RESPONDENTS' POINT VII

Respondents here attack the court's instruction No. 7, claiming that they have been adversely affected thereby. Our discussion on this matter is found on pp. 26-29 and 43-44 of our brief.

We should point out here, however, that the court did not use the phrase “wanton or *wilful*” as stated by

respondents. The phrasing used is “wanton or *reckless*,” or simply “reckless”.

It should also, perhaps, be emphasized that this subject is now moot inasmuch as the jury found plaintiff not to be contributorily negligent and because plaintiff did not ask for and the court did not give any instruction as to punitive damages. The only argument that appellant’s counsel made to the jury was that if the jury should determine that defendants’ conduct was wanton or reckless according to the definition set forth in Instruction 7, then defendants could not assert the defense of contributory negligence. We submit that such an argument would not and did not “inflame the jury” as respondents here claim.

REPLY TO RESPONDENTS’ POINT VIII

That plaintiff was not contributorily negligent is discussed in appellant’s brief at pp. 18-26 with a summary of the matter at pp. 24-26.

However, we urge most strongly our exception to respondents’ statement that one of the reasons the trial judge granted a new trial was because he believed the evidence was such that plaintiff was contributorily negligent as a matter of law or that the verdict in this respect was against the weight of the evidence. Nothing in the record or in the court’s expressions off the record justify such a conclusion.

If there is any truth in the theory that this was a

reason for the court's order of a new trial, then our position that the court abused its discretion would be further enhanced. In view of the evidence and of the business invitee position of plaintiff, there is a very plausible view that plaintiff was *not* contributorily negligent as a matter of law, and it is inconceivable that the trial court would impose its own judgment over the jury's findings on this point.

Even so, the issue of contributory negligence is also moot in view of the jury's specific finding of defendant's wanton and reckless conduct. If this court agrees with us that the evidence warranted an instruction as to the matter of reckless and wanton conduct of the plaintiff, then contributory negligence is no defense to plaintiff's action since the jury found that defendants' conduct was wanton and reckless.

REPLY TO RESPONDENTS' POINT IX

Our views on the subject of this court's right to consider this case at this time and that what the trial court did in vacating the judgment and granting a new trial was action which is appealable to this court is set forth in pp. 44-48 of our brief.

However, we wish here to analyze respondents' authorities and show thereby that they do not support their contention and that, in fact, they in some instances really support our view of the matter.

They cite *Beck vs. Dutchman Coalition Mines*

Company (1954), 2 Utah 2d 104, 269 P2d 867, to the effect that trial courts have wide latitude in granting or denying motions for new trials, a point with which we agree. But there is a limit to a trial court's latitude. In that case a jury rendered a verdict in plaintiff's favor of \$1500.00 against defendant for attorney's fees. He was not satisfied with the amount and his motion for a new trial was denied. There was evidence in the record which supported the jury's verdict, and there was also evidence which would have supported a fee of a larger amount. With these facts the court must conclude, as it did, that it had no right to upset the jury's verdict. In a concurring opinion, Mr. Justice Henriod said that in his opinion the plaintiff's verdict should have been much greater in view of the evidence which supported a greater verdict, even though there was a conflict in the evidence on this point. Said he:

“But the writer and this court were not and cannot pretend to be the jury in this case, and our personal feelings in any such matter cannot exceed the four corners of the record made.”

Respondents then cite *Bowden vs. Denver and Rio Grande Western Railroad Company* (1955), 3 Utah 2d 444, 286 P2d 240, to the effect that a reviewing court will interfere with the exercise thereof only if there is a clear abuse of discretion. Now, this is precisely what our position is and we submit that such is the state of the case now before the court.

In the *Bowden* case the plaintiff was granted a new trial by the trial court and this court did consider

the appeal and did reverse the order for a new trial and reinstated the judgment. In support of its new trial order the trial court had referred to the “Butz” case, a then recent case, by which it felt bound to grant a new trial. This court, in rejecting the applicability of that authority, had the following important things to say:

“There is a most important difference between this case and the ‘Butz’ case hereinabove discussed. In the latter, the trial court had deprived the plaintiff of a trial by jury and resolved all of the issues of fact against him as a matter of law, whereas in this case the matter was submitted to a jury and the facts were found against the plaintiff. We reaffirm our commitment that ‘The right of a jury trial * * * is * * * a right so fundamental and sacred to the citizens [that it] should be jealously guarded by the courts’. But once having been granted such right and a verdict rendered, it should not be regarded lightly nor overturned without good and sufficient reason; nor should a judgment be disturbed merely because of error. Only where there is error both substantial and prejudicial, and when there is a reasonable likelihood that the result would have been different without it, should error be regarded as sufficient to upset a judgment or grant a new trial”.

Respondents next cite the case of *Holmes vs. Nelson* (1958), 7 Utah 2d 435, 326 P2d 722, because they are impressed with the fact that this court affirmed the granting of a new trial. In that case there was no dispute in the evidence, and the evidence was clear as to the fact that a 3½-year-old child would never have

been struck by defendant's car except for a set of facts that inevitably spelled out negligence in the defendant's conduct. In this case this court dealt at some length with the problem of trial courts ordering new trials. In a concurring opinion, Mr. Justice Crockett states a principle which we believe was violated by the trial judge in the case now before the court. He said:

“The verdict, when supported by substantial evidence, should be regarded as presumptively correct and should not be interfered with merely because the judge might disagree with the result. The prerogative should only be exercised when, in the view of the trial court, it seems clear that the jury has misapplied or failed to take into account proven facts; or misunderstood or disregarded the law; or made findings clearly against the weight of the evidence so that the verdict is offensive to his sense of justice to the extent that he cannot in good conscience permit it to stand.”

Although the foregoing rule would preclude, we believe, a trial judge from granting a new trial on the record in this case, it is a rule that does not go as far in restraining of a trial judge from granting a new trial as does the dissenting opinion of Mr. Justice Henriod, who observes that the majority opinion in the Holmes case necessarily holds the defendant was liable as a matter of law. Otherwise the court has no right to interfere with a jury's verdict and order a new trial, for he says:

“If there is another trial and the jury again finds no negligence, all that the plaintiff need

do is to appeal again to this court, and, under the decision here, it would have to be reversed, and another trial ordered. This could go on ad infinitum until finally a jury would hold for the plaintiff. Hence, the plaintiff cannot lose in this case. It would be more sensible, in my opinion, if the case were sent back for the assessment of damages only, saying what the main opinion in substance and effect has said, that defendant is liable as a matter of law.”

CONCLUSION

In conclusion we submit that every issue of fact raised in this case was clearly and unequivocally a question for the jury to decide, that every issue of law was adequately covered by the trial court’s instructions, and that if either party was prejudiced by such instructions it was certainly not the respondents; that the jury acted upon both the issues of fact and law well within and reasonably within their exclusive province to act, and that, having done so, it is not within the trial court’s province or powers to retain jurisdiction of the case for a new trial; that there are limits to the right of a trial court to order a new trial and those limits were clearly exceeded by such an order in this case.

Respectfully submitted,

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I hereby certify that on this day of February, 1964, I mailed two copies of this Brief by United States Mail, postage prepaid, to Raymond M. Berry; two copies to George H. Searle; and two copies to Skeen, Worsley, Snow and Christensen at the addresses shown on this Brief.

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