

2003

Kelly Smith, Lisa Nielsen, and Jason Kelly Smith v.  
Hales & Warner Construction, Inc., and the  
Corporation of the Presiding Bishop of the Church  
of Jesus Christ of Latter Day Saints : Brief of  
Appellee

Utah Court of Appeals

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UTAH APPELLATE COURTS  
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**IN THE UTAH COURT OF APPEALS  
STATE OF UTAH**

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**KELLY SMITH and LISA NIELSEN,  
Individually and as Heirs of JASON  
KELLY SMITH, Deceased**

Plaintiffs and Appellants,

v.

**HALES & WARNER  
CONSTRUCTION, INC., and  
CORPORATION OF THE  
PRESIDING BISHOP OF THE  
CHURCH OF JESUS  
CHRIST OF LATTER DAY SAINTS  
(the CPB),**

Defendants and Appellees.

Appellate Court No. 20030901-CA

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**BRIEF OF APPELLEE HALES & WARNER CONSTRUCTION, INC.**

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**APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH,  
HONORABLE CLAUDIA LAYCOCK**

---

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**Appellee Hales & Warner Construction, Inc. requests oral argument.**

### **PARTIES TO THE PROCEEDING**

- a. Plaintiffs/Appellants: Kelly Smith and Lisa Nielsen, individually and as heirs of Jason Kelly Smith, deceased.
- b. Defendant/Third Party Plaintiff/Appellee: Hales & Warner Construction, Inc.
- c. Defendant/Appellee: Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints.
- d. Third Party Defendant: Brent Reynolds Construction, Inc.



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## **I. STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction pursuant to Section 78-2a-3(2)(j) of the Utah Code Annotated. (Utah Supreme Court previously had jurisdiction pursuant to Section 78-2-2(3)(j) of the Utah Code Annotated.)

## **II. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Appellant/Plaintiffs Smiths list three issues in their “Statement of Issues.” Only the first issue listed by Smiths related to summary judgment in favor of Hales & Warner.

Smiths remaining two issues relate to summary judgment in favor of CPB.

Hales & Warner addresses and disputes Smiths first issue in, among other points, Hales & Warner’s points 1 (including its subpoints), 2, 3, 4, and 5 below. Further, Hales & Warner addresses and disputes Smiths second listed issue in, among other points, Hales & Warner’s point 1 and its subpoints, including subpoint 1(A), 1(B), 1(B)(i) and 1(C) below. Hales & Warner addresses and disputes Smiths third listed issue in, among other points, Hales & Warner’s point 6 below.

1. Hales & Warner’s first point (or issue) is that Smiths can not meet their burden of establishing the “retained control” exception to the general rule of non-liability, (i.e. that Hales & Warner owed a duty to Jason Smith based upon Hales & Warner’s exertion of affirmative control over the injury causing aspect of Jason Smith’s work); part of this point/issue is that the CPB/Hales & Warner contract does not create a duty (as alleged by Smiths). (Hales & Warner also points out relating thereto that even under Smiths’ erroneously asserted “retained control” standard, no duty is created). This was addressed

at the trial court level. (See e.g. R. 922-1020, R. 1059.)

2. Hales & Warner's second point (or issue) is that this Court should affirm the trial court based upon Smiths' stipulation that if the standard in Thompson v. Jess, 1999 UT 22, (which case is attached hereto as "Attachment"9"), requires that Hales & Warner exerts affirmative control over the "injury causing aspect of the work," then Smiths "lose." Smiths made this stipulation to the trial court, and the trial court included this stipulation in the Summary Judgment Order. (R. 1059, p. 45, ll. 12-25, p. 46, ll. 1-6, R. 1036-1043.)

3. Hales & Warner's third point (or issue) is that Smiths agreed to the trial court in the first hearing on the subject motions that the "retained control" required that Hales & Warner' exert of affirmative control over "the injury causing aspect" of Jason Smith's work. When that stipulation is combined with Smiths' Stipulation referred to in point 2 above, Smiths have apparently stipulated "away" their case. This first agreement (stipulation) was also made to the trial court during oral argument. (R. 1058, p. 30, 37.)

4. Hales & Warner's fourth point (or issue) is that Smiths' can not meet their burden of establishing Hale & Warner "breached" a duty. This issue was briefed and argued to the trial court below. (See R. 991-992, and R. 1059, pp. 24-25, 72-74.)

5. Hales & Warner's fifth point (or issue) is that Smiths' can not meet their burden of establishing Hale & Warner "causation." This issue was also briefed and argued to the trial court below. (See R. 990-991, R. 1059, pp. 25-29, 72-74.)

6. Hales & Warner's sixth point (or issue) is that Hales & Warner was an independent contractor, and was not the employee of CPB.

7. Hales & Warner's seventh point briefly discusses certain problems as to the "Reply Brief of the Appellants to the Brief of Appellee CPB."

As to the standard of review, summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Thompson v. Jess, 1999 UT 22, ¶ 12. An appellate court reviews the district court's grant of summary judgment for correctness, according no deference to the district court's legal conclusions. Id.

As to stipulations, they are conclusive and binding on the party making the stipulation, (unless good cause is shown for relief); and stipulations made by an attorney may not be disregarded or set aside at will. See e.g. DLB Collection Trust v. Harris, 893 P.2d 593, 595 (Utah Ct. App 1995).

### **III. STATEMENT OF THE CASE**

#### **A. Nature of the Case**

This case is a civil action, (based upon claimed "negligence"), which action Plaintiffs/Appellants Smiths brought against Defendants/Appellees Hales & Warner and the CPB. (R. 3-12.)

#### **B. Course of Proceedings and its Disposition in the Trial Court**

Hales & Warner and the CPB each filed motions for summary judgment, which motions were granted. The trial court's "Summary Judgment Order" is attached hereto as Attachment "1." (See Summary Judgment Order, Attachment "1," pp. 3-7, R. 1036-1043.) Hales & Warner requests that this Court review at this juncture the trial court's "Summary Judgement

Order,” not only because it is the Order appealed from, but because a review of the facts and law referred to therein provides background and context for the facts discussed below.

**C. Statement of Undisputed Facts**

The following are undisputed facts.

Michael Lewis Deposition

1. Michael Lewis testified in his deposition:

Q Who did you work for in August of 1999?

A Egbert Construction.

(Michael Lewis Deposition, p. 4, ll. 23-24, Attachment “2,” R. 985.)

2. As it relates to Hales & Warner Job Superintendent Maurice Egbert, (**who has no relation to Ken Egbert Construction**), and as to other matters, Michael Lewis testified as follows:

Q (by Mr. Badaruddin) I’m just asking you, what did Maurice [Egbert of Hales & Warner], if anything, tell you to do?

.....

The Witness: Really, nothing. Honestly, I never talked to Maurice more than one or two words, more than, you know, if I needed to ask him a question or something. I never really talked to him very much.

Q (by Mr. Badaruddin) Did he ever tell you you were doing something wrong and to stop it?

A No. That would more be the other framers.

Q Who showed you how to raise a wall?

A Ken Egbert [of Egbert Construction].

Q Okay.

A He taught me the proper way, you know, how to stand when you’re holding the wall. You don’t want to stand right up to it. You’ve got to put your foot back, you know, be ready to brace it, and bail if it goes out of the way.

.....

Q Do you remember Jason Smith?



A Yes. . . .

. . .

Q And what, if anything, did he do, if you know what he did?

A He was the same as I was; he was a laborer.

Q And he worked for who?

A He worked for Ken Egbert.

Q And did you have any supervisors when you worked with Ken Egbert?

A Oh, man. We had – there was Ken, and I guess one of the other supervisors, his name was Manny. And then there was this guy named Dale. . . .

Q How, if at all, did they supervise you?

A Like I said, if I was doing something wrong, you know, if I was cutting a board wrong, they'd come tell me.

. . . .

A . . . Sometimes I would assemble the wall.

Q How did you know how to assemble a wall?

A I was taught how.

Q By?

A By Manny.

Q Okay. Did you stand up any walls?

A Oh, yeah. A lot of walls.

Q Who told you how to stand up a wall?

A Ken Egbert.

(Michael Lewis Deposition p. 8, ll. 12-25, p. 9, ll. 1-5, 8-9, 15-25, p. 10, ll. 1-4, 16-25, p. 11, ll.1-2, Attachment "2," R. 979-982, brackets and underlining added.)

3. Thereafter, when separate counsel was questioning Michael Lewis, Michael Lewis testified that Maurice Egbert of Hales & Warner never gave instructions to Michael Lewis or Jason Smith or Jose as to lifting the subject wall. (Michael Lewis Deposition, p. 24, ll. 10-19, Attachment "2," R. 983.)

4. As to the accident, Michael Lewis testified:

Q Do you remember August 13 of 1999?

A Was that the day of the accident?

Q Yes.

A Yes.

Q Tell me what happened on that day.

A Well, we had just finished eating lunch, and there was a wall that had already been built, and Manny – I think it was Manny – told me and Jason and a guy named Jose to go put it up.

Q Okay. And then what happened?

A So we went over there, and we lifted it up, and it wasn't quite onto the bolts, so Jason and Jose were holding it, and I went to go get a board, and I was going to, you know, try to use the leverage and jack it up onto the bolts. And I put it under there, the wall came down. Jose bailed out of the way, and it was like Jason, he tried to catch it, and he kind of crouched down. I don't know if he was trying to catch it or what, it just came down on him.

....

And we started yelling for help, and Maurice came out of the trailer, and the other guys, everyone else was working on the east – yeah, the east side of the church ....

(Michael Lewis Deposition, p. 12, ll. 9-25, p. 13, ll. 1-3, 9-13, Attachment “2,” R. 976-977, underlining added.)

5. Michael Lewis testified that he did not know why the wall started to fall. (Michael Lewis Deposition, p. 41, ll. 1-12, Attachment “2,” R. 975.)

6. When the wall started to fall, Michael Smith yelled “something, get out of the way, something along the lines of that,” and Jose also yelled. (Michael Lewis Deposition, p. 41, ll. 22-25, p. 42, ll. 1-5, Attachment “2,” R. 974-975.)

7. Michael Lewis went on to testify as to Jason Smith's actions: “If he would have just moved to the side rather than backwards, he would have been fine.” (Michael Lewis Deposition, p. 42, ll. 12-13, Attachment “2,” R. 974.)

#### Maurice Egbert Deposition

8. Maurice Egbert of Hales & Warner, **(and, again, no relation to Egbert**

**Construction**), testified in his deposition as follows:

Q Where were you located when the wall fell on Mr. Smith?

A I was in the job trailer.

(Maurice Egbert Deposition, p. 102, ll. 6-8, Attachment "3," R. 972.)

9. Maurice Egbert testified:

Q Did you ever tell Jason Smith how to place that wall on the bolts . . . ?

A No, I did not.

Q Did you ever instruct or tell any Egbert employee how to raise that wall or place that wall on the bolts?

A No, I did not.

....

Q Did you ever prohibit any Egbert employee or any Reynolds Construction employee from using the method they chose in placing a wall onto bolts for that construction site?

A No, I did not.

(Maurice Egbert Deposition, p. 183, ll. 5-12, p. 184, ll. 7-11, Attachment "3," R. 970-971.)

10. Maurice testifies as follows as to whether he saw the methodology that was used in raising the wall involved in the accident: "I did not see the methodology."

(Maurice Egbert Deposition, p. 194, ll. 1-5, Attachment "3," R. 969.)

#### Brent Reynolds Deposition

11. During his deposition, Brent Reynolds was handed a copy of the Subcontract Agreement entered into between Hales & Warner Construction, Inc. and BRC, Inc., and testified that he signed that contract as President of BRC, Inc. (Brent Reynolds Deposition, p. 49, ll. 4-18, Attachment "4," R. 961.)

12. Brent Reynolds testified:

Q And the subcontract refers to an amount of \$156,000. This is

the subcontract between Hales & Warner and BRC; correct?

A Yes.

Q And I couldn't hear you too well over here, but did you say that your sub-subcontract between BRC and Egbert Construction was \$72,000?

A I believe that's correct.

(Brent Reynolds Deposition, p. 50, ll. 11-17, Attachment "4," R. 960.)

13. As to Brent Reynolds Construction, Inc.'s sub-subcontract with Egbert Construction, Brent Reynolds testified:

A I was busy and didn't finish up some other work that I had going and couldn't get to this one. . . . so I got Ken Egbert to do the work.

....

Q Who is Ken Egbert?

A A contractor.

....

Q Did you ask Mr. Egbert to help you out with all aspects of the work described on Exhibit 32 or just the framing? What did you ask Mr. Egbert to do?

A Just the framing on it. I told him I would still supply the material and he could do the framing on it.

Q And what is "framing"?

A Putting the frame structure together, the boards.

Q The boards?

A The structure of it.

Q And the structure – you've got to understand I don't know as much about the construction business as you do.

A Build the walls, put the roof on.

Q That's something I can understand. You wanted Mr. Egbert to build the walls?

A Yes.

Q And stand them up?

A Yes.

....

Q Okay. And what about the men who were going to do all of this work?

A His employees.

(Brent Reynolds Deposition, p. 7, ll. 21-24, p. 8, ll. 4-5, 18-25, p. 9 ll. 1-12, 18-20, Attachment

“4,” R. 957-959.)

14. Brent Reynolds testified that other than attending the pre-construction meeting, which occurred prior to any framing on the project, he did not again visit the site until after the accident, testifying:

Q Did you ever visit the Highland 4 and 20 project site?

A During the framing?

Q At any time.

A I did at the preconstruction meeting.

Q Okay.

A And one time when the roof was being done, I sent some new guys down there, and I had to take a paycheck down to them off of one of my projects.

Q So other than those two occasions, you never set foot on the property?

A I went down and cleaned some material up after everything was done.

Q Okay. So other than those three occasions, you never set foot on the property?

A No.

(Brent Reynolds Deposition, p. 58, ll. 4-23, Attachment “4,” R. 956.)

15. At another point in his deposition, Brent Reynolds testified:

Q Did you, yourself, inspect the site from time to time?

A No.

(Reynolds Deposition, p. 53, ll. 10-12, Attachment “4,” R. 955.)

16. Brent Reynolds further testified:

Q So as I understand it, you have no personal knowledge of Hales & Warner ever instructing a framing subcontractor or a framing subcontractor’s employees as to the method in which they should raise a wall from the ground to an upright position; is

that correct?

A That's correct.

Q And you have no personal knowledge whether or not Hales & Warner ever gave any instructions as to any framing subcontractor or its employee as to how to hold a wall that has not yet been tied into place after it's been raised; is that correct?

A Correct.

Q And you have no personal knowledge as to whether Hales & Warner ever gave any framing subcontractor instructions as to how to put a wall onto the bolts after it's been raised; is that correct?

A That's correct.

(Brent Reynolds Deposition, p. 47, ll. 8-24, Attachment "4," R. 952.)

#### Joel Warner Deposition

17. Joel Warner of Hales & Warner testified in his deposition:

Q Did you ever give any instructions to the men that were raising that wall as to how to raise that wall?

A No, I did not.

Q Did you ever give any instructions to anyone from Brent Reynolds Construction or Egbert Construction as to how to raise that wall?

A No.

Q Did you ever give any instructions at any time to anyone at Brent Reynolds Construction or Egbert Construction as to how to raise any wall?

A No.

Q Did you ever tell anyone else from Hales & Warner, including Maurice Egbert, to give instructions to Egbert Construction or its employees or Brent Reynolds Construction or its employees as to how to raise a particular wall?

A No.

(Joel Warner Deposition, p. 99, ll. 14-25, p. 100, ll. 1-6, Attachment "5," R. 938A-939.)

#### Clifford Hales Deposition

18. Clifford Hales of Hales & Warner testified that Hales & Warner Construction, Inc.

entered the Subcontract with BRC, Inc., (Brent Reynolds Construction Incorporated).  
(Clifford Hales Deposition p. 38, ll. 2-9, Attachment "6," R. 932.)

19. Clifford Hales testified as to Egbert Construction, Inc.: "We didn't have a contract with Egbert [Construction]." (Clifford Hales Deposition, p. 40, ll. 7-8, Attachment "6," R. 930, brackets added.)

20. Clifford Hales testified in his deposition:

Q Did you ever instruct Maurice Egbert or any other Hales & Warner employee to take over from Brent Reynolds or Maurice Egbert the framing of the subject wall or the placement of the subject wall onto the bolts?

A No.

Q You weren't at the scene of the accident on the day of the accident?

A No.

Q You personally didn't ever instruct any Egbert employee to place the subject wall on the bolts in a certain method or by way of a certain operative detail, did you?

A No.

(Clifford Hales Deposition, p. 66, ll. 21-24, 67, ll. 1-9, Attachment "6," R. 922, 929.)

**D. Response to Plaintiffs/Appellants Smiths Statement of "Facts"**

There are a number of problems associated with Smiths' Statement of the "Fact" section in Plaintiffs/Appellants Smith brief, many of which problems will be discussed in a number of sub-subsections below.

- (1) **Appellants Smiths inappropriately attach to their brief many pages of various deposition transcripts that are not a part of the "Record on Appeal;" and this Court should grant this Appellee Hales & Warner's Motion to strike such (and any new issue or arguments raised thereto) and/or otherwise disregard such.**

Rule 24 of the Utah Rules of Appellant Procedure states as to the brief of an appellant:

“All statements of fact and references to the preceding below shall be supported by citations to the record in accordance with paragraph (e) of this rule.” See Utah R. App. P. 24(a)(7) (underlining added). Rule 24(e) states: “References shall be made to the pages of the original record . . . .” See Utah R. App. P. 24(e).

In addition, the Utah Supreme Court has stated: “This court need not, and will not, consider any facts not properly cited to, or supported by, the record.” See Uckerman v. Lincoln National Life Insurance Company, 588 P.2d 142, 144 (Utah 1978). The Utah Supreme Court has also pointed out that appellate courts will not consider matters raised for the first time on appeal. See Coleman v. Stevens, 200 Ut. 98, ¶ 9.

The Utah Rules of Appellant Procedure also require that an appellant cite to the record where an issue is preserved in the trial court. See Utah R. App. P. 24(a)(5)(a).

**Appellants/Plaintiffs Smiths have attached to Smiths’ Brief many deposition pages from various depositions which are not part of the “Record” on appeal.** In Smiths’ “Statement of the Facts” section, Smiths cite to this deposition testimony which is not part of the “Record.” Hales & Warner objects to such, and requests that this Court strike such deposition testimony and other references thereto, and any newly alleged issues and arguments based thereon. Hales & Warner has filed along with this Brief a Motion to Strike Smiths’ new deposition testimony and any new issues and arguments, which motion should be granted.

However, even if this court were to consider this new deposition testimony (other than hearsay), summary judgment in Hales & Warner’s favor is still clearly indicated, as more fully



discussed below.

As to what is, and what is not, part of the “Record,” in Hales & Warner’s initial reply memorandum, it attached 5 pages of deposition testimony (that are a part of the “Record”) from Plaintiffs Kelly Smith and Lisa Nielson depositions. (See R. 677-679, 681-682.) After the additional depositions were taken, approximately 57 pages of deposition testimony from various deponents,”(as outlined above in Hales & Warner’s Statement of Undisputed Facts), were submitted with Hales & Warner’s “Supplemental Reply Memorandum in Support of Hales & Warner Construction, Inc.’s Motion for Summary Judgment Against Plaintiffs”( and are contained in the “Record on Appeal.”) (See R. 922-1020.) CPB submitted with its supplemental reply memorandum approximately 28 additional pages from the deposition of Dean Schick, (in addition to the deposition pages of Dean Schick previously submitted by Hales & Warner), as well as four pages from a deposition of Paul Evans. (See R. 891-912.)

As indicated by a review of the “Record on Appeal,” Plaintiffs/Appellants Smiths did not attach any pages of any deposition transcripts to Smiths supplemental memorandum (or any other memorandum of Smiths) filed with the trial court as to the motions for summary judgment. In Smiths’ supplemental memorandum, Smiths do refer to certain deposition pages attached to the reply memoranda of Hales & Warner and CPB. In addition thereto, in their supplemental memoranda to the trial court, Smiths cited to a small number of additional pages of depositions, but fail to attach those additional pages to Smiths supplemental memorandum or make them part of the “Record..”

In Smiths “Brief of Appellant,” Smiths attach to their brief for the first time

approximately 13 pages of deposition testimony to which Smiths had referred, but did not submit, in their supplemental memorandum to the trial court. **However, far more egregiously, Smiths didn't stop there, but Smiths have also attached to their Brief for the first time, (in addition to the 13 pages mentioned immediately above), an additional 96 pages of deposition testimony from various (7) deponents, **which pages of deposition testimony: were not submitted to the trial court: are not part of the "Record" on appeal: and were never even cited to by Smiths at the trial level. Thus, the total number of additional pages of deposition testimony Smiths has attached to Smiths Brief, which pages are not part of the "Record" on appeal, is approximately 109 pages.****

In particular, according to Hales & Warner's review of the "Record" on appeal and Smiths' Brief, Smiths have inappropriately attached to their Brief the following deposition pages from the following depositions, **which deposition pages are not a part of the "Record" on appeal, and which deposition pages were not even cited to by Smiths in their memoranda filed with the trial court:** pages 6, 7, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, and 54 from Michael Lewis' deposition transcript; pages 65, 66, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 103, 104, and 105 from Maurice Egbert's deposition transcript; pages 6, 11, 12, 13, 18, 19, 21, 22, 23, 24, 31, 32, and 48 of Brent Reynolds' deposition transcript; pages 20, 21, 30, 31, 33, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 51, 52, 53, 78, 80, 81, 82, 83, 84, and 85 of Joel Warner's deposition transcript; page 29 of Clifford Hales' deposition transcript; pages 6, 7, and 9 of Dean Schick's deposition transcript; and pages 21, 22, 24, 33, 34, 35, 41, 42, 43, 46, 47, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, and 80 of Paul Evans' deposition

transcript. (See Smiths “Brief of Appellants” and attachments thereto, including in particular Exhibits 1, 4, 6, 7, 8, 18, and 19.)

As to the other approximately 13 deposition pages Smiths have inappropriately attached to their Brief, which deposition pages are also not a part of the “Record” on appeal, they are the following: pages 10 and 33 of Brent Reynolds’ deposition transcript; pages 32, 45, and 79 of Joel Warner’s deposition transcript; page 28 of Clifford Hales’ deposition transcript; page 8 of Dean Schick’s deposition transcript; and pages 23, 24, 36, 44, 45, and 48 of Paul Evans’ deposition transcript. (See Smiths “Brief of Appellants” and attachments thereto, including in particular Exhibits 1, 4, 6, 8, and 18.)

Again, this Court should strike the above referred to deposition pages, (and any new issues and arguments Smiths now attempt to raise in their Brief); and Hale & Warner hereby request that such be stricken..

- (2) **Appellants Smiths inappropriately refer to and rely on inadmissible hearsay, which the trial court also found to be inadmissible hearsay; and this court should strike or otherwise disregard such inadmissible hearsay.**

As more fully discussed below, Plaintiffs’ rely on inadmissible hearsay in support of their position as to the acts of Hales & Warner. Hales & Warner objected to such hearsay to the trial court, requesting that it be stricken. (See e.g. R. 997-1011). For example, Hales & Warner expressly indicated to the trial court: “Brent Reynolds hearsay deposition testimony and statements in his letter based upon hearsay should be stricken or otherwise disregarded.” (See Supplemental Reply Memorandum in Support of Hales & Warner Construction’s Motion for Summary Judgment, p. 18, R. 1003.)

The trial court discussed such hearsay statements during oral argument and found that as to Brent Reynolds' deposition testimony and statements made in letters written by Brent Reynolds concerning Hales & Warner's actions before the accident, that Brent Reynolds was relying on hearsay statements he had heard, and that he was not testifying concerning things of which he had actual knowledge. (See Oral Argument Hearing on Motions, R. 1059, pp. 58-59, attached hereto as Attachment "7.") The trial court points out that "in the end" Brent Reynolds' deposition "turned into pretty minor stuff." (R. 1059, p. 59, ll. 19-20.)

Smiths "Facts" that refer to or are based upon inadmissible hearsay should be stricken and/or otherwise disregarded, including Smiths' unnumbered paragraph (in part) three, and Smiths' paragraphs "a" through "g" in Plaintiffs' "Statement of the Facts." (See Brief of Appellants, pp. 9-12.)

- (3) **Appellants Smiths agreed and stipulated to the trial court that there were no dispute of facts, and that the instances to which Smiths referred as to Hales & Warner's acts were only two minor instances, and Smiths can not now attempt to assert otherwise.**

During the second hearing before the trial court, towards the end of Smiths' counsel's argument, Smiths' counsel agreed to the trial court that Smiths' position as to Hales & Warner's actions (that Smiths' claimed would allegedly establish a duty in Hales & Warner) only related to "[1] the height of the one wall, the one inch difference, and then [2] there was the, how they were going to build the wall that was supposed to be raked to meet the trusses." (R. 1059, p. 58 ll. 23-25, p. 59 ll. 1-6.)

Based upon this agreement by Smiths' counsel with the trial court, this Court should also strike or otherwise disregard Plaintiffs' assertions that Hales & Warner's prior acts were

anything than these two minor instances.

The point here is that Smiths cannot agree and stipulate to the trial court in oral argument that Hales & Warner's prior actions only involved these two minor incidents, and then later on appeal change their (Smiths') position.

Further, this Court should note that this is a stipulation by Smiths' counsel as to the facts, which stipulation the trial court refer to in its ruling (R. 1059, p. 75, Attachment "7"), and also expressly referred to in its "Order on Summary Judgment." As Utah law indicates, stipulations are conclusive and binding upon the party making the stipulation; and stipulations made by an attorney may not be disregarded or set aside at will. See e.g. DLB Collection Trust v. Hales, 893 P.2d 593, 595 (Utah Court App. 1995).

**(4) Further Response to Smiths "Statement of the Facts" in Smiths' Brief.**

In addition to the above, Hales & Warner will also point out that in Smiths' Briefs' "Statement of the Facts" section, Smiths make astoundingly many other inaccurate and misleading assertions and/or statements that are not supported by the record and/or deposition testimony to which Smiths cite; Smiths also cite to deposition pages that are not a part of the record, and which this Court should strike.

Because of space constrains, and because of the many inaccuracies in Smiths' Facts, Hales & Warner requests that this Court review the actual "Record," rather than rely on Smiths' inaccurate and misleading assertions pertaining thereto. When the actual "Record" is review, it does not support Smiths' position, but supports the trial court's order.

Hales & Warner will also point out that, (other than the new "facts" not previously cited

to by Smiths), most of Smiths “facts” are essentially the same facts (many verbatim) that Smiths set forth in Smiths’ supplemental memorandum to the trial court. Hales & Warner refers his Court to, and incorporates herein, Hales & Warner’s response to Smiths’ “Facts” in Hales & Warner’s “Supplemental Reply Memorandum in support of Hales and Warner Construction’s Motion for Summary Judgment ” (R. 997-1011.), as well as the “Reply Memorandum of Points and Authorities in Support of Appellee Hales & Warner’s Motion For Summary Disposition” (pp. 2-16) filed in this Court, (both of which responses are incorporated herein).

However, before concluding this section, Hales & Warner would like to discuss a number of examples of Smiths’ inaccurate and misleading assertions in Smiths’ “Statement of the Facts.” For example, Smiths’ counsel misrepresents Brent Reynolds’ testimony in Smiths’ paragraph “g;” Smiths assert:

g. Brent Reynolds could not recall whether there was a single aspect of the framing process with which defendant Appellee H & W did **not** interfere. See BRC Depo at 28, attached as exhibit 4, (emphasis supplied).

(See Smiths’ Brief, p. 6, bolding in original Smiths’ Brief.) Smiths use this false “fact” to further argue in Smiths Brief that Hales & Warner interfered with Egbert Constructions’ work. This is a misrepresentation of what was said. It is one thing to say that a person does not know one way or the another the extent to which someone had interfered with the work of another; it is another thing to try to mis-characterize that testimony to try to suggest that Hales & Warner interfered with all aspects of Egbert Constructions’ work. Mr. Reynolds’ deposition testimony actually states that he only had personal knowledge

of one thing that occurred (after the accident); and he states “I don’t know” (one way or another) as to other instances (other than the two other hearsay instances he mentioned).

As another example, the actual deposition testimony of Reynolds shows the hearsay nature of Brent Reynolds letter and deposition testimony, as well as the inaccuracy of Smith’s “statements” thereto; see Brent Reynolds’ testimony on pages 25-30, and 44-47, (R. 941-950), as compared to Smiths’ unnumbered paragraph (in part) three, and Smiths’ paragraphs “a” through “g” in Plaintiffs’ “Statement of the Facts” (See Brief of Appellants, pp. 9-12.). Again, Brent Reynolds’ deposition testimony only refers to three separate instances as to Hales & Warner alleged action: two of these instances occurred prior to the accident and of which Brent Reynolds admitted he had no personal knowledge; and one instance which occurred after the accident and of which Brent Reynolds had only partial personal knowledge.

As yet another example, in Smiths’ paragraph “q,” Smiths cite to deposition testimony which is not part of the “record” on appeal, and also which was not referred to by Smiths in their memoranda filed with the trial court. Accordingly, Smiths’ paragraph “q” should be stricken, as well as the deposition pages cited to. Further, as to the second sentence in this paragraph, such is inaccurate and misleading as to the deposition testimony cited in support of such. Moreover, the deposition testimony refers to the conduct of Egbert Construction, Inc.; and nothing in the deposition testimony cited to imposes a duty upon Hales & Warner as to the injuries suffered by Jason Smith, even if such was considered.

Smiths' second sentence in paragraph "q" is without citation, without basis or foundation, and was not briefed, let alone fully briefed in the trial court. The next sentence in paragraph "q" is also inaccurate, and contrary to the deposition testimony cited. The last sentence of Plaintiffs' paragraph "q" is also inaccurate and misleading.

These are just some of the many and pervasive inaccuracies contained in Smiths' "Statement of the Facts." The following (and nearly all) paragraphs in Smiths' "Statement of the Facts" are inaccurate and/or unreliable and/or hearsay and/or not part of the "Record:" unnumbered paragraphs 1, 2, 3, and 5; and designated paragraphs a, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p, q, r, s, and t.

**E. Response to Defendant CPB's Statement of Facts**

Appellee Hales & Warner has received and reviewed the Brief of Appellee/Defendant CPB. In CPB's Brief, it contains a "Statement of the Case" which refers to various provisions to the contract between CPB and Hales & Warner. We will point out that there is no contract between Hales & Warner and Egbert Construction. As to the contract between CPB and Hales & Warner, those contract provisions are irrelevant as to whether Hales & Warner (the general contractor) owed a duty to the employee (Plaintiff Jason Smith) of a sub-subcontractor (Egbert Construction, Inc.) under the circumstances of this case.

However, Hales & Warner will note that the contract between CPB and Hales & Warner expressly contemplated the use of subcontractors to perform work thereunder.

For example, as to the CPB/Hales & Warner contract, the first section of the



General Conditions (after the Definitions section) is entitled “Execution, Correlation and Intent,” and states that the Contract Documents are

... not intended to control the contractor in dividing the work among the subcontractors or to establish the extent of the work performed by any trade.

(See “General Conditions,” p. 2, R. 267.) The General Conditions of the CPB/Hales & Warner contract also state:

The Contractor shall enter into contracts and Subcontractors to perform portions of the Work that the Contractor does not customarily perform with its own employees.

(See “General Conditions,” p. 2, R. 267.) Further, as to the CPB/Hales & Warner contract and the contemplation of the use of subcontractors, there is an entire section, Section 5, relating to subcontractors. (See “General Conditions,” pp. 5-6, R. 263-264.) In addition, in the “General Provisions,” it defines a “subcontractor,” stating:

... a subcontractor is any entity supplying labor, materials or equipment for the work under separate contract with the contractor or with any other subcontractor.

(See “General Conditions,” p. 1, R. 268.)

#### **IV. SUMMARY OF ARGUMENTS**

Point I of Hales & Warner’s argument section points out that Hales & Warner did not owe Jason Smith a duty under the “retained control” exception to the general rule of non-liability. Thompson v. Jess, 1999 UT 22 expressly states that the “retained control” exception requires that the general contractor (Hales & Warner) exert affirmative control over the “the injury-causing aspect” of Jason Smith’s work. Hales & Warner did not exert

affirmative control over the “injury-causing aspect” of Jason Smith’s work.

In Point II, Hales & Warner points out that the court should affirm based upon the Plaintiffs’ stipulation that if the standard in Thompson v. Jess, requires Hales & Warner to exert affirmative control over the “injury-causing aspect of the work,” then Smiths “lose.” The Thompson v. Jess decision clearly indicates that one must affirmatively exert control over the injury-causing aspect of the work for there to be duty.

In Point III, Hales & Warner points out that in the initial oral argument hearing before the trial court, Smiths’ counsel stipulated that the applicable standard required the affirmative exertion of control over “the injury-causing” aspect of the work. (It was not until after Smith’s counsel had conducted additional discovery and saw that he could not meet that standard, that Smiths’ counsel changed his position at a second hearing, and argued that a broader standard applied.) However, when one combines the stipulation made on the record to the trial court in the first hearing, with the stipulation referred to above in Point II made to the trial court on the record in the second hearing, it appears that the Smiths have stipulated “away” their case.

In Point IV, Hales & Warner points out that Smiths cannot meet their burden of establishing that Hales & Warner “breached” any duty claimed to have been owed Jason Smith.

In Point V, Hales & Warner points out that Smiths cannot meet their burden of showing the element of “causation,” (i.e. that Hales & Warner breached a duty that caused Jason Smith’s injury.)

In Point VI, although Smiths only assert liability against CPB relating thereto, Hales & Warner points out that Hales & Warner is not an employee of CPB; rather, Hales & Warner is an independent contractor.

In Point VII, Hales & Warner points out that it has received a copy of Smiths' "Reply Brief of the Appellants to the Brief of Appellee CPB," and Hales & Warner points out a number of problems pertaining thereto, including the inappropriate raising of new issues by Smiths in their reply brief.

In conclusion, Hales & Warner requests that the court affirm the trial court's summary judgment order, and/or otherwise grant judgment in favor of Hales & Warner. Hales & Warner also requests an order striking the contents of various documents and new issues/arguments inappropriately asserted by Smiths.

## **V. ARGUMENT**

### **1. Hales & Warner Owed No Duty to Jason Smith**

The discussion in this point, (and in points 2, 3, 4, and 5 below), relate to Smiths' first "issue" presented for review.

Smiths have the burden of establishing that Hales & Warner owed Jason Smith a "duty" of care under the circumstances of this case. Weber v. Springville City, 725 P.2d 1360, 1363-1368 (Utah 1986). Further, Smiths' have the burden of establishing the "retained control" exception to the general rule of non-liability of general contractors. See e.g. Thompson v. Jess, 1999 UT. 22, ¶¶ 13-26.) Plaintiffs have failed to meet their burden of establishing that Hales & Warner owed Plaintiff Jason Smith a duty.

Note, as the Utah Supreme Court points out in Thompson v. Jess:

We note that the term ‘retained control’ doctrine is somewhat of a misnomer. Under the standards announced herein, a duty of care is imposed if the [general contractor] asserts affirmative control over or actually participates actively in the manner of performance of the [sub]contracted work. ‘Retained,’ to the extent the word implies placidity or non-action, is inapt.”

See id. at ¶¶ 13-22, n.3 (brackets added)..

A. **The Standard Set Forth in Thompson v. Jess as to the “Retained Control” Exception Requires That Hales & Warner Affirmatively Took Control Over the “Injury-Causing Aspect” of Jason Smith’s Work.**

In Appellant/Plaintiff Smith’s Brief, Smiths agree, (as they agreed in the trial court below), that Thompson v. Jess, 1999 Utah 22, sets the standard as to the “retained control” exception to the general rule of non-liability, and as to whether Hales & Warner owed Jason Smith a duty. (See Brief of Appellants, p. 19.) However, Smiths go on in their Brief to misstate the narrow standard pertaining to the “retained control” exception outlined in Thompson.

Smiths take a position that if Hales & Warner affirmatively took control over any aspect of the framing work, even though it was unrelated to the injury-causing aspect of Jason Smith’s work, then Hales & Warner owed Jason Smith a duty as to the Jason Smith’s injury.

However, contrary to Smiths’ position, the Utah Supreme Court in Thompson expressly states, (multiple times and in various ways), that the “retained control” exception requires the exertion of affirmative control over the method or operative detail of the “injury-causing aspect of the work.” Thompson, 1999 UT 22, at ¶¶ 15-26.

Because Thompson is directly on point and dispositive, Thompson will be reviewed in some detail. In Thompson, Connie Jess was the owner of four motels; and Jess purchased a

used steel pipe from AmeriKan Sanitation, which pipe “would fit vertically over an existing pipe stud” “for use as a sign post.” Id. at ¶3. When the pipe was delivered by Dennis Jensen and Trevor Thompson, (employees of AmeriKan Sanitation), Jess asked Jensen if he would install the pipe. Mr. Jensen agreed to do so, even though he was not equipped to erect it in the best manner. The Thompson Court points out:

... Jensen, who had hoisted similar pipes more than a hundred times before, determined on his own the manner and method of lifting and installing the pipe. ...

Id. at ¶4 (emphasis added). Thompson was injured during the installation of the pipe, and filed suit against Jess. Jess moved for summary judgment, arguing that:

... she did not direct or otherwise control the manner or method of installing the pipe, and therefore owed no duty of care to Thompson or Jensen to insure they raised the pipe safely . . . .

Id. at ¶7 (emphasis added). In Thompson, the Court went on to point out:

... Thompson argues that by requesting that he and Jensen erect the pipe when they were not obligated to do so, and by directing them to install the pipe over the existing pipe stub, Jess asserted control over the work and thereby assumed a duty of care to him to him under the “retained control” doctrine . . .

Id. at ¶8. (The Thompson Court found that these requests and direction did not impose a duty.)

The “Analysis” section of the Thompson decision begins by setting forth the general rule, stating:

Utah adheres to the general common law rule that “the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.” Restatement § 409; see Gleason v. Salt Lake City, 94 Utah 1, 16, 74 P.2d 1225, 1232 (1937) (noting applicability of said general rule and certain exceptions to it). This general rule recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor’s work is performed owes no

duty of care concerning the safety of the manner or method of performance implemented. See W. Prosser & W. Keaton, The Law of Torts 409 (5<sup>th</sup> ed. 1984). The most commonly accepted reason for this rule is that, where the principal employer does not control the means of accomplishing the contracted work, the contractor “is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it.” Id.

Id. at ¶ 13.

As the Utah Supreme Court indicates in Thompson, this rule of nonliability also applies to situations where a general contractor hires a subcontractor. (See e.g. id. at ¶¶ 23-25.) Thus, Thompson sets the standard to be applied as to whether a general contractor (here Hales & Warner) owes a duty to an employee of a sub-subcontractor (here Jason Smith).

The Thompson Court goes on to indicate that there are “certain exceptions to the general rule of nonliability,” including the “retained control” doctrine. Id. at ¶ 13. The Court points out in Thompson that the “retained control” exception is a “narrow theory of liability” applicable in the unique circumstance where an employer (or general contractor) of an independent contractor (or subcontractor) exercises enough control “to give rise to a limited duty of care.” Id. at ¶ 15.

As to the “retained control” exception, the Thompson Court went on to adopt the standard that a principal retaining an independent contractor has no duty to the employees of the contractor, unless the principal has “actively participated,” but the Thompson Court states that “elaboration on the contours of the standard is needed, however.” Id. at ¶ 18 (emphasis added.).

In setting forth the contours of this standard, the Thompson Court expressly indicates on multiple occasions that the exertion of control must be over the injury-causing aspect of the work; and in this review below of the Thompson Court's elaboration of this standard, we underline some of these phrases indicating that the control has to be related to the part of the work that caused the injury.

Immediately after indicating that elaboration on the contours of the standard is needed, the Thompson Court states:

Under the "active participation" standard, a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work. See Conklin v. Cohen, 287 So. 2d 56, 60 (Fla. 1973) (holding that under "active participation" standard, principal employer must directly influence manner in which work is performed; no duty arises from "passive nonparticipation"). Such an assertion of control occurs, for example, when the principal employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished. See, e.g., Lewis v. N.J. Riebe Enterprises, Inc., 170 Ariz. 384, 825 P.2d 5, 7-8 (Ariz. 1992) (imposing liability where subcontractor's employee was injured as result of new, less safe method of work required by general contractor); Redinger v. Living, Inc., 689 S.W.2d 415, 418 (Tex. 1985) (imposing liability where subcontractor was ordered to operate backhoe dangerously close to plaintiff).

Id. at ¶ 19 (underlining added).

This Court will note that the above quoted language in Thompson includes cases addressing whether a duty was owed by a general contractor to an injured employee of the subcontractor. Id. The Thompson Court goes on to state:

... In other words, to have "actively participated" in the contracted work, a principal employer must have exercised affirmative control over the method or operative detail of that work. The degree of control necessary for

the creation of a legal duty must involve either the direct management of the means and methods of the independent contractor's activities or the provision of the specific equipment that caused the injury."

... [T]he principal employer must exert such control over the means utilized that the contractor cannot carry out the injury-causing aspect of the work in his or her own way.

Id. at ¶¶ 20, 21 (citations omitted, underlining added). This Court will note the underlined language indicating that the control has to be over the "injury-causing aspect of the work;" and such only makes sense for various obvious reasons. Among other things, causation (of injury) tied to the negligent behavior has always been a key element to negligence claims.

The Thompson Court goes on to discuss a case to illustrate "the requisite level of control over the contractor's work;" and this Court will note that this illustrative case involves a general contractor and an injured employee of a subcontractor. The Thompson Court states:

The requisite level of control over the contractor's work is well illustrated in Lewis, 825 P.2d at 7-8. There, the general contractor, Riebe, hired the subcontractor, Garges, to install a pitched roof constructed of beams and sheets of plywood nailed to the beams. After Garges had already put the plywood in place, Riebe's on-site superintendent told Garges the roof was improperly installed and ordered it redone, specifying the use of H-clips to secure the plywood. Pursuant to this instruction, Garges employees began removing the nails from each row of plywood, installing H-clips, and then renailing the plywood to the beams. Soon thereafter, however, Riebe's superintendent instructed the Garges employees to use a different, faster method of dislodging the plywood by banging it from underneath. Because this method resulted in plywood being dislodged faster than H-clips could be installed, numerous sheets of plywood were left lying loose on top of the beams. A Garges employee stepped on the loose plywood and fell through the roof, incurring serious injuries. See id.



Thus, in Lewis, the general contractor interfered with the subcontractor's method of performing the work and instructed that a quicker but less safe method be implemented. A worker was injured as a direct result of the dangerous condition created by the general contractor's method. The court concluded, on the basis of these facts, that the general contractor exercised sufficient control over the means used in performing the contracted work to subject it to retained control liability. See 825 P.2d at 14-15.

Id. at ¶¶ 22, 23, (underlining added). Again, this Court will note the language indicating that the injury was “a direct result” of the dangerous condition created by the control exerted by the general contractor. Thus, the Thompson Court's discussion of the Lewis case illustrates, and expressly states, the necessary causal link between the control exerted by the general contractor and the injury.

It is also important to note, as indicated in the Thompson Court's discussion of Lewis, that the Utah Supreme Court did not state that general contractor Riebe was liable merely because he had entered into a subcontract with a subcontractor (Garges) to do the framing work on that project. Further, in its discussion of Lewis, the Utah Supreme Court did not state that general contractor Reibe was liable merely because general contractor Reibe had an on-site superintendent.

Moreover, the Thompson Courts discussion of Lewis indicates that the general contractor was not liable due to the general contractor's on-site superintendent's first action of telling the subcontractor “Garges the roof was improperly installed and order[ing] it redone, specifying the use of H-clips to secure the plywood.” Id. at ¶ 22. The Thompson Court's discussion of Lewis indicates that the general contractor only became liable due to the second and “thereafter” action by general contractor “Reibe's

superintendent instruct[ing] the Garges employees to use a different” and “quicker but less safe method,” and the fact that the subcontractor’s “worker was injured as a direct result of the dangerous condition created by the general contractor’s method;” and it was only those additional facts, (i.e. of the general contractor’s exertion of affirmative control and direction that a less safe method be used, and injury as a direct result of that less safe method), that subjected the general contractor to liability Id. at ¶¶ 22, 23 (brackets added).

In concluding its analysis on the “retain control” exception, the Thompson Court applies the facts of that case to the standard enunciated, stating:

Applying these standards to the case at hand, we conclude that Jess did not actively participate in the manner in which Thompson and Jensen attempted to lift and install the steel pipe. After agreeing to erect the pipe, Jensen, not Jess, determined the method for bringing about the desired result. . . . Thompson’s injury was caused by the manner of performance, implemented by Jensen, over which Jess exercised no direction, control, or supervision. . . .

....

Thus, because Jess did not actively participate in or otherwise exercise affirmative control over the manner or method of performance utilized by Jensen and Thompson, she owed Thompson no duty of care under the retained control doctrine.

Id. at ¶¶ 24, 25.

Thus, as referenced above, the Thompson Court expressly and repeatedly states that the exerted control has to be over the injury causing aspect of the work in order for there to be liability. If a general contractor exerts control over another aspect of the work that did not cause injury, but did not exert control over the aspect of the work that did cause

injury, there is no liability.

For an example of the “narrowness” of the “retained control” standard and it being “confined in scope to the control asserted,” (*id.* at ¶ 15), even assuming Hales & Warner had asserted control over one aspect of the lifting of the wall involved in the accident, and also assuming that this one aspect over which Hales & Warner asserted affirmative control did not cause Jason Smith’s injury, there would be no duty under Thompson.

Turning to the facts, the undisputed facts show that Hales & Warner did not exert affirmative control over the injury-causing aspect of Jason Smith’s work, (even assuming that it was the method by which he and the other Egbert employees were placing the wall onto the bolts which caused injury).<sup>1</sup> Thus, under the standard enunciated and elaborated by the Utah Supreme Court in Thompson, Hales & Warner owed no duty to Jason Smith, and the trial court order of summary judgment should be affirmed..

**B. In Order for Hales & Warner to Owe a Duty, the Thompson “Retained Control” Standard Requires that Smiths Establish the Affirmative Exertion of the Degree of “Control” to the Extent that the Subcontractor is Prohibited from Doing the Work the Subcontractor’s Own Way.**

In the discussion above of Thompson, particular focus has been given to the language therein requiring that the affirmative exertion of control be over the “injury-causing aspect of the work.” In this subsection, we would like to focus on the language in the Thompson Court discussing the degree of affirmative “control” that must be exerted

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<sup>1</sup>Note, there is no evidence that the (Egbert Construction) method by which they (i.e. Jason Smith, Michael Lewis, and Jose Louis), were placing the wall on the foundation bolts was an unsafe method.

in order to impose a duty (on Hales & Warner). In discussing the “retained control” exception to the general rule of nonliability, the Thompson Court expressly states as to the degree of control required, that the general contractor “must exert such control over the means utilized that the [sub]contractor cannot carry out the injury-causing aspect of the work in his or her own way.” Id. at ¶ 21(emphasis added).

As indicated above, the Utah Supreme Court illustrated the requisite level of control over the subcontractor’s work which is required, in discussing the Lewis case. Id. at ¶¶ 22, 23. The Thompson Court points out that it was not enough that the general contractor, after noticing that the roof had been improperly installed, ordered it to be done. A duty only arose when, thereafter, the general contractor superintendent took control over the subcontractor employees “and instructed that a quicker but lesser method be implemented.” Id. at ¶¶ 22, 23 (emphasis added). The court refers to “the dangerous condition created by the general contractor’s method.” The Thompson Court points out that the Lewis court concluded, “on the basis of these facts, that the general contractor exercised sufficient control over the means used in performing the contracted work to subject it to retain control liability.” Id. at ¶ 23.

The Thompson Court also points out as to the control asserted, that for an imposition of a duty:

... It is not enough that he [the general contractor] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, **but it does not mean that the contractor is controlled as to his methods of work, or as to**

**operative detail.**”

Id. at ¶ 20 (underlining added).

In summary, not only must there be an affirmative exertion of control by the general contractor over the injury-causing aspect of Jason Smith’s work, that exertion of control must be to the degree that Jason Smith could not “carry out the injury-causing aspect of the work in his or her own way.” Id. at ¶ 21. Here, as Smiths admit, there is no evidence that Hales & Warner affirmatively took control over the method of the work being performed by Jason Smith at the time of the accident, (i.e. placing the wall onto the bolts), prohibited Jason Smith (or Egbert Construction) from using their own method as to the placement of that wall onto the bolt, and required Jason Smith (and Egbert Construction) to use a different, less safe, and dangerous method.

Accordingly, Plaintiffs have failed to establish that Hales & Warner owed a duty to Jason Smith. In particular, and among other things, Plaintiffs have failed to establish that (1) Hales & Warner affirmatively exerted the required degree of “control,” and (2) that the control was over “the injury-causing aspect” of the work of Jason Smith.

As a more extreme example to highlight the point being made here, Hales & Warner would owe no duty even assuming (for argument purposes) that Hales & Warner had only “recommended,” but had not “required,” that Egbert Construction instruct Jason Smith to place the subject wall onto the foundation stud bolts by using an unsafe method, and that unsafe method caused Jason Smith’s injury; (although such action by Hales & Warner did not actually occur).

Moreover, not only is Smiths' position directly contrary to the policy enunciated in Thompson (of charging the responsibility for preventing risk to the person in actual control), Plaintiffs' position is also contrary to other policies, including policies underlying the Utah comparative fault scheme, (and only being held responsible for one's own fault), and policies of fairness. Moreover, the (obvious and not so obvious) negative implications of Smiths' position are significant and far-reaching.

We will point out that as to its ruling, the trial court judge thoroughly reviewed the factual record (including the cited deposition testimony), and the law, including in particular the Thompson case. (R. 1058, p. 5, ll. 8-10, R. 1059, p. 6, ll. 19-24, p. 75.) In fact, after oral argument had concluded during the second hearing, the court took a break and re-read Thompson, before issuing its ruling. (R. 1059, p. 74, ll. 22-25, p. 75 l. 1.) The court then gave a thorough and detailed ruling covering approximately 18 pages. (R. 1059, pp. 75-92.)

Judge Laycock states in her ruling, among many other things:

I think the testimony in the depositions makes it clear that those three employees [Jason Smith, Michael Lewis and Jose Louis] were never under the direction of Maurice Egbert who was the superintendent for Hales and Warner. They were under the supervision, the instruction and the direction of Ken Egbert. That was the person that Michael Lewis said showed him how to put up a wall, how to build a wall, a, down on the, the ground level . . . before it was put up. There [sic] was Ken Egbert that gave him his education on the job . . . .

I have no facts before me that persuade me that Maurice Egbert ever interfered with, in any way, the way in which Egbert Construction did its work under the Thompson case.

....

And particularly with reference to the, the wall that was being

constructed on the date of the plaintiff's death. That wall was supervised by Ken Egbert and apparently a man named Manny. And it was after lunch that Manny instructed these three men including the plaintiff to put that wall up. Maurice Egbert was in the trailer at the time and had no involvement in that wall.

(R. 1059, pp. 77-79.)

**(i) The CPB/Hales & Warner Contract**

Smiths assert in their second issue on appeal that CPB (not Hales & Warner) owed a duty to Jason Smith due to the terms of the CPB/Hales & Warner contract. However, Hales and Warner will make a number of points relating thereto.

First, there is no contract between Hale & Warner and Egbert Construction.

Second, although such is irrelevant as to Hales & Warner because Hales & Warner did not have a contract with Egbert Construction, the Thompson Court states that contract rights to “order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations” “or to prescribe alterations and deviations” “does not mean that the [sub]contractor is controlled as to his methods of work or as to operative detail.” Id. at ¶ 20.

Moreover, even though the CPB contract is irrelevant as to Hales & Warner's relationship with Jason Smith and Egbert Construction, we will note that the trial court pointed out in her ruling, after citing the Thompson language referred to immediately above:

And so all of those things that were listed by plaintiff in the memo a, coming out of the contract I find do not change the status of Hales and Warner as an independent contractor, and they also do not become the equivalent of retaining control. . .

(R. 1059, p.84, ll. 22 - 25, p. 85, p. 86, ll. 1-7.)

The recent California Supreme Court case Hooker v. Department of Transportation, 38 P.3d 1081 (Cal. 2002) supports summary judgment in Hales & Warner's favor. Note, the California Supreme Court referred to and quoted from the Utah Supreme Court decision of Thompson. The Hooker Court states:

... Under *Kinney*, ... mere retention of the ability to control safety conditions is not enough. "[A] general contractor owes no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct. The mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff. . .

The *Kinney* court, we conclude, correctly applied the principles of our decisions in *Privette* and *Toland*. . . .

Id. at 1087-1088. In Hooker, the court went on to discuss Kenney, stating:

The question, as the *Kinney* court framed it, was "whether a general contractor who claims the power to control all safety procedures on the worksite may be liable to the injured employee of a subcontractor for failing to direct the subcontractor to take safety precautions where there is no evidence that any conduct by the general contractor contributed affirmatively to the injuries." (*Kinney*, supra, 87 Cal. App.4th at p. 30.) *Kinney* answered that question in the negative.

Id. Thus, and lastly as to this sub-subpoint, based upon the authority above, contract provisions, (regardless of their content), do not impose such a duty; only the exertion of affirmative control (over the injury causing aspect of the work) imposes a duty.

C. **Even Under Appellants/Plaintiffs Smith Erroneously Asserted Standard, There Still Would Be No Liability Because Hales & Warner Did Not Affirmatively Exert Control Over the Non-Injury Related Aspects of Jason Smith's Work.**



Although the Thompson standard requires affirmative exertion of control over the injury causing aspect of the work, Hales & Warner will point out that Hales & Warner would still prevail even under the standard erroneously asserted by Smiths. Even if, as Smiths assert, the standard only required affirmative exertion of control over a non-related and non-injury causing aspect of the means utilized in the work of Jason Smith (or Egbert Construction), there would still be no liability imposed upon Hales & Warner herein.

Even under the erroneous standard asserted by Smiths, the general contractor must still exert such control over the “non-injury” methods utilized that the subcontractor cannot carry out that part of the work in the subcontractors own way. In addition, the Thomspson Court states that it is not enough that the general contractor has general rights to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations, or to prescribe alterations and deviations; and the Utah Supreme Court further states that such rights “does not mean that the [sub]contractor is controlled as to his methods of work, or as to operative detail.” Id. at ¶ 20.

In this case at bar, Smiths cannot meet their own erroneous standard. The two referenced instances as to Hales & Warner actions do not rise to the required level of control, (let alone cause injury). For example, as to the first instance, instructing Egbert Construction to “comply with the plans” as to the height of a wall is not even exerting control over the method utilized, let alone exerting sufficient control. As to the second instance, merely recommending that studs above the top plate not be cut until a later time

is not taking control, let alone affirmatively exerting the required and sufficient control (outlined in Thompson) to impose liability.

We will here also address a number of Smiths' other meritless arguments. In Smiths' Brief, Smiths discuss a number of cases from other courts as though they are controlling over the Utah Supreme Court's own "elaboration on the contours of the standard" in Thompson. Smiths refer to and discuss at some length Simon v. Deery Oil, 699 F. Supp.257 (D. Utah 1988), Sewell v. Phillips Petroleum Co., 606 F.2d 274 (10<sup>th</sup> Cir. 1979), Texaco, Inc v. Pruitt, 396 F.2d 237 (10<sup>th</sup> Cir. 1968), and Erwin v. Kern River Gas Transmission Co., 1997 WL 804238. While the Thompson Court initially cites to these cases and refers to the standard relied upon by these cases, the Thompson Court immediately thereafter states that: "Elaboration of the contours of the standard is needed, however." Id. at ¶ 18 (emphasis added). The Thompson Court then goes on to elaborate the contours of the standard in its paragraphs 19 through 24, which paragraphs Hales & Warner has discussed above in detail and at length.

The Thompson Court's elaboration includes the court expressly stating that the general contractor "must exert such control over the mean utilized that the [sub]contractor cannot carry out the injury causing aspect of the work in his or her own way." Id. at ¶ 21 (brackets added).

The standard elaborated in Thompson is the controlling standard, not any standard or interpretation set forth in Simon, Sewell, Texaco, or Erwin, particularly if the standards in those other cases are in any way different than the standard elaborated in Thompson; and

Smiths' assertions otherwise are meritless and inaccurate.

Moreover, while page limitation does not allow for a more detailed discussion of such, certain assertions made by Smiths' counsel as to those other cases are not completely accurate. For example, contrary to Smiths' counsel's assertions otherwise, Erwin expressly states that the injury must be caused by the act of performance (or exertion) over which the general contractor exercised control. See Erwin, 1977 Tex. App. Lexis 6685, at \*9, \*21. In any event, nothing in those cases, (even if Thompson did not set forth the standard), preclude summary judgment in Hales & Warner's favor.

In Smiths' Brief, Smiths' inaccurately assert that the Thompson Court's "elaboration on the contours of the standard" ends after paragraph 19 of the Thompson decision. A simple reading of the Thompson case indicates that this assertion by Smiths is false; and the Court's elaboration goes on to paragraph 24. In fact, Smiths' counsel took the same position with the trial court; and during oral argument the trial court was critical of Smiths' assertion, and disagreed with such. (See R. 1059, p. 55.) In the trial court's ruling, the Court also referred to the fallacy of Plaintiffs' argument. (See R. 1059, p. 89, ll. 9-25, p. 90, ll. 1-2.)

Moreover, as to Smiths' discussion of other "authorities," to the extent that they are in any way consistent with the actual standard set forth by the Utah Supreme Court in Thompson, they are inapplicable.

2. **This Court Should Affirm the Trial Court Based Upon Plaintiffs' Stipulation That If the Standard in Thompson v. Jess Requires That Hales & Warner Exerts Affirmative Control Over the "Injury Causing Aspect of the Work," Then Smiths "Lose."**

During the second oral argument hearing, Smiths' counsel represented to the court that if the retained control standard in Thompson requires exertion of control over the "injury causing aspect of the work," "then we [Smiths] lose" on the Appellees' motions for summary judgment. (R. 1059, p. 45, ll. 12-25, p. 46, ll. 1-6, attached hereto as Attachment "7," brackets added.) The trial court referenced Smiths' counsel's representation in the trial court's Summary Judgment Order; the Summary Judgment Order states:

The Court notes that Plaintiffs' [Smiths'] counsel stipulated on the record in oral argument that if the standard for the "retained control" exception (to the general rule) set forth in Thompson relates to the "injury-causing aspect of the work," that Plaintiffs cannot meet the "retained control" exception, and that Defendants Hales & Warner's and the CPB's motions for summary judgment should be granted.

(R. 1038, Attachment "1," brackets added.)

As discussed above, the Thompson Court expressly states as to the "retained control" exception, that the affirmative exertion of control has to be over "the injury causing aspect of the work." Thompson, 1999 UT 22, at ¶¶ 20, 21. Thus, based upon Smiths' counsel's stipulation, and a reading of the Thompson case, this court should affirm the trial court's ruling.

Note, this stipulation is a stipulation by Smiths' counsel as to facts. As this court has stated, stipulations are conclusive and binding on the party making the stipulation, (unless good cause is shown for relief); and stipulations made by an attorney may not be disregarded or set aside at will. See e.g. DLB Collection Trust v. Harris, 893 P.2d 593, 595 (Utah Ct. App 1995).

A party, through their attorney, is not allowed to make such a stipulation to the trial

court, particularly where the trial court may have relied, at least in part, on that stipulation in making its decision, and then on appeal take a different position.

While we have addressed the facts above that show Hales & Warner did not exert control over the injury-causing aspect of the work, the point here is that this court need not even review the facts based upon Plaintiffs' stipulation to the trial court. The only thing this court needs to review is the Thompson case; and if this court agrees with Hales & Warner that the Thompson case requires affirmative exertion of control over "the injury-causing aspect" of the work, this court should affirm the trial court's order on that basis alone.

3. **Appellant/Plaintiffs Smiths Stipulated in the First Hearing that for there to be a duty the Standard Required Affirmative Exertion of Control Over "the Injury-Causing Aspect" of the Work.**

At the initial oral argument hearing, Smiths' counsel agreed with Hale & Warner's position that the Thompson standard **does** require the exertion of control over "the injury causing aspect of the work." For example, at the initial oral argument hearing, Smiths' counsel stated:

I'll agree with Mr. Davenport that if he has one paragraph in one affidavit that goes to the narrow issue at hand he's entitled to, his client is entitled to summary judgment. . . .

. . . And I don't see how those facts will help this Court determine that not one or more of the defendants did not exercise affirmative control over the manner, method and means of the injury causing aspect of the work. . . .

(See R. 1058, Attachment "8," p.30, ll. 16-25, p. 31, ll. 1-2, underlining added.) For another example, Smiths' counsel also stated in the initial oral argument hearing:

THE JUDGE: Tell me what you think you're going to find in your discovery, or that you should find in your discovery that's going to get you past the case law.

MR. BADARUDDIN: Well, the case law doesn't say you can't sue a general, well, it doesn't say you can't recover against a general contractor or an owner.

THE JUDGE: Right.

MR. BADARUDDIN: It says if the general contractor actively participates or exercises control over the means, method, manner of accident causing injury, accident causing work, the plaintiff can recover. Those, those are the sort of facts we hope to establish. . . .

(See R. 1058, Attachment "8," p. 37, ll. 10-22, underlining added.)

Thus, Smiths' counsel agreed and represented to the trial court in the first hearing that the "retained control" standard did relate to the (exertion of control over the) "injury causing aspect of the work." At the initial hearing, Smiths were seeking additional time to conduct further discovery. After additional discovery was conducted, which discovery showed that Hale & Warner did not exert affirmative control over the injury-causing aspect of Jason Smith's work, Smiths changed their position as to what the "retained control" standard is (in Thompson).

It appears that one has to conclude that Smiths' counsel has agreed or stipulated "away" Smiths' case when one combines (1) Smiths' counsel's agreement to the court in the first hearing that the "retained control" standard relates to the (exertion of control over the) "injury-causing aspect of the work," and (2) Smiths' counsel's representation (stipulation) to the court in the second hearing that Smiths' "lose" if the retained control standard relates to the (exertion of control over the) "injury-causing aspect of the work."

On this separate basis, the trial court's judgment should be affirmed.

In Smiths' "Appellant's Memorandum in Response to Opposing Appellee's Motion for Summary Deposition" filed with this appellate court, Smiths admit that counsel can stipulate to facts. As discussed above, the second stipulation made by Smiths' counsel during the second oral argument was a stipulation as to the facts.

As to the other stipulation made by Smiths' counsel in the first oral argument, in Smiths' "Appellant's Memorandum in Response to Opposing Appellee's Motion for Summary Deposition," Smiths cite to the dissenting opinion of Associate Chief Justice Russon in Rivera v. State Farm Mutual Automobile Insurance Company, 2000 Utah 36. However, Justice Russon points out in that dissenting opinion that: "Parties can stipulate to facts, and such stipulations are generally binding on the court. Parties can sometimes even stipulate as to conclusions of law, such as liability." Id. at ¶ 27 (citation omitted, emphasis added).

Note also that Justice Russon, in his dissent, indicates that the stipulated statement involved therein related to the legal effect of the stipulation; and if such is the case, the majority in Rivera upheld the stipulation even though it related to the legal effect of the stipulated facts.

Thus, Smiths have apparently stipulated away their case.

4. **Smiths Have Failed to Meet, and Cannot Meet, Their Burden of Establishing that Hales & Warner "Breached" a Duty Owed to Jason Smith**

Smiths not only have the burden of establishing that Hales & Warner owed Jason

Smith a duty, Plaintiffs also have the burden of establishing “a breach of that duty.” See e.g. Weber v. Springville City, 725 P.2d 1360, 1363-1368 (Utah 1986) (quoting Williams v. Melby, 699 P.2d 723, 726 (Utah 1985).)

Smiths have not, and cannot, meet their burden of establishing that Hales & Warner “**breached**” a duty owed to Jason Smith. This issue was briefed and argued to the trial court below (See R. 991-992, and R. 1059, pp. 24-25, 72-74.)

We have discussed above the fact that Smiths cannot even establish that a duty was owed. However, this Court should not overlook the fact that Smiths also cannot establish the elements of “breach” (and “causation”). As the Utah Supreme Court indicates in Thompson, even where a duty is shown, “the duty in such situations is one of reasonable care under the circumstances and is confined in scope to the control asserted.” Thompson, 1999 Ut. 22, ¶ 15.

Normally, if Appellants/Plaintiffs Smiths were able to show that a duty existed, the next requirement would be for Smiths to show that it was breached. Plaintiffs have not even asserted, let alone shown, an issue as to any “breach” (of a duty). As to the “breach” element, the Thompson Court refers to the Lewis case, where the general contractor not only affirmatively took control (of the method being utilized by the subcontractor), but required that a “quicker” and “unsafe” method be implemented, which “created” a “dangerous condition.” Id. at ¶ 22.

Thus, as the Thompson Court indicates, not only must Smiths establish there was a duty, but the Smiths must establish that there was a breach of that duty after the exertion



of control where Hales & Warner required the subcontractor or its employee to implement a “less safe method,” creating a dangerous condition. Plaintiffs have not, and cannot, show such a breach.

Now, although there is no evidence that it was the manner in which the subject wall was placed on the bolts which caused Jason Smith’s injury, for the purposes of illustration here, we will assume that it was the manner in which Jason Smith placed the subject wall accident onto the bolts which caused his injury.

Under this assumption, not only would Smiths be required to show that Hales & Warner exerted control over the method utilized to place the subject wall onto the bolts, Smiths would also have to prove that Hales & Warner instructed that an unreasonable, unsafe, and dangerous method be used. In other words, even under this assumed hypothetical if Hales & Warner took control over this aspect of the work, but instructed Jason Smith and the others assisting him to use a safe method, there would be no liability.

The trial court stated as to this issue:

Well, I think the way that I’ve approached it where I found that there’s actually been no duty it leaves me having to say hypothetically if there had been a duty then I don’t have any facts to support a breach.

(See R. 1059, p. 91, ll. 11-14, Attachment “7.”)

The trial Judge goes on to state that she “will hang my hat, on the finding that there’s no duty of care on the part of these two defendants and leave it at that.” (See R. 1059, ll. 11-19.) While the trial court decided not to reach a decision on the “breach” issue under the circumstances, it is still Hales & Warner’s position that Plaintiffs have

not, and cannot, meet their burden of establishing breach, and that such is another valid basis for summary judgment in favor of Hales & Warner; and Hales & Warner requests that this Court rule in Hales & Warner's favor on this point.

**5. Smiths Have Not, and Cannot, Meet Their Burden of Showing "Causation."**

Smiths also have the burden of establishing that Hales & Warner breach of a duty owed Jason Smith "caus[ed], both actually and proximately," injury to Jason Smith. See Weber v. Springville City, 725 P.2d 1360, 13673-1368 (Utah 1986) (quoting Williams v. Melby, 699 P.2d 723, 726 (Utah 1985)).

Smiths have not, and cannot, meet their burden of showing that a breach of a duty owed to Plaintiff "caused, both actually and proximately," injury to Jason Smith. (This issue was also briefed and argued at the trial court level. (See R. 990-991, and R. 1059, pp. 25-29.)

In the Thompson Court's initial citation to Lewis v. N. J. Riebe Enterprises, Inc., the Court pointed out that Lewis case was a case "imposing liability where subcontractor's employee was injured as a result of a new, less safe method of work required by the general contractor." See Thompson, 1979 UT 22, ¶ 19, Attachment "9."

As to the facts of this case, the "cause" of Jason Smith's injury could have been Jason Smith: merely failing to follow an appropriate method; otherwise acting (himself) inappropriately; etc. Moreover, there is no evidence that negligence of Hales & Warner "caused" the wall to fall on Jason Smith. As the Utah Supreme Court states in Weber v. Springville City, 725 P.2d 1360 (Utah 1986):

... A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Id. at 1367-68 (part of emphasis in original and part of emphasis added).

Here, there isn't even a possibility of causation (as to Hales & Warner).

As noted above, the trial court decided not to reach this issue because she found that there was no duty. However, again, we believe that this separate basis is a valid basis supporting judgment in favor of Hales & Warner, and request judgment of this basis also.

**6. Hales & Warner Was An Independant Contractor, and Was Not An Employee of CPB**

In Smiths' Brief, Smiths assert as their third and last issue on appeal:

3. Whether the relationship of principle employer and independent contractor can exist when the principle employer possesses the right to accept or reject any subcontractor or employee selected by the purported independent contractor.

(Brief of Appellants, p. 6.) Smiths argue in there Brief that because "CPB had the authority to hire and fire employees and subcontractors of Appellee H & W," Hales & Warner was the employee of CPB and not an independent contractor. (Brief of Appellants, p. 46.)

Smiths' arguments are meritless and fail for a number of reasons. First, contrary to Smiths' inaccurate assertions otherwise, the CPB/Hales & Warner contract does not give CPB the right to hire or fire Hales & Warner's employees (or anyone else's employees); and the contract provisions cited by Smiths' do not state such. (See R. 262-263, Sections 5.1(A),(B), 6.1(A).) Further, Smiths' assertions as to the contract language pertaining to subcontractors is not entirely accurate, and the cited provisions do not state that CPB can

“fire” subcontractors once they are contracted with.

Note, in any event, even if Smiths’ assertions were accurate, which they are not, such would not make Hales & Warner an employee of CPB, as more fully discussed in the parts of the Brief of Appellee CPB referred to below.

Rule 24 of the Utah Rules of Appellate Procedure allow a party to “adopt by reference any part of the brief of another.” Utah R. App. P. 24(h). In the interests of brevity, Hales & Warner hereby adopts the excellent discussion of Utah law contained on pages 32 and 33 of the Brief of Appellee CPB.

As CPB indicates immediately after that discussion of Utah law on this point:

“If we look at the factors, mentioned above, such as control over the day to day work, as opposed to merely influencing the result to be achieved, the method of payment, that is, wages v. payment for a completed project, the furnishing of equipment, etc. The relationship between the CPB and Hales & Warner was clearly that of the owner and independent contractor, not employer/employee.

In sum, Hales & Warner was not the employee of CPB.

However, even if Hales & Warner was the employee of CPB, which it wasn’t, such alone does not impose liability on Hales & Warner (or CPB) to Smiths; Smiths would still have the burden of showing: (1) a duty owed to Jason Smith by Hales & Warner; (2) breach of that duty; and (3) causation, both actually and proximately, of the injury. As discussed above, Smiths have not, and can not, meet their burden in showing any of these three essential elements, (let alone all of them).

**7. Reply Brief of the Appellants to the Brief of Appellee CPB.**

Appellee Hales & Warner has received the “Reply Brief of the Appellants to the Brief

of Appellee CPB. While Hales & Warner does not have adequate space to fully address such, Hales & Warner would like to point out that in Smiths' reply brief, Smith have improperly raised several new issues/arguments including: the argument that Brent Reynolds was an employee of CPB; the argument that Egbert Construction was an employee of CPB; the argument that CPB, as a landowner, retained control over Hales & Warner, Brent Reynolds Construction and Egbert Construction, and failed to take reasonable care to protect the employees of the contractors; the arguments that CPB could be liable under the "peculiar risk" or "inherently dangerous work" doctrines; and the argument that CPB is liable because it failed to warn Jason Smith of hazards present on the land.

Further, as to the cases and authority cited by Appellees in their reply brief, Appellees have in some instances misinterpreted the law and/or have failed to address the findings of the respective courts in full.

Furthermore, Plaintiffs argue that Restatement (Second) of Torts §§413, 416 and 427 apply in this case. Their argument is clearly erroneous, and against well established Utah law. Those Restatements deal with the "peculiar risk" or "inherently dangerous work" doctrines. The Thompson Court found that these doctrines does not apply in cases where an injured person is an employee of an independent contractor, such as in this case; rather the "peculiar risk" or "inherently dangerous work" doctrine only applies to innocent "third parties." Thompson, 1999 UT 22, at ¶¶30-31, p. 329.

### CONCLUSION

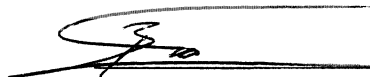
Based upon the discussion above, Hales & Warner requests that the court affirm the

trial court summary judgment order, (or otherwise enter judgment in favor of Hales & Warner and against Smiths).

In addition, Hales & Warner requests that the court grant Hales & Warner's requests to strike outlined above, including the striking of (1) the many deposition pages of various depositions attached to Smiths' brief, and which are not a part of the "Record" on appeal; (2) new issues and arguments, including such based upon documents which are not part of the record on appeal, and new issues raised in Smiths' reply brief; (3) hearsay statements, including hearsay statements in letters prepared by Brent Reynolds and the deposition testimony of Brent Reynolds, and Plaintiffs' references to and arguments based upon such; etc.

Dated this 19<sup>th</sup> day of May, 2004.

SMITH & GLAUSER



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RICHARD K. GLAUSER  
ERIC K. DAVENPORT  
Attorneys for Defendant/Appellee  
Hales & Warner Construction, Inc.



**CERTIFICATE OF SERVICE**


I hereby certify that on this 19<sup>th</sup> day of May, 2004, a true and correct copy of the foregoing was served upon the persons named below, at the addresses set out below their name, by depositing a true and correct copy of said document in a properly addressed envelope, postage prepaid to the following;

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FILED  
Fourth Judicial District Court  
of Utah County, State of Utah  
10-8-03 Deputy

KELLY SMITH and LISA NIELSEN,  
Individually and as Heirs of JASON  
KELLY SMITH, Deceased,

V.

ORDER OF SUMMARY JUDGMENT  
IN FAVOR OF HALES & WARNER  
CONSTRUCTION, INC., AND THE  
CORPORATION OF THE  
PRESIDING BISHOP OF THE  
CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS

HALES & WARNER CONSTRUCTION,  
INC., a Utah Corporation,

Civil No. 020401834

Judge Claudia Laycock

Third-Party Defendant.

Defendant "Hales & Warner Construction, Inc.'s Motion for Summary Judgment against Plaintiffs" and the "Motion for Summary Judgment of the Defendant Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints" came before this Court on August 20, 2003. Shandor Badaruddin, Jeffrey D. Gooch and Justin T. Ashworth appeared on behalf of Plaintiffs; and the Plaintiffs also appeared at the hearing. Eric K. Davenport appeared on behalf of Hales & Warner Construction, Inc. (hereinafter "Hales & Warner"); Clifford T. Hales of Hales & Warner was also present. Robert R. Wallace appeared on behalf of the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints (hereinafter the "CPB"). Steven G. Morgan appeared on behalf of BRC, Inc., aka Brent Reynolds Construction, Inc., (hereinafter "BRC"). Oral argument was received on August 20, 2003 from counsel for the parties.

The Court will note that after the initial memoranda in support and opposition to these motions had been filed, the Court held a hearing on November 19, 2002, and signed an order on January 31, 2003, which order provided that the parties "shall have until February 28, 2003 to conduct and complete additional fact discovery;" the order also referred to the filing of supplemental memoranda by the parties after the additional discovery referred to was completed. After additional discovery was conducted, Plaintiffs, Hales & Warner and the CPB filed supplemental memoranda pertaining to the motions for summary judgment. Thereafter, supplemental oral argument on the motions for summary judgment was scheduled for August 20, 2003, as referenced above.

The Court, having reviewed the motions and memoranda submitted in support and in opposition to the motions, and having heard oral argument on the motions, hereby enters the

following order for good cause shown:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that "Hales & Warner Construction, Inc.'s Motion for Summary Judgment against Plaintiffs" and the "Motion for Summary Judgment of the Defendant Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints" are hereby granted.

The Court finds that there are no material disputes of fact which preclude summary judgment in favor of Hales & Warner or the CPB. The Court notes that Plaintiffs' counsel agreed during oral argument that there was no dispute as to the material facts.

On or about May 7, 1999, the CPB entered an agreement with Hales & Warner for the construction of a church house for the Highland 4<sup>th</sup> and 20<sup>th</sup> Wards. On or about May 10, 1999, Hales & Warner entered into a subcontract agreement with BRC, under which subcontract agreement BRC was to perform: "All of the Section 06100 Rough Carpentry complete, including all labor and materials, all material handling and crane time, except wood trusses to be supplied by others but installed by BRC, Inc." BRC entered into an oral contract with "Egbert Construction, Inc.," (hereinafter "Egbert Construction"), wherein BRC was to provide the materials, and Egbert Construction was to provide all labor, as to the section 06100 rough carpentry.

Egbert Construction hired and trained Jason Smith, Michael Lewis, and Jose Louis. On August 13, 1999, an Egbert Construction supervisor instructed Jason Smith, Michael Lewis, and Jose Louis to "put up" a wooden framed wall Egbert Construction had built. On August 13, 1999, Jason Smith, Michael Lewis, and Jose Louis raised the wooden framed wall, and were in the process of putting the wall onto bolt studs when the wall started to fall and

fell on Jason Smith, causing Jason Smith's death (hereinafter the "Accident").

The Court finds that it is undisputed that it was Egbert Construction who hired, trained and educated Jason Smith, Michael Lewis, and Jose Louis as it relates to the work being performed at the time of the Accident. Hales & Warner and the CPB did not hire, train or educate Jason Smith, Michael Lewis, or Jose Louis as to the work they were performing at the time of the Accident.

The Court finds that it is undisputed that Plaintiff Jason Smith was an employee of Egbert Construction prior to and at the time of the Accident. Michael Lewis and Jose Louis were also employees of Egbert Construction prior to and at the time of the Accident.

The Court finds that Jason Smith, Michael Lewis, and Jose Louis were under the direction, supervision, instruction and control of Egbert Construction at the time of the Accident.

The Court finds that Jason Smith, Michael Lewis and Jose Louis were not under the direction, supervision, instruction or control of Hales & Warner or the CPB prior to and at the time of the Accident. The Court finds that there is no evidence that Jason Smith, Michael Lewis and Jose Louis were ever under the direction, supervision, instruction, or control of Hales & Warner or the CPB.

The Court finds that there is no evidence that Hales & Warner or the CPB instructed Egbert Construction or its employees (or BRC or its employees) to do the work being performed at the time of the Accident in a different manner or by way of a different method.

The Court finds that there is no evidence that Hales & Warner or the CPB exerted control over the means utilized by Jason Smith, Michael Lewis, or Jose Louis, in doing the

work Jason Smith, Michael Lewis and Jose Louis were performing at the time of the Accident, or that Hales & Warner or the CPB interfered with that work.

The Court finds that the employee of Hales & Warner on the site at the time of the Accident was in the construction trailer and had no involvement as to the work being performed, and the wall being put into place, by Jason Smith, Michael Lewis, and Jose Louis at the time of the Accident.

The Court also finds that there was no employee or representative of the CPB on the site at the time of the Accident, and no employee or representative of the CPB had any involvement in the work being performed by Jason Smith, Michael Lewis, and Jose Louis at the time of the Accident.

The Court finds that the evidence indicates that it was Egbert Construction who was controlling the means utilized and the manner of performance of the work being performed by Jason Smith, Michael Lewis, and Jose Louis at the time of the Accident.

The Utah Supreme Court decision Thompson v. Jeffs, 1999 Utah 22, 972 2d. 322, is applicable, authoritative, and supports the Court's granting of the motions for summary judgment as to both Hales & Warner and the CPB. In its analysis section, the Utah Supreme Court in Thompson first sets forth the general rule, stating:

Utah adheres to the general common law rule that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." . . . This general rule recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety of the manner or method of performance implemented.

Id. at ¶ 13 (citations omitted). The Thompson Court went on to discuss therein "certain

exceptions to the general rule of nonliability of an employer of an independent contractor,” including the “retained control” doctrine exception.

The Court notes that Plaintiffs’ counsel stipulated on the record in oral argument that if the standard for the “retained control” exception (to the general rule) set forth in Thompson relates to the “injury-causing aspect of the work,” that Plaintiffs cannot meet the “retained control” exception, and that Defendants Hales & Warner’s and the CPB’s motions for summary judgment should be granted.

The Court finds that Plaintiffs have not met, and cannot meet, the “retained control” exception to the general rule, pursuant to the contours of that standard outlined in Thompson. In discussing the contours of the “retained control” exception and the “active participation” requirement pertaining thereto, the Thompson Court states, among other things:

In other words, to have “actively participated” in the contracted work, a principal employer must have exercised affirmative control over the method or operative detail of that work. “The degree of control necessary for the creation of a legal duty must involve either the direct management of the means and method of the independent contractor’s activities or the provision of the specific equipment that caused the injury.”

Thompson, 1999 UT 22, ¶ 20 (citations omitted). The Thompson Court also points out that there must be exertion “of such control over the means utilized that the contractor cannot carry out the injury-causing aspect of the work in his or her own way.” Id. at ¶ 21.

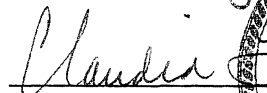
Hales & Warner and the CPB did not exert affirmative control over the method or operative detail of the work and did not directly manage the means and methods of Egbert Construction’s work nor provide the specific equipment used by Egbert Construction as to the work Jason Smith was performing at the time of the Accident.

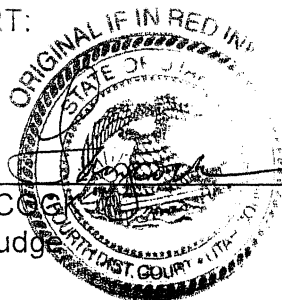
As referenced in the above quote, the standard set forth in Thompson also indicates that the exertion of control over the means utilized must relate to the "injury-causing aspect of the work." Id. (underlining added). Hales & Warner and the CPB did not exert control over the means utilized as to the "injury-causing aspect of the work" of Jason Smith, (even assuming the means utilized caused his death); rather, Egbert Construction controlled the means utilized as to the work Jason Smith was performing at the time of the Accident. The activities of Hales & Warner and the CPB to which Plaintiffs refer did not relate to, and were not an exertion of control over, the work Jason Smith was performing at the time of the accident, and did not cause the accident and death of Jason Smith.

The Court also finds that Hales & Warner and its employees were not employees of the CPB; the Court finds that Hales & Warner was an independent contractor of the CPB. Further, the contracts and their provisions do not preclude summary judgment in favor of Hales & Warner and the CPB.

DATED this <sup>October</sup> 7th day of ~~September~~, 2003.

BY THE COURT:

  
CLAUDIA LAYCOCK  
District Court Judge





**CERTIFICATE OF MAILING**

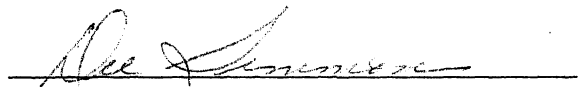
I certify that a true and correct copy of the foregoing document was faxed and mailed,  
postage prepaid, this 17<sup>th</sup> day of September, 2003, to:

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<p>             1. The first part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies. The second part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies. The third part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies.           </p>	<p>             2. The first part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies. The second part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies. The third part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies.           </p>
<p>             3. The first part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies. The second part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies. The third part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies.           </p>	<p>             4. The first part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies. The second part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies. The third part of the paper is a review of the literature on the effects of the 1997 Asian financial crisis on the Asian economies.           </p>

Tab 2

P R O C E E D I N G S

MICHAEL LEWIS,

called as a witness, for and on behalf of the plaintiff,  
being first duly sworn, was examined and testified as  
follows:

EXAMINATION

BY MR. BADARUDDIN:

Q Can you state your name for me.

A Michael Lewis.

Q And Mr. Lewis, what do you do for a living?

A Well, currently, I work at a telephone survey  
company called Western Research.

Q Okay. What did you do back in August of 1999?

A I was a framer.

Q A framer. What is a framer?

A We frame houses, buildings like churches.  
Just frame buildings.

Q And can you tell me more specifically, what  
does framing entail?

A Building actual framework for a building,  
everything from the walls to the floors, the trusses,  
the joists, everything. Framing the building.

Q Who did you work for in August of 1999?

A Egbert Construction.

Q And when did you start working for Egbert?

EXAMINATION BY MR. DAVENPORT

16:29 1 A Well, he was saying that he was going to put  
2 up like a monument or something, a little something in  
3 memory of Jason.

4 Q He expressed some remorse about Jason's death?

16:29 5 A Yes. I don't know if that ever happened or  
6 not, but that's what he told us.

7 Q Okay. Do you know who the architect was on  
8 this project?

9 A No.

16:29 10 Q Do you know whether or not you had any  
11 discussions with him?

12 A No. I never personally, no.

13 MR. BADARUDDIN: Thank you, Mr. Lewis. Some  
14 of the other gentlemen may have some questions, but I  
16:30 15 don't. I appreciate you coming down.

16 THE WITNESS: I'm sorry I was late.

17 MR. BADARUDDIN: That's all right.

18 MR. DAVENPORT: I've got some.

19 EXAMINATION

16:30 20 BY MR. DAVENPORT:

21 Q Do you want me to call you Mr. Lewis or  
22 Michael or Mike or what?

23 A Mike, whatever. I don't even care.

24 Q Mike, I'm going to probably ask you some of  
16:30 25 the same type of questions, but I just want to make sure

EXAMINATION BY MR. DAVENPORT

16:30 1 I'm clear. So if you think, well, I already answered  
2 that, you have, and --

3 A It's okay, I understand that.

4 Q First, I want to make sure that you understand  
16:30 5 that Ken Egbert and Ken Egbert Construction are separate  
6 and apart from Maurice Egbert, who was the employee of  
7 Hales & Warner.

8 You understand that?

9 A Yeah, I understand that.

16:30 10 Q And in the deposition of Maurice Egbert, as  
11 well as others that have been deposed, and the  
12 affidavits of not only yourself, but the other people  
13 we've obtained affidavits from, from Ken Egbert, all  
14 have indicated that Maurice Egbert, himself, the  
16:31 15 employee of Hales & Warner, never gave instructions to  
16 you or Jason Smith or Jose as to going and lifting that  
17 wall. And that's consistent with your testimony today;  
18 correct?

19 A Yes, that's right.

16:31 20 Q And also, everybody indicated that Maurice  
21 Egbert did not teach you or Jason Smith how to lift the  
22 wall; is that correct?

23 A Yeah.

24 Q Okay.

16:31 25 A Well, to be honest with you, no one really

EXAMINATION BY MR. BADARUDDIN

16:12 1 his name. And he told me -- they taught me -- they just  
2 showed me how to raise the wall.

3 MR. DAVENPORT: Are you saying Maurice Egbert,  
4 the general contractor, or are you saying --

16:12 5 THE WITNESS: Well, Ken Egbert was actually  
6 telling me to do it, but Maurice was there. I think he  
7 was in the trailer or something. I don't know where he  
8 was.

9 MR. DAVENPORT: There's a big difference  
16:12 10 between --

11 THE WITNESS: Okay, sorry.

12 Q (BY MR. BADARUDDIN) I'm just asking you, what  
13 did Maurice, if anything, tell you to do?

14 MR. DAVENPORT: Keep in mind, distinguish Ken  
16:12 15 Egbert and Maurice.

16 THE WITNESS: Really, nothing. Honestly, I  
17 never talked to Maurice more than one or two words, more  
18 than, you know, if I needed to ask him a question or  
19 something. I never really talked to him very much.

16:12 20 Q (BY MR. BADARUDDIN) Did he ever tell you you  
21 were doing something wrong and to stop it?

22 A No. That would more be the other framers.

23 Q Who showed you how to raise a wall?

24 A Ken Egbert.

16:13 25 Q Okay.

000082

EXAMINATION BY MR. BADARUDDIN

16:13 1 A He taught me the proper way, you know, how to  
2 stand when you're holding the wall. You don't want to  
3 stand right up to it. You've got to put your foot back,  
4 you know, be ready to brace it, and bail if it goes out  
16:13 5 of the way.

6 Q Okay.

7 A That's what he told me.

8 Q Do you remember Jason Smith?

9 A Yes.

16:13 10 Q How did you know Jason Smith?

11 A He had been working there for maybe like two  
12 or three days. Just a couple of days.

13 Q Did he get trained along with you?

14 A No. He started after I did.

16:13 15 Q And what, if anything, did he do, if you know  
16 what he did?

17 A He was the same as I was; he was a laborer.

18 Q And he worked for who?

19 A He worked for Ken Egbert.

16:13 20 Q And did you have any supervisors when you  
21 worked with Ken Egbert?

22 A Oh, man. We had -- there was Ken, and I guess  
23 one of the other supervisors, his name was Manny. And  
24 then there was this guy named Dale. And they were  
16:14 25 always fighting with each other.

000981

EXAMINATION BY MR. BADARUDDIN

16:14 1 Q How, if at all, did they supervise you?

2 A Like I said, if I was doing something wrong,  
3 you know, if I was cutting a board wrong, they'd come  
4 tell me.

16:14 5 Q How did you know what boards to cut or what  
6 walls to build?

7 A They would tell me. See, usually what I would  
8 do is, I would cut the boards for them, and they would  
9 actually put the boards together, because I was just  
16:14 10 learning. That's kind of how it goes when you're in  
11 that business.

12 Q And so you would cut the boards. They would  
13 assemble the wall?

14 A They'd say, I need 10 boards at 82 and a half  
16:14 15 inches or whatever, so I'd go cut 10 boards and bring  
16 them over to them. Sometimes I would assemble the wall.

17 Q How did you know how to assemble a wall?

18 A I was taught how.

19 Q By?

16:14 20 A By Manny.

21 Q Do you know if Jason assembled any walls?

22 A You know, I think from most of what I saw him  
23 doing, he did mostly cutting.

24 Q Okay. Did you stand up any walls?

16:15 25 A Oh, yeah. A lot of walls.

000000



EXAMINATION BY MR. BADARUDDIN

16:15 1 Q Who told you how to stand up a wall?

2 A Ken Egbert.

3 Q And how do you stand up a wall?

4 A Well, you -- just depending on the size of the  
16:15 5 wall. Sometimes, if the wall was a real big wall, we  
6 would use the forklift, and they'd suspend like tow  
7 straps to the top of the wall and raise the wall with a  
8 forklift. But if it was a smaller wall that we could  
9 lift ourselves, we would stand it. Someone else would  
16:15 10 go around and position the wall into the bolts. You  
11 know, sometimes they'd use a board and jack underneath  
12 it to lift the wall up onto the bolts if it wasn't quite  
13 on there. You know, there would always be people  
14 raising the wall.

16:15 15 And then once the wall was up, you put an  
16 A-frame on it. Once you have it down on the bolts, then  
17 you put an A-frame and a brace on it.

18 Q But not before?

19 A No.

16:16 20 Q Okay. Do you know who Brent Reynolds is?

21 A No. I recognize the name from the legal  
22 papers, but that's it.

23 Q But you don't know how, if at all, he was  
24 involved in the framing process?

16:16 25 A No.

000979

EXAMINATION BY MR. DAVENPORT

16:30 1 I'm clear. So if you think, well, I already answered  
2 that, you have, and --

3 A It's okay, I understand that.

4 Q First, I want to make sure that you understand  
16:30 5 that Ken Egbert and Ken Egbert Construction are separate  
6 and apart from Maurice Egbert, who was the employee of  
7 Hales & Warner.

8 You understand that?

9 A Yeah, I understand that.

16:30 10 Q And in the deposition of Maurice Egbert, as  
11 well as others that have been deposed, and the  
12 affidavits of not only yourself, but the other people  
13 we've obtained affidavits from, from Ken Egbert, all  
14 have indicated that Maurice Egbert, himself, the  
16:31 15 employee of Hales & Warner, never gave instructions to  
16 you or Jason Smith or Jose as to going and lifting that  
17 wall. And that's consistent with your testimony today;  
18 correct?

19 A Yes, that's right.

16:31 20 Q And also, everybody indicated that Maurice  
21 Egbert did not teach you or Jason Smith how to lift the  
22 wall; is that correct?

23 A Yeah.

24 Q Okay.

16:31 25 A Well, to be honest with you, no one really

000978

EXAMINATION BY MR. BADARUDDIN

16:16 1 Q Do you know who Brent Reynolds Construction,  
2 Inc. is?  
3 A I've heard of them.  
4 Q From the court papers?  
16:16 5 A Yeah.  
6 Q That I've sent you?  
7 A Well, just in the construction business, I've  
8 heard of them.  
9 Q Do you remember August 13 of 1999?  
16:16 10 A Was that the day of the accident?  
11 Q Yes.  
12 A Yes.  
13 Q Tell me what happened on that day.  
14 A Well, we had just finished eating lunch, and  
16:16 15 there was a wall that had already been built, and  
16 Manny -- I think it was Manny -- told me and Jason and a  
17 guy named Jose to go put it up.  
18 Q Okay. And then what happened?  
19 A So we went over there, and we lifted it up,  
16:17 20 and it wasn't quite onto the bolts, so Jason and Jose  
21 were holding it, and I went to go get a board, and I was  
22 going to, you know, try to use the leverage and jack it  
23 up onto the bolts. And I put it under there, and as  
24 soon as I put some pressure on there, the wall came  
16:17 25 down. Jose bailed out of the way, and it was like

EXAMINATION BY MR. BADARUDDIN

16:17 1 Jason, he tried to catch it, and he kind of crouched  
2 down. I don't know if he was trying to catch it or  
3 what, it just came down on him.

4 And they lifted the wall up, and Jason was  
16:17 5 just laying there. There was already a puddle of blood  
6 around his head like this. At first, I didn't know it  
7 was going to be serious. I thought he was knocked out  
8 or something, but I saw the blood.

9 And we started yelling for help, and Maurice  
16:17 10 came out of the trailer, and the other guys, everyone  
11 else was working on the east -- yeah, the east side of  
12 the church, and there was a big wall already built on  
13 that side, so they couldn't really see into the church.

14 I don't know if you guys have been out there  
16:18 15 and seen the site or anything, but it's more on the west  
16 side of the church where it happened.

17 Q Okay.

18 A So they all came running over from there, and  
19 Maurice got his cell phone, called the police, fire  
16:18 20 department.

21 Q And an ambulance came?

22 A Yeah. And some guy came that -- I guess he  
23 had a scanner or something. He was just a doctor. He  
24 was driving by, so he stopped. He got there way before  
16:18 25 the ambulance did.

000376

EXAMINATION BY MR. DAVENPORT

16:50 1 relates to the wall actually beginning its fall, it  
2 seems to me, and you correct me if I'm wrong, but you  
3 don't really know why the wall actually started to fall.  
4 You know you were in the process of jimmying it up, but  
16:50 5 other than that, you don't know why it started to fall;  
6 is that a fair statement?

7 A That's right. That's something I've been  
8 trying to figure out for quite a long time, because my  
9 first reaction was to blame myself. If I wasn't  
16:50 10 jimmying the wall, it wouldn't have fallen, so for a  
11 long time, I thought it was my fault, that I jimmied the  
12 wall and I made it fall, but then -- I just don't know.

13 Q But had you previously jimmied walls like that  
14 and that type of jimmying didn't cause the wall to fall?

16:51 15 A Yeah, and that's the way I've done it since  
16 then, also.

17 Q So at this juncture, you're not saying that  
18 your jimmying caused the wall to fall; correct? That's  
19 not your position?

16:51 20 A But I'm saying, it may have, I don't know.  
21 What I'm saying is, I don't know.

22 Q Okay. Now, did anyone say anything during  
23 this process? Like once it started to fall, did anybody  
24 yell out, Watch out, or, Get out of the way, or, Run?

16:51 25 A Yeah, I did, and Jose yelled something in

000375

EXAMINATION BY MR. DAVENPORT

16:51 1 Spanish. I'm not sure what it was.

2 Q What did you say?

3 A I just -- honestly, I don't remember. It was  
4 something, Get out of the way, something along the lines  
16:51 5 of that.

6 Q Did you hear Jason yell anything?

7 A No.

8 Q Let's assume that he was paying attention  
9 right there. Once he noticed the wall to start fall, if  
16:52 10 he would have just jumped out of the way, would he have  
11 time to do that instead of trying to catch it?

12 A Yeah. If he would have just moved to the side  
13 rather than backwards, he would have been fine.

14 Q As I understand it, a wall falling on its own  
16:52 15 volition, the initial falling motion, it is not like  
16 someone is on top of it and is throwing it down, it kind  
17 of starts out slowly as it begins; is that kind of the  
18 movement that occurred here?

19 A Yeah. It was kind of like it all went into  
16:52 20 slow motion. It was weird.

21 Q Now, based upon my prior conversation with  
22 you, I believe you indicated to me that it was a calm  
23 day. It wasn't real windy or something like that.

24 A Yeah, it wasn't super windy or anything.

16:53 25 Q It was a calm, sunny day; is that a fair

000974

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100

Tab 3

EXAMINATION BY MR. MORIARITY

12:06 1 whether or not you ever saw him on the construction  
2 project or not?

3 A I do not remember faces or names real easy.  
4 It takes time for me personally to develop a familiarity  
12:06 5 with a person's face.

6 Q Where were you located when the wall fell on  
7 Mr. Smith?

8 A I was in the job trailer.

9 Q How far away from where the wall fell?

12:07 10 A Probably 100 feet.

11 Q And were there windows looking out over the  
12 project?

13 A The door window did look toward the project.

14 Q And how did you become aware of the fact that  
12:07 15 there had been an incident there on the project?

16 A One of Ken Egbert's guys came and knocked on  
17 the door and said we needed to call 911, that there had  
18 been an accident.

19 Q Who was that?

12:07 20 A I don't recall.

21 Q What do you recall about him, if anything?

22 A I don't remember. It's been too long.

23 Q How many employees of Mr. Egbert were on the  
24 job site on August 13, 1999?

12:08 25 A I don't remember the exact number. That would

000072



EXAMINATION BY MR. DAVENPORT

14:46 1 any questions.

2 Let me just ask a few quick questions.

3 EXAMINATION

4 BY MR. DAVENPORT:

14:46 5 Q Did you ever tell Jason Smith how to place  
6 that wall on the bolts that are there on the  
7 construction site?

8 A No, I did not.

9 Q Did you ever instruct or tell any Egbert  
14:47 10 employee how to raise that wall or place that wall on  
11 the bolts?

12 A No, I did not.

13 Q Did you ever exert control over, firmly take  
14 control over the method that Jason Smith was using in  
14:47 15 placing that wall onto the bolts?

16 A No, I did not.

17 Q Did you ever firmly exert control over any  
18 other employee of Egbert Construction or Brent Reynolds  
19 Construction as to the method in which they were placing  
14:48 20 a wall onto bolts?

21 A No, I did not.

22 Q Did you ever affirmatively take control over  
23 or exert control over the operative detail of Jason  
24 Smith's work relating to the placement of that wall onto  
14:48 25 those bolts?

000971

EXAMINATION BY MR. DAVENPORT

14:48 1 A No, I did not.

2 Q Did you ever affirmatively take control or  
3 exert control over the operative detail of any Egbert  
4 employee or Brent Reynolds Construction employee as it  
14:48 5 relates to the placement of walls onto bolts?

6 A No, I did not.

7 Q Did you ever prohibit any Egbert employee or  
8 any Reynolds Construction employee from using the method  
9 they chose in placing a wall onto bolts for that  
14:49 10 construction site?

11 A No, I did not.

12 Q As it relates to this construction project, do  
13 you know whether or not you were in any way involved in  
14 the bidding process for that job?

14:50 15 A Bidding process itself, no.

16 Q As it relates to any project, I just want you  
17 to describe for me as to how involved, if any, have you  
18 been in the past as it relates to the bidding process  
19 for any job.

14:50 20 A Occasionally, Cliff and Joel will talk to  
21 superintendents about how they felt about working with  
22 certain subcontractors and ask for our opinions, how  
23 they work, qualities of workmanship, if we like working  
24 with them.

14:50 25 Q Other than that, you wouldn't get involved

FURTHER EXAMINATION BY MR. MORIARITY

15:03 1 if that was the same methodology used in raising the  
2 wall which fell on Jason Smith.

3 Q So you didn't see the methodology; isn't that  
4 correct?

15:03 5 A I did not see the methodology.

6 Q Now, let me ask you another question. Did you  
7 approve the methodology that was used in the raising of  
8 the wall that killed Jason Smith?

9 A I neither approved or disapproved.

15:03 10 Q So you didn't approve that methodology, did  
11 you?

12 MR. DAVENPORT: Asked and answered.

13 THE WITNESS: I neither approved or  
14 disapproved.

15:03 15 MR. MORIARITY: What did you say?

16 MR. HALES: Just yawning.

17 MR. MORIARITY: You yawn with words?

18 Q (BY MR. MORIARITY) Now, Mr. Schick would come  
19 to the site only once a month?

15:04 20 A He would come at least once a month.

21 Q Yes, but would he come more often than that?

22 A He would occasionally make a visit.

23 Q How often?

24 A I don't know.

15:04 25 Q Did you watch Egbert Construction attempt to

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EXAMINATION BY MR. MORIARITY

10:45 1 A No.

2 Q Was there anything done with the electrical,  
3 or the wrapping of wires, or anything of that nature?

4 A No.

10:45 5 Q You're sure of that?

6 A Yes.

7 Q Had that been done, you would have observed  
8 it; correct?

9 MR. DAVENPORT: Are you saying done by Hales &  
10:46 10 Warner or someone else?

11 MR. MORIARITY: Done by anyone, sir.

12 THE WITNESS: I cannot be at all spots of a  
13 job site at all times, so items may have been -- taken  
14 place without me seeing them.

10:46 15 Q (BY MR. MORIARITY) Was there a pole,  
16 telephone pole, anywhere on the project?

17 A There was a power pole by my job trailer.

18 Q And was that power pole used in any way, shape  
19 or form for power for this project?

10:46 20 A Yes.

21 Q Was there anything done with the power and how  
22 the power was brought to the project or covered up in  
23 any way by anyone that you observed after the Smith boy  
24 had been killed, but prior to the time that OSHA had  
10:47 25 arrived?

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EXAMINATION BY MR. MORIARITY

10:47 1 A Not to my knowledge.

2 Q Prior to the time that the Smith boy was  
3 killed, was the framing on schedule?

4 A No.

10:48 5 Q How far was it behind schedule?

6 A Probably a couple of weeks, maybe three weeks.

7 Q Why was it behind schedule?

8 A That would be based on the work of Egbert  
9 Construction.

10:48 10 Q Yes, but why was it behind schedule, if you  
11 know?

12 A I would say because of their not having done  
13 churches before. I had found problems that had to be  
14 corrected in their framing, such as heights of walls.  
10:48 15 We had to tear apart one whole side, back section of a  
16 wall, that they had made an inch too tall, and we had to  
17 tear that apart and rebuild it. Just Egbert  
18 Construction not being able to watch what was going on,  
19 I guess.

10:49 20 Q Why weren't they able to watch what was going  
21 on?

22 A Actually, with that situation, with the wall,  
23 BRC had actually instructed them to build it that way to  
24 save time in cutting studs. And the plan had called for  
10:49 25 the shorter wall, and we had requested that they follow

EXAMINATION BY MR. MORIARITY

10:50 1 the plans.

2 Q Who is BRC?

3 A Brent Reynolds Construction.

4 Q What role did they play in this project?

10:50 5 A They were the contracted framers.

6 Q Wait a minute. I thought you said Egbert  
7 Construction was doing the framing.

8 A Brent Reynolds Construction had verbally  
9 agreed with Egbert Construction to come in and take over  
10:50 10 the project, because Brent Reynolds was unable to man  
11 the project at the time.

12 Q How did you find that out?

13 A In speaking with Ken Egbert.

14 Q How did you first meet Ken Egbert?

10:50 15 A The day he came on the job site.

16 Q What day was that?

17 A That would be the first day that framing  
18 began. He was waiting for and unloading materials. I'm  
19 not sure exactly what date that was.

10:51 20 Q I want to make sure I'm understanding.

21 Had you had previous work at all of any nature  
22 whatsoever with BRC?

23 A I had called him on the phone to let him know  
24 where the project was on schedule.

10:51 25 Q Called who?

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EXAMINATION BY MR. MORIARITY

11:26 1 sir.

2 A Can you restate the question, please.

3 Q Did you then give Ken Egbert your approval as  
4 to him having Bruce Lemmon become the foreman on the  
11:27 5 job?

6 (Off-the-record discussion)

7 THE WITNESS: That is Ken Egbert's call as to  
8 how he will run his crew.

9 Q (BY MR. MORIARITY) Did you or did you not  
11:27 10 give your approval to Mr. Lemmon becoming the foreman  
11 for Egbert Construction?

12 A That's not for me to do.

13 Q So is your answer, No, I did not give my  
14 approval?

11:27 15 MR. DAVENPORT: He's answered the question.

16 Q (BY MR. MORIARITY) Please answer.

17 A I neither approved or disapproved.

18 Q I see.

19 A As a superintendent, I work with the crews  
11:28 20 that are given me, unless I see a problem.

21 Q Given you by whom?

22 A By the subcontractors.

23 Q Well, who was the subcontractor that gave you  
24 Mr. Lemmon?

11:28 25 A Ken Egbert.

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EXAMINATION BY MR. MORIARITY

11:28 1 Q Was there a contract with Mr. Egbert?

2 MR. DAVENPORT: It's been asked and answered  
3 many times, but you can go ahead and answer that again.

4 THE WITNESS: I believe I've answered that.

11:28 5 Q (BY MR. MORIARITY) Please answer.

6 A There was verbal agreement, as told me by Ken,  
7 between Ken and Brent Reynolds.

8 Q Did you trust Mr. Lemmon?

9 A I trusted Ken Egbert's qualifications to  
11:29 10 select his own men.

11 Q Let me ask you a question. Did you trust Ken  
12 Egbert's qualifications to select his own men?

13 A Yes.

14 Q Now, let me ask you a different question. Did  
11:29 15 you trust Bruce Lemmon?

16 A As I worked with him, I developed a trust and  
17 an understanding of his knowledge of construction, how  
18 to read plans and work with his men.

19 Q So is the answer, then, that you trusted him?

11:29 20 A I developed a trust for him.

21 Q Did you find him to be an honest and truthful  
22 person?

23 A Yes, I did.

24 Q Thanks very much.

11:29 25 How often did you deal with Bruce Lemmon? 964



EXAMINATION BY MR. MORIARITY

11:07 1       them redo?

2               A     There were several items.

3               Q     Anything else?

4               A     Not enough manpower.

11:07 5           Q     Yes. Tell me about that.

6               A     Egbert Construction is a small company, and  
7       hires on, as we do, as needed, new employees, and he was  
8       building his crew, but it wasn't coming very fast.

9               MR. DAVENPORT: If you know this personally,  
11:08 10       that's fine, but if you're speculating on someone else's  
11       statement to you, you need to tell him it's based on  
12       someone else's statement.

13              THE WITNESS: I had discussed this with Ken.

14              Q     (BY MR. MORIARITY) Yes. And this was the  
11:08 15       explanation given to you by Ken Egbert; correct?

16              A     Yes.

17              Q     Did he, Ken Egbert, tell you whether or not  
18       his framers were experienced?

19              A     I did not go into the qualifications of his  
11:08 20       employees.

21              Q     Well, isn't it one of your roles as the  
22       superintendent to make sure that the work is done in a  
23       workmanlike manner?

24              A     Could you repeat that, please?

11:09 25       Q     Yes. Isn't it one of your roles as the

Tab 4

EXAMINATION BY MR. DAVENPORT

14:20 1 Lumber that has your name on it.

2 Does that sound accurate?

3 A Yes.

4 Q I'm going to show you the subcontract  
14:21 5 agreement, have you thumb through it, and I'm going to  
6 ask you after you have an opportunity to review it  
7 whether or not this is the subcontract you were  
8 referring to previously and whether or not that's your  
9 signature.

14:22 10 (Off-the-record discussion)

11 Q (BY MR. DAVENPORT) Is this a copy of the  
12 subcontract agreement entered into between Hales &  
13 Warner Construction, Inc. and BRC, Inc.?

14 A It looks like it, yes.

14:24 15 Q And that's dated May 10, 1999?

16 A Yes.

17 Q Is that your signature found on page 8?

18 A Yes.

19 Q You signed it as president of BRC?

14:24 20 A Yes. BRC, Inc.

21 Q Now, let me ask you a couple of quick general  
22 questions. As we've gone through all of these  
23 documents, it appears to me that the manner in which  
24 this matter proceeded was that Hales & Warner would  
14:25 25 still deal directly with you as their subcontractor and

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EXAMINATION BY MR. DAVENPORT

14:25 1 you would, in turn, deal with Ken Egbert Construction as  
2 your sub subcontractor.

3 Is that a fair statement?

4 A Yes.

14:25 5 Q Now, as I understand it, you only sub  
6 subcontracted to Ken Egbert part of your subcontract  
7 with Hales & Warner; is that correct? In other words,  
8 you kept the part of purchasing materials and things  
9 like that.

14:25 10 A Yes.

11 Q And the subcontract refers to an amount of  
12 \$156,000. This is the subcontract between Hales &  
13 Warner and BRC; correct?

14 A Yes.

14:26 15 Q And I couldn't hear you too well over here,  
16 but did you say that your sub subcontract between BRC  
17 and Egbert Construction was \$72,000?

18 A I believe that's correct.

19 Q Okay. Now, as I understand it, at the  
14:26 20 beginning of this project there was a preconstruction  
21 meeting that you attended; is that correct?

22 A Yes.

23 Q And as I also understand it, not only were you  
24 issued checks as it relates to materials obtained by  
14:27 25 you, but you were also issued checks by Hales & Warner

EXAMINATION BY MR. BADARUDDIN

13:18 1 A I gave Hales & Warner a bid to do the framing  
2 on the job.  
3 Q I want to show you Exhibit 32.  
4 (Exhibit No. 32 is marked for identification.)  
13:19 5 Q (BY MR. BADARUDDIN) Can you take a look at  
6 Exhibit 31 for me.  
7 A This says 32.  
8 Q That's what I meant, Exhibit 32. Just  
9 checking to see if you're paying attention.  
13:19 10 Could you please take a look at Exhibit 32.  
11 A Yes.  
12 Q Is Exhibit 32 the bid you sent to Hales &  
13 Warner?  
14 A Yes.  
13:19 15 Q For the framing?  
16 A Yes.  
17 Q And what happened next?  
18 A They sent me a contract, and I signed it and  
19 sent it back to them.  
13:20 20 Q And then what?  
21 A I was busy and didn't finish up some other  
22 work that I had going and couldn't get to this one.  
23 They scheduled it, and so I got Ken Egbert to do the  
24 work.  
13:20 25 Q How exactly did you go about getting Ken

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EXAMINATION BY MR. BADARUDDIN

13:20 1 Egbert to do the work?

2 A I called him up and asked him if he'd be  
3 interested in doing this job.

4 Q Who is Ken Egbert?

13:20 5 A A contractor.

6 Q Is he an employee of yours?

7 A No.

8 Q Is he a friend of yours?

9 A He's an acquaintance.

13:20 10 Q Is he a business associate?

11 A Yes.

12 Q And what did Mr. Egbert say about doing some  
13 framing for you?

14 A He said he would be interested in doing it.

13:20 15 Q I was looking at Exhibit 32. There's more  
16 than framing; am I correct?

17 A Yes.

18 Q Did you ask Mr. Egbert to help you out with  
19 all aspects of the work described on Exhibit 32 or just  
13:21 20 the framing? What did you ask Mr. Egbert to do?

21 A Just the framing on it. I told him I would  
22 still supply the material and he could do the framing on  
23 it.

24 Q And what is "framing"?

13:21 25 A Putting the frame structure together, the

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EXAMINATION BY MR. BADARUDDIN

13:21 1 boards.

2 Q The boards?

3 A The structure of it.

4 Q And the structure -- you've got to understand  
13:21 5 I don't know as much about the construction business as  
6 you do.

7 A Build the walls, put the roof on.

8 Q That's something I can understand. You wanted  
9 Mr. Egbert to build the walls?

13:21 10 A Yes.

11 Q And stand them up?

12 A Yes.

13 Q What about the roof?

14 A Do the roof, too.

13:21 15 Q And you were going to supply him all the wood  
16 and nails that he needed to build these walls?

17 A He supplied the nails.

18 Q Okay. And what about the men who were going  
19 to do all of this work?

13:21 20 A His employees.

21 Q What, if any, involvement did you have in the  
22 selection of those men?

23 A None.

24 Q Did you tell him how many men you needed?

13:22 25 A I told him he would need 12 to 14 men. 000357

EXAMINATION BY MR. DAVENPORT

14:41 1 MR. DAVENPORT: That's all I have.

2 FURTHER EXAMINATION

3 BY MR. BADARUDDIN:

4 Q Did you ever visit the Highland 4 and 20  
14:41 5 project site?

6 A During the framing?

7 Q At any time.

8 A I did at the preconstruction meeting.

9 Q Okay.

14:41 10 A And one time when the roof was being done, I  
11 sent some new guys down there, and I had to take a  
12 paycheck down to them off of one of my projects.

13 Q So other than those two occasions, you never  
14 set foot on the property?

14:42 15 A I went down and cleaned some material up after  
16 everything was done.

17 Q Okay. So other than those three occasions,  
18 you never set foot on the property?

19 A No.

14:42 20 Q Did you act in the capacity of manager or  
21 something like that where you would be off site, but  
22 somehow involved in the project?

23 A No.

24 MR. BADARUDDIN: All right. Thank you. I

14:42 25 don't have any more questions.

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EXAMINATION BY MR. DAVENPORT

14:32 1 Q Let me break it down. Did you ever give any  
2 instructions to any Egbert employees as it relates to  
3 this project or how to frame it?

4 A No.

14:32 5 Q Did you ever give any instructions to Ken  
6 Egbert, himself, as to how he should go about framing  
7 the project or any projections as to employees or safety  
8 concerns or anything like that?

9 A No.

14:33 10 Q Did you, yourself, inspect the site from time  
11 to time?

12 A No.

13 Q A question was asked in Dean Schick's  
14 deposition whether or not it would be appropriate to  
14:33 15 have a person on the site who didn't have any  
16 experience, and he referred to the fact that everybody  
17 has to start sometime.

18 Is it appropriate, in your mind, to say, if  
19 you have a crew on the site, which includes experienced  
14:34 20 workmen, to hire someone brand new and have them work  
21 alongside experienced workmen in framing such a  
22 building?

23 A Yes.

24 Q You've indicated that you've done a number of  
14:34 25 projects for the LDS Church; is that correct?

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EXAMINATION BY MR. DAVENPORT

14:09 1 correct?

2 A Correct.

3 Q And you don't have any personal knowledge as  
4 to whether Hales & Warner instructed the plaintiff --  
14:09 5 when I say the plaintiff, I'm referring to the decedent,  
6 Jason Smith -- as to how you would go about placing that  
7 wall on foundation bolts; is that correct?

8 A That's correct.

9 Q It's my understanding you don't have any  
14:10 10 personal knowledge as to how, in fact, the accident  
11 happened, whether Jason Smith just let go of the wall,  
12 tripped over his foot or whatever, you have no personal  
13 knowledge whatsoever as to how the accident, in fact,  
14 happened; correct?

14:10 15 A That's correct.

16 Q Let me refer you back to Exhibit 37.

17 Now, according to my notes, as we walk through  
18 these initial letters, it wasn't until we got to the  
19 letter of April 25, 1999, that you indicated that you  
14:11 20 understood that it was around that point in time is when  
21 you sent over some additional workmen; is that correct?

22 A You said April or August?

23 Q August 25. Let me restate the question.

24 We reviewed some initial letters prior to  
14:12 25 August 25, 1999 relating to workmen, or at least this

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EXAMINATION BY MR. DAVENPORT

14:12 1 one, Exhibit 34. And then we reviewed the August 25,  
2 1999 letter, and I believe it was your testimony that it  
3 was after that letter that you'd sent some additional  
4 workmen to the site; is that correct?

14:12 5 A Yes.

6 Q Now, in the August 3, 2000 letter, I want to  
7 review a couple of sentences in there and make sure I  
8 have it in the right context.

9 In that letter to you of August 25, 1999, it  
14:13 10 refers to the fact that if the issue isn't remedied that  
11 they -- let me find the exact language -- I guess  
12 reserve the right to engage additional help; correct?

13 A Yes.

14 Q And what I guess I'm getting at is in the  
14:13 15 first paragraph of your letter, when we refer to that  
16 you, meaning Hales & Warner, looked for other framers to  
17 do the work but could not find any, was that after this  
18 August 25 letter you were referring to?

19 A No. It was before the beginning of the  
14:13 20 project.

21 Q Now, later on in the letter when you refer to  
22 sending other men, you're talking about the time period  
23 after August 25, 1999; correct?

24 A Yes.

14:14 25 Q Now, as it relates to the second paragraph, as

EXAMINATION BY MR. DAVENPORT

14:17 1 that I knew of.

2 Q Okay, what was that?

3 A When they put sheetrock in the chapel and the  
4 cultural area so they couldn't frame some door pockets.

14:17 5 Q Other than those three, any other ones you  
6 were personally aware of?

7 A No.

8 Q So as I understand it, you have no personal  
9 knowledge of Hales & Warner ever instructing a framing  
14:17 10 subcontractor or a framing subcontractor's employees as  
11 to the method in which they should raise a wall from the  
12 ground to an upright position; is that correct?

13 A That's correct.

14 Q And you have no personal knowledge whether or  
14:18 15 not Hales & Warner ever gave any instructions as to any  
16 framing subcontractor or its employee as to how to hold  
17 a wall that has not yet been tied into place after it's  
18 been raised; is that correct?

19 A Correct.

14:18 20 Q And you have no personal knowledge as to  
21 whether Hales & Warner ever gave any framing  
22 subcontractor instructions as to how to put a wall onto  
23 the bolts after it's been raised; is that correct?

24 A That's correct.

14:19 25 Q Now, as I've reviewed documents containing the

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EXAMINATION BY MR. BADARUDDIN

13:36 1 A All I know is according to this and what I  
2 talked with Ken about.

3 Q But you don't think that the job was right on  
4 schedule and Mr. Hales was just being unreasonable?

13:36 5 A No.

6 Q And then it talks about your construction  
7 subcontract, and I don't have any questions about that.

8 What, if anything, did you do after you  
9 received this letter?

13:36 10 A I called Ken Egbert.

11 Q And told him?

12 A That he needed more men on the job.

13 Q Did you do anything else?

14 A I think about this time I told him I would  
13:36 15 send some men down off of my crew, and on his payroll,  
16 and he could use them however he saw fit.

17 Q And these men of yours, were they experienced  
18 or inexperienced, or did it vary?

19 A They were experienced on churches.

13:37 20 Q And on framing?

21 A Framing churches.

22 Q How many men did you send?

23 A I don't remember. I think there was four or  
24 five.

13:37 25 Q Okay. Let me ask you about what I'm going to

EXAMINATION BY MR. BADARUDDIN

13:43 1 Q It was August 13 of 1999.

2 Do you know whether you were sending men to  
3 Hales & Warner's Highland 4 and 20 project before and  
4 after August 13 of 1999?

13:43 5 A It was after that.

6 Q Let me ask you about the second paragraph of  
7 Exhibit 37. It says, "From the very beginning, your  
8 superintendent interfered with the framing process."

9 Who is the superintendent?

13:43 10 A I don't know.

11 Q Well, do you remember what he was doing, how  
12 he was interfering with the framing process?

13 A Ken called me and told me that they wouldn't  
14 let him frame some of the walls the way he wanted to  
13:44 15 frame them, told him it wasn't effective framing the way  
16 they wanted them framed, and they wouldn't let him frame  
17 them in that manner. And I tried to help him out by  
18 calling down there and talking to -- I don't remember if  
19 I called Cliff Hales or who I called.

13:44 20 Q Do you know how Egbert wanted to frame?

21 A Yes.

22 Q How did he want to frame?

23 A Well, the walls we're talking about is -- he  
24 wanted to frame them -- they had a rake on them to  
13:44 25 follow the roof joist in one area, and he wanted 306350

EXAMINATION BY MR. BADARUDDIN

13:44 1 frame them that way, and they didn't want him to until  
2 the roof joists were up so they could make sure the rake  
3 on the wall matched the joist.

4 MR. DAVENPORT: Let me ask him, if you don't  
13:45 5 mind, did you say "rake"?

6 THE WITNESS: Slope on the wall, the rake on  
7 the wall.

8 Q (BY MR. BADARUDDIN) What is a "rake"?

9 A Slope.

13:45 10 Q Okay. That's the way Ken Egbert wanted to do  
11 it; correct?

12 A Yes.

13 Q How did the superintendent want him to do it?

14 A He wanted him to run the studs along and stand  
13:45 15 the wall, and when the joists were up, cut the studs off  
16 and put the top plates on.

17 Q Okay. And how was that difference resolved?  
18 In other words, who won out, Ken Egbert or the  
19 superintendent?

13:45 20 A The superintendent. He wanted it done his  
21 way, and I told Ken he had to do it his way if he  
22 couldn't resolve it.

23 MR. MINNOCK: "Do it his way," you mean do it  
24 the superintendent's way?

13:45 25 THE WITNESS: Do it the superintendent's way.

EXAMINATION BY MR. BADARUDDIN

13:45 1 Q (BY MR. BADARUDDIN) Well, then the sentence  
2 continues, referencing, I think, the superintendent  
3 "telling them that they couldn't do it the way they were  
4 used to framing and caused the framer many problems,  
13:46 5 costing extra time and material."

6 Is that what you've told me about or is there  
7 something else the superintendent was doing?

8 A It just cost extra material to frame it that  
9 way, because you can use shorter boards and it costs  
13:46 10 more time to frame it with -- standing the wall and then  
11 cutting the studs off later.

12 Q Was there some other aspect of the framing  
13 that the superintendent was interfering with?

14 A They wanted to frame the outside walls an inch  
13:46 15 higher and not cut the studs off; the superintendent  
16 didn't want them to do that.

17 Q And what did the plans or specifications call  
18 for, as far as one inch this way or that?

19 A You have to meet the specified elevations.

13:46 20 Q Sure. So Ken Egbert wanted to build it, say,  
21 one inch higher than the superintendent; correct?

22 A Yes.

23 Q What did the plans say?

24 A The plans said it was supposed to be one inch  
13:47 25 lower than Ken wanted to build it.



EXAMINATION BY MR. BADARUDDIN

13:47 1 Q I've got you.

2 In the second sentence of the second  
3 paragraph, it says, "This interference continued  
4 throughout the framing of the building."

13:47 5 What did you mean by that?

6 A I don't remember right now.

7 Q Was there some aspect of framing that the  
8 superintendent didn't interfere with?

9 A I don't know.

13:47 10 Q This paragraph seems to say from the very  
11 beginning that the superintendent interfered, and then  
12 it goes on, and then it says the interference continued  
13 through the framing of the building. The way I  
14 interpreted it is that the superintendent was  
13:47 15 interfering from the beginning to the end of your  
16 framing process.

17 MR. DAVENPORT: I'm going to object. You're  
18 asking him to speculate. As I understand his prior  
19 testimony, he wasn't even on the job site. I guess I  
13:48 20 just object to the lack of foundation. He doesn't have  
21 any personal knowledge as to what actually occurred.

22 MR. BADARUDDIN: I'm asking him to interpret  
23 his writing, if he's able to do so.

24 MR. MINNOCK: Do you understand what his  
13:48 25 question was? He was asking you what you meant by that

EXAMINATION BY MR. BADARUDDIN

13:48 1 in terms of the duration the interference lasted.

2 THE WITNESS: I don't remember other  
3 specifics. Those are the two specifics I remember. Ken  
4 told me that they weren't being able to frame like they  
13:48 5 wanted to, and so I put that in there to try and help  
6 Ken out.

7 Q (BY MR. BADARUDDIN) Okay. And what I'm  
8 really wondering is -- tell me if this is correct. Did  
9 the superintendent interfere with the framing process  
13:48 10 from the very beginning?

11 MR. DAVENPORT: Objection; lacks foundation.  
12 He's already testified he wasn't there.

13 MR. MINNOCK: You can answer.

14 THE WITNESS: Exterior walls are one of the  
13:49 15 first ones you frame, so that was the beginning of the  
16 project.

17 Q (BY MR. BADARUDDIN) Okay. Did his  
18 interference ever stop?

19 A I don't know.

13:49 20 MR. DAVENPORT: Same objection.

21 Q (BY MR. BADARUDDIN) And then the last  
22 sentence of the second paragraph, "If it wasn't wanting  
23 something done out of sequence, it was putting other  
24 subs and/or material in the way so the framers could not  
13:49 25 do their job."

000345

EXAMINATION BY MR. BADARUDDIN

13:49 1 Can you tell me what you meant by that  
2 sentence?

3 A I know of one instance. This was after that,  
4 I went down --

13:49 5 MR. DAVENPORT: Excuse me, after what?

6 THE WITNESS: It was before the completion of  
7 the building. It was during the framing of the roof. I  
8 had to go down and give -- I sent some other guys down  
9 on the job, and I -- they needed a paycheck from me on  
10 work that they'd done for me, so I took a paycheck down  
11 to them, and they had stacked sheetrock in the way  
12 inside the cultural hall/chapel area of the building.  
13 And that's what I meant by putting material in the way  
14 so that they couldn't complete the project.

13:50 15 Q (BY MR. BADARUDDIN) Was there any other thing  
16 you might have been referring to?

17 A That's the only thing I have personal  
18 knowledge of.

19 Q Okay.

13:50 20 (Off-the-record discussion)

21 MR. BADARUDDIN: Let me ask you about some  
22 other exhibits we've already marked. Let me ask you to  
23 look at Exhibit 29. That's the daily from August 4,  
24 1999.

13:51 25 MR. DAVENPORT: What is it?

000345

EXAMINATION BY MR. DAVENPORT

14:12 1 one, Exhibit 34. And then we reviewed the August 25,  
2 1999 letter, and I believe it was your testimony that it  
3 was after that letter that you'd sent some additional  
4 workmen to the site; is that correct?

14:12 5 A Yes.

6 Q Now, in the August 3, 2000 letter, I want to  
7 review a couple of sentences in there and make sure I  
8 have it in the right context.

9 In that letter to you of August 25, 1999, it  
14:13 10 refers to the fact that if the issue isn't remedied that  
11 they -- let me find the exact language -- I guess  
12 reserve the right to engage additional help; correct?

13 A Yes.

14 Q And what I guess I'm getting at is in the  
14:13 15 first paragraph of your letter, when we refer to that  
16 you, meaning Hales & Warner, looked for other framers to  
17 do the work but could not find any, was that after this  
18 August 25 letter you were referring to?

19 A No. It was before the beginning of the  
14:13 20 project.

21 Q Now, later on in the letter when you refer to  
22 sending other men, you're talking about the time period  
23 after August 25, 1999; correct?

24 A Yes.

14:14 25 Q Now, as it relates to the second paragraph 000 044

EXAMINATION BY MR. DAVENPORT

14:14 1 I understand it, you referred to an issue relating to  
2 these -- I think they were referred to as the sheer  
3 wall?

4 A Yes.

14:14 5 MR. MINNOCK: We're talking about 37?

6 MR. DAVENPORT: Yes.

7 Q (BY MR. DAVENPORT) Where the studs apparently  
8 stuck up past what would be normally the top plate; is  
9 that correct?

14:14 10 A Yes.

11 Q Now, the architect referred to that wall as  
12 being built at the site location from the ground up, not  
13 being something that was lifted up and put onto bolts.

14 Is that your understanding, or do you have any  
14:14 15 knowledge one way or the other as to how that particular  
16 wall was built?

17 A I don't know how they built it.

18 Q Can you build it ground up, so to speak,  
19 rather than building it -- well, kind of laying down and  
14:14 20 then lifting it up?

21 A It can be done, yes.

22 Q The way in which it was referenced as being  
23 built with the studs coming out the top is not an  
24 inappropriate way to build it, is it?

14:15 25 A No.

000343

EXAMINATION BY MR. DAVENPORT

14:15 1 Q Could you understand the logic behind building  
2 it the way they did, even though you may have felt that  
3 another way would have been cheaper in cost?

4 A Yes.

14:15 5 Q Now, I think you explained before this  
6 sentence where it says, "From the very beginning, your  
7 superintendent interfered with the framing process," and  
8 I believe you indicated that that was referring to this  
9 initial wall that was one inch too high; correct?

10 A Yes.

11 Q Would you agree that there was nothing  
12 inappropriate with the superintendent asking Ken Egbert  
13 to comply with the plans and build it an inch lower as  
14 specified by the plans?

14:16 15 A Correct.

16 Q Now, as I understand it, the references  
17 relating to this interference relate to those two  
18 issues, namely, number one, building the wall as  
19 specified by the plans, one inch lower than it had been  
14:16 20 built, and the other issue was relating to the sheer  
21 wall with the studs sticking out the top; correct?

22 A Are you saying that's the only issues?

23 Q Those were the two you were referring to as  
24 far as interference; right? That you had knowledge of?

14:17 25 A No. There was another issue that I know of, 2  
300042

EXAMINATION BY MR. DAVENPORT

14:17 1 that I knew of.

2 Q Okay, what was that?

3 A When they put sheetrock in the chapel and the  
4 cultural area so they couldn't frame some door pockets.

14:17 5 Q Other than those three, any other ones you  
6 were personally aware of?

7 A No.

8 Q So as I understand it, you have no personal  
9 knowledge of Hales & Warner ever instructing a framing  
14:17 10 subcontractor or a framing subcontractor's employees as  
11 to the method in which they should raise a wall from the  
12 ground to an upright position; is that correct?

13 A That's correct.

14 Q And you have no personal knowledge whether or  
14:18 15 not Hales & Warner ever gave any instructions as to any  
16 framing subcontractor or its employee as to how to hold  
17 a wall that has not yet been tied into place after it's  
18 been raised; is that correct?

19 A Correct.

14:18 20 Q And you have no personal knowledge as to  
21 whether Hales & Warner ever gave any framing  
22 subcontractor instructions as to how to put a wall onto  
23 the bolts after it's been raised; is that correct?

24 A That's correct.

14:19 25 Q Now, as I've reviewed documents containing the

Tab 5



FURTHER EXAMINATION BY MR. MORIARITY

12:37 1 time of the accident.

2 Did you witness the accident?

3 A No, I did not.

4 Q Did you know how many men were working on that  
12:37 5 wall at the time of the accident?

6 A No, I did not.

7 Q How did you find out how many men were working  
8 on that wall?

9 A Through conversations after the fact.

12:38 10 Q Okay. Did you ever at any time know before  
11 that wall was raised how many men were going to raise  
12 it?

13 A No, I did not.

14 Q Did you ever give any instructions to the men  
12:38 15 that were raising that wall as to how to raise that  
16 wall?

17 A No, I did not.

18 Q Did you ever give any instructions to anyone  
19 from Brent Reynolds Construction or Egbert Construction  
12:38 20 as to how to raise that wall?

21 A No.

22 Q Did you ever give any instructions at any time  
23 to anyone at Brent Reynolds Construction or Egbert  
24 Construction as to how to raise any wall?

12:38 25 A No.

000339

FURTHER EXAMINATION BY MR. MORIARITY

12:38 1 Q Did you ever tell anyone else from Hales &  
2 Warner, including Maurice Egbert, to give instructions  
3 to Egbert Construction or its employees or Brent  
4 Reynolds Construction or its employees as to how to  
12:39 5 raise a particular wall?

6 A No.

7 Q Are you aware of Maurice Egbert or anyone else  
8 at Hales & Warner Construction ever giving the Egbert  
9 employees who were working on the wall at the time of  
12:39 10 the accident instructions relating to how to raise that  
11 wall?

12 A No.

13 Q It is my understanding, based on your prior  
14 testimony, you do not have any personal knowledge as to  
12:40 15 how, in fact, the accident actually happened; is that  
16 correct?

17 A That's correct.

18 MR. DAVENPORT: That's all I have.

19 MR. MORIARITY: Now there's some more good  
12:40 20 news or bad news. What do you want first?

21 THE WITNESS: You have more questions.

22 MR. MORIARITY: What's that?

23 THE WITNESS: Let me assume again. You have  
24 more questions.

12:41 25 MR. MORIARITY: Only because of what these

800338A

EXAMINATION BY MR. MORIARITY

10:44 1 Q Now, the first wall that Ken Egbert  
2 Construction built was too tall, wasn't it?

3 A Yes.

4 Q How did you know that?

10:44 5 A How did I personally know?

6 Q Yes.

7 A Maurice called me.

8 Q Where did he call you at?

9 A On my cell phone.

10:45 10 Q What did he say?

11 A He told me the problem.

12 Q This is another problem that the problem  
13 solver would take care of; correct?

14 A Jointly, yes.

10:45 15 Q Jointly with whom?

16 A Maurice.

17 MR. DAVENPORT: Can we go off the record for a  
18 minute.

19 (Off-the-record discussion)

10:49 20 Q (BY MR. MORIARITY) Was Maurice Egbert an  
21 officer of Hales & Warner's partnership?

22 A It's a corporation and, no, he was not.

23 Q Was he a director?

24 A No.

10:49 25 Q He was an employee; correct?

000338

EXAMINATION BY MR. MORIARITY

10:49 1 A Yes.

2 Q Now, when he called you on your cell phone and  
3 told you that Egbert Construction had constructed a wall  
4 that was too tall, what, if anything, did you do about  
10:50 5 solving that problem?

6 A First of all, I asked him why, what their  
7 thinking was. Oftentimes, subcontractors come up with  
8 what they think is a better idea.

9 Q And what was Maurice's information that he  
10:50 10 gave you in response to your inquiry?

11 A It was so that they could use precut studs.

12 Q So what did you then do?

13 A I remember telling Maurice I'd get back to  
14 him. I mulled it over in my own mind, called him back,  
10:51 15 and told him to have them do it the way -- according to  
16 plans and specs.

17 Q This was the first wall that Egbert  
18 Construction had constructed; correct?

19 A I believe so.

10:52 20 Q And isn't it true that Maurice told you that  
21 when he had asked Ken Egbert why he was doing it that  
22 way, that Mr. Ken Egbert told Mr. Maurice Egbert that  
23 the reason was because BRC, specifically Mr. Reynolds,  
24 had told him to do it that way; is that correct?

10:52 25 A That was my understanding.

EXAMINATION BY MR. MORIARITY

09:35 1 Hales & Warner Construction?

2 A It's signed by Clifford Hales.

3 Q May I see it, please?

4 The date of this permit is May what, 1999?

09:35 5 A May 17.

6 Q How long did Hales & Warner have to construct  
7 this Highland project for the LDS Church?

8 A I'd have to review the documents.

9 Q What documents do you need to review?

09:36 10 A It should be in the spec book. It might be  
11 part of the contract.

12 Q Exhibit 21, in front of you there, tell me  
13 what that is.

14 A Specifications for the Highland building.

09:36 15 Q Yes. Now, can you look at that and tell me  
16 how long it was that Hales & Warner had to construct the  
17 Highland church for the LDS Church.

18 A Time of completion, "Time limit for completion  
19 of this work shall be 330 calendar days after time set  
09:36 20 forth in written notice to proceed as noted in the  
21 agreement."

22 Q And what page is that?

23 A It's invitation to bid, I'm assuming page 1.

24 Q And how many days was it?

09:37 25 A 330.

000536

EXAMINATION BY MR. MORIARITY

09:37 1 Q From what?

2 A From written notice to proceed.

3 Q And when did you receive the written notice to

4 proceed?

09:37 5 A I don't know the date.

6 Q Well, what would you have to look at to

7 determine that?

8 A They send me out a formal notice to proceed;

9 I'd have to find that.

09:37 10 Q Well, that's a document that pertains to the

11 Highland project, setting time limits; isn't that

12 correct?

13 A Yes.

14 Q You received it at least prior to the May 17

09:37 15 issuing of the permit as shown in Exhibit 22; isn't that

16 correct?

17 A I don't know that, sir.

18 Q You don't? Well, who sets the time schedules

19 for a project on behalf of Hales & Warner?

09:38 20 A I generally write the schedule.

21 Q Where is the schedule for the Highland

22 project?

23 A I'm assuming it's in my office somewhere.

24 Q When you prepare this schedule, do you break

09:38 25 it down as to various parts of the project, sir?

EXAMINATION BY MR. MORIARITY

09:38 1 A Yes.

2 Q Tell me what parts of the project you would  
3 set time limits on, and using as an example this  
4 Highland project.

09:39 5 A I would set a time limit on forming and  
6 pouring footings, a time limit to excavate for the  
7 footings, a time limit to form and pour the foundation,  
8 time to prepare the slab, a time limit to pour the slab.  
9 Basically, every portion of that work has a time affixed  
09:39 10 to it.

11 Q Why?

12 A It's a matter of coordination between subs.

13 Q Why is that important?

14 A It keeps everyone informed. They know what to  
09:40 15 expect up front. It makes jobs go smoother.

16 Q When you say it lets everyone know what to  
17 expect up front, what do you mean?

18 A It means that we send out a schedule, either  
19 with their contract or shortly after. They can review  
09:40 20 it and plan for those time schedules.

21 Q For example, Exhibit 14, what is that?

22 A It's a subcontract from Hales & Warner  
23 Construction to BRC, Incorporated.

24 Q Is the schedule attached to it?

09:41 25 A No, sir.

000934

Tab 6



FURTHER EXAMINATION BY MR. BADARUDDIN

14:21 1 contractor entering a contract with a subcontractor, is  
2 there?

3 A No.

4 Q And, in fact, there's a whole separate section  
14:22 5 in here on subcontractors, and I believe your prior  
6 testimony was it was obviously contemplated that Hales &  
7 Warner would use subcontractors and that they, in turn,  
8 could use sub subcontractors; is that your  
9 understanding?

14:22 10 A Yes.

11 Q And you didn't have a problem with that?

12 A No.

13 Q Okay. And so there's nothing out of the  
14 ordinary of maybe a subcontractor either engaging  
14:22 15 someone just to help them out, or even to do most of the  
16 work on their behalf, is there?

17 A Right.

18 Q Okay. In the contract, it also refers to,  
19 "And the architect shall be the owner's representative  
14:22 20 during the construction period, and shall have the  
21 authority to act on behalf of the owner, to the extent  
22 provided in the contract document."

23 That was the role being filled by Butler &  
24 Evans; correct?

14:22 25 A Yes.

000927

EXAMINATION BY MR. BADARUDDIN

13:30 1 working on any part of the Highland 4 and 20 project,  
2 because whatever it was they might be doing or the  
3 subcontractors were doing didn't meet your standards?

4 A No.

13:31 5 Q Did you inspect the Highland 4 and 20 project  
6 at any time after the work began?

7 When I say "work," I mean construction.

8 A Let's put it this way; I observed. I don't  
9 inspect.

13:31 10 Q Okay. What exactly did you do? You drove out  
11 there; right?

12 A We would hold monthly meetings.

13 Q Where?

14 A On the site.

13:31 15 Q Where?

16 A In the construction trailer.

17 Q In a trailer? And what did those entail?

18 A We would review the schedule, mostly payment  
19 requests, any subcontractor problems or change orders,  
13:31 20 things of that nature.

21 Q And what else, if anything, did you do?

22 A We would go out and look at the work that had  
23 been done.

24 Q You would walk around the site?

13:31 25 A Yes.

000323

EXAMINATION BY MR. BADARUDDIN

13:31 1 Q And look at the work that had been done?

2 Inspect it? What exactly did you do?

3 A We'd look at it, observe it.

4 Q And would you compare it to your plans or  
13:32 5 designs?

6 A Yes.

7 Q For what purpose?

8 A Make sure it was installed correctly.

9 Q In the Highland 4 and 20 project, was anything  
13:32 10 installed incorrectly?

11 A No.

12 Q Were all the components as you specified in  
13 your designs or otherwise?

14 A When you say "all," you know, we're all human.  
13:32 15 I couldn't have caught everything, but to my knowledge,  
16 yes.

17 Q Do you recall whether or not you made any  
18 change orders?

19 A Yes.

13:32 20 Q Did you make any change orders?

21 A I always do. I have yet to build one that we  
22 don't.

23 Q What sort of change orders did you make?

24 A I don't remember right offhand. I'd have to  
13:32 25 look back on that project. It's been too long ago to  
000000

FURTHER EXAMINATION BY MR. BADARUDDIN

14:30 1 on the phone?

2 A No.

3 Q What?

4 A Just tell the contractor, I'm not going to  
14:30 5 accept that subcontractor.

6 Q And that would just be oral?

7 A Yes.

8 Q Hales & Warner could not substitute a  
9 subcontractor that had been accepted by the LDS Church;  
14:31 10 correct?

11 MR. DAVENPORT: Objection; asked and answered.  
12 Go ahead.

13 THE WITNESS: I'm trying to figure out what  
14 you're after. I guess --

14:31 15 Q (BY MR. BADARUDDIN) Let me direct you to  
16 5.1 D.

17 It says "the contractor." That would be  
18 Hales & Warner.

19 A That's correct.

14:32 20 Q Shall not --

21 A Usually that's in writing.

22 Q What is in writing?

23 A Substitution of a contractor.

24 Q So he will give you the list of subs, which he  
14:32 25 did. And by not objecting, you're accepting them? 000324

FURTHER EXAMINATION BY MR. BADARUDDIN

14:32 1 A Yes. Or if they could not comply with the  
2 schedule, the subcontractor.

3 Q You get a list of subcontractors. You could  
4 reject them straightaway or wait for them to get into  
14:32 5 the project, and if they're just not meeting their time  
6 schedule, you could then reject them?

7 A Well, the general contractor would then say,  
8 We need to find another subcontractor. Are you okay  
9 with so and so.

14:32 10 Q Okay. So Hales & Warner should not have  
11 substituted any subcontractors unless notifying you that  
12 they were going to do so?

13 A Right.

14 Q What does it mean to substitute a  
14:33 15 subcontractor?

16 A Put somebody else in their place, another  
17 subcontractor.

18 (Off-the-record discussion)

19 MR. BADARUDDIN: That concludes my second set  
14:33 20 of questions. I don't know if anyone else has any.

21 MR. TOLK: I have none.

22 We'll reserve the right to have Mr. Schick  
23 review the transcript. Send that to our office and  
24 we'll get that to him.

25 (Exhibit No. 24 is marked for identification.)

000023

FURTHER EXAMINATION BY MR. MORIARITY

17:08 1 A No.

2 Q You weren't at the scene of the accident on  
3 the day of the accident?

4 A No.

17:08 5 Q You personally didn't ever instruct any Egbert  
6 employee to place the subject wall on the bolts in a  
7 certain method or by way of a certain operative detail,  
8 did you?

9 A No.

17:09 10 Q Does the LDS Church provide you with an  
11 overall time frame under which they want a project  
12 completed?

13 A Yes.

14 MR. DAVENPORT: That's all the questions I  
17:09 15 have.

16 FURTHER EXAMINATION

17 BY MR. MORIARITY:

18 Q What time frame did the LDS Church give you on  
19 this project?

17:09 20 A I'd have to look for sure.

21 Q Where would that be?

22 A It might be in that manual. It's probably  
23 nine months, but it could have been 11 months at that  
24 time.

17:09 25 Q You believe it's in the manual?

000J22

Tab 7

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IN THE FOURTH JUDICIAL DISTRICT - PROVO COURT  
UTAH COUNTY, STATE OF UTAH

=====

KELLY SMITH, et al,	)	MOTIONS
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
HALES & WARNER CONSTRUCTION,	)	Case 020401834
INC., et al	)	
	)	
	)	
Defendant.	)	Judge Claudia Laycock
	)	

=====

BE IT REMEMBERED that this matter came on for hearing  
before the above-named court on August 20, 2003.

WHEREUPON, the parties appearing and represented by  
counsel, the following proceedings were held:

CERTIFIED TRANSCRIPT  
(From Electronic Recording)

ORIGINAL

FILED 12/19/03  
Fourth Judicial District Court  
of Utah County, State of Utah  
CLERK  
CARMA B. SMITH, Deputy



1 that, that Hales and Warner cited over and over, the injury  
2 causing aspect, or Section 414, then I don't think our, under  
3 our facts we can meet that standard. But I believe that we  
4 meet, what we're arguing is a broader standard as articulated  
5 in paragraphs 18 and 19 that all they have to do is  
6 participate in the work.

7 THE JUDGE: All right. I understand your  
8 argument. Let me just ask you then, for purposes of my  
9 understanding that the framework of your argument, you're not  
10 really, as perhaps you did earlier, arguing that there are  
11 factual disputes? You know, we really as far as a summary  
12 judgment goes are we really, I mean, it's an A and B thing so  
13 we have disputed facts, if there are none then we're talking  
14 pure law. Is that where you are?

15 MR. BADARUDDIN: I think that's where we are.  
16 But from reading the Hales and Warner's reply memorandum  
17 they've accused us of taking unfair liberties with the  
18 facts. And we're entitled to a, we're entitled to any  
19 reasonable inference from any testimony or fact or evidence.

20 THE JUDGE: All right.

21 MR. BADARUDDIN: So I don't think we're really  
22 arguing about the facts, I mean--

23 THE JUDGE: Okay. I mean as, as I looked at the  
24 various references to the depositions and, and a, things, it  
25 looked to me like maybe the only real factual issue was the

1 whether or not there had been some control exerted by Hales  
2 and Warner over the height of the one wall, the one inch  
3 difference, and then there was the, how they were going to  
4 build the wall that was supposed to be raked to meet the  
5 trusses.

6 MR. BADARUDDIN: Right.

7 THE JUDGE: And then maybe there was one other  
8 thing.

9 MR. BADARUDDIN: No. Well, Brent Reynolds in his  
10 deposition made general references to interference and he  
11 used layman's--

12 THE JUDGE: Right. And then those letters.

13 MR. BADARUDDIN: Right.

14 THE JUDGE: And there was the issue there of  
15 whether he was just relying on hearsay, and I thought that  
16 became pretty clear he was relaying complaints he'd heard  
17 from Brent Reynolds, wasn't really telling things that he  
18 knew about, but that was Brent Reynolds' complaint. And in  
19 the end it seemed like in Brent Reynolds' deposition it  
20 turned into pretty minor stuff.

21 MR. BADARUDDIN: Well, no one really, none of  
22 the witnesses really did well on cross. You could kind of  
23 get them to admit whatever you wanted. But to the extent  
24 that that happened, this being summary judgment and us being  
25 the nonmovant, we go with the evidence that's favorable to

1 all in context and then I'll retake the bench.

2 MR. GOOCH: Okay. Thank you.

3 MR. DAVENPORT: Thank you.

4 (Tape turned off.)

5 COURT'S RULING

6 THE JUDGE: All right. We're back on the  
7 record. It looks like everyone is here.

8 First of all, I'd like to thank all the counsel for  
9 their memos, their briefing and the attachments. As we all  
10 admitted it took a great deal of time to get through it all.  
11 And it was spread all over my kitchen table last night until  
12 about midnight where I do any finest work.

13 The... I think all the parties have been well  
14 represented and a, I think we have effectively today narrowed  
15 the issues for my consideration. And I think factually, and  
16 this is what I asked plaintiff's counsel very carefully about  
17 it, I think factually there is not any dispute here at all.  
18 I think what it's all coming down to is an interpretation of  
19 Thompson v. Jess.

20 I'm going to outline some facts and I will ask the  
21 prevailing party to fill in those facts that may put it in  
22 better perspective, but as I indicated I don't think that we  
23 have any great facts in dispute. The a... And I don't have  
24 the dates at the top of my head so I'd ask you to put in the  
25 dates.

1 Those are page three, four, six and seven of our original  
2 memorandum that talk about the responsibilities of others who  
3 inspected the property.

4 Thank you.

5 MR. BADARUDDIN: By process of elimination if must  
6 be my turn.

7 THE JUDGE: It must be.

8 ARGUMENT BY MR. BADARUDDIN

9 MR. BADARUDDIN: I'm not going to spend a lot of  
10 time with the facts, Judge, because they're, the facts on  
11 which we rely are kind of listed in a serial fashion in our  
12 memorandums. But I just wanted to remind the Court that  
13 basically the, the operative facts I think that are involved  
14 is Jason Smith, Jose Luis and Michael Lewis were, were  
15 lifting a wall onto some bolts and in the course of doing so  
16 the well fell on Jason and Jason was killed.

17 Now if their, if Hales and Warner, if  
18 Mr. Davenport's quotation of a, Thompson versus Jess that,  
19 that Hales and Warner has to be involved in, in maybe telling  
20 Jason lift that wall onto those bolts, if that's what  
21 Thompson versus Jess requires, then we lose. He's, he's  
22 quoted Thompson versus Jess in this handout and extensively,  
23 extensively in his brief, and basically he makes frequent  
24 reference to, Hales and Warner and makes frequent reference  
25 to the injury causing aspect of the work.

1           We've quoted Thompson versus Jess extensively in  
2 our brief and we a, frequently refer to basically what, what  
3 the plaintiff says is the principal employer is liable if he  
4 actively participates in the work or project, basically  
5 leaving out that operative, reference to operative detail or  
6 injury causing aspect.

7           So what is it that Thompson says? Well, first  
8 thing Thompson does is they quote from Section 415 of the  
9 Second Restatement of Torts. Which by the way is the,  
10 that's, that's where Hales and Warner's quote came from,  
11 injury causing aspect, that's comment B, excuse me, comment C  
12 to section 414 of the Restatement. And the Supreme Court of  
13 Utah after it quotes section 14 says this doctrine is--

14           **THE JUDGE:** Will you give me the paragraph so I  
15 can follow?

16           **MR. BADARUDDIN:** Yes ma'am, Your Honor. Hales  
17 and Warner is quoting from paragraph 21 if you have the Lexis  
18 version of this case.

19           **THE JUDGE:** That's my most marked up version.

20           **MR. BADARUDDIN:** And it's at paragraph 979 P.2d at  
21 327, or paragraph 21.

22           **THE JUDGE:** I've got paragraph 21.

23           **MR. BADARUDDIN:** Okay. Although the requisite  
24 level?

25           **THE JUDGE:** Uh-huh (affirmative).

1 these two defendants.

2 Now as to the issues of breach, having found that  
3 there is no duty I don't know that I have to address breach,  
4 do I?

5 MR. DAVENPORT: Well, we prefer you do just  
6 because in case of an appeal. I don't know, I think it's  
7 pretty clear, but I think we prevail on those two issues  
8 too.

9 MR. BADARUDDIN: We would just argue that it's not  
10 before the Court. But breach of what if there's no duty?

11 THE JUDGE: Well, I think the way that I've  
12 approached it where I found that there's actually been no  
13 duty it leaves me having to say hypothetically if there had  
14 been a duty then I don't have any facts to support a breach.  
15 And I just didn't feel from what I had read that that was  
16 briefed in a manner that I could really make an ultimate  
17 decision on it. And so I'll hang my hat on, on the finding  
18 that there's no duty of care on the part of these two  
19 defendants and leave it at that.

20 Is there anything else I need to cover? Which of  
21 you... Well, I suspect you both want to write your own.

22 MR. DAVENPORT: I'll prepare it and circulate it  
23 to Rob if that's okay. And we'll, and then we'll (short  
24 inaudible, no mic).

25 THE JUDGE: Okay. Are there any legal theories

Tab 8

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IN THE FOURTH JUDICIAL DISTRICT - PROVO COURT

UTAH COUNTY, STATE OF UTAH

=====

KELLY SMITH, et al,	)	ORAL ARGUMENT
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
HALES & WARNER CONSTRUCTION,	)	Case 020401834
INC., et al	)	
	)	
	)	
Defendant.	)	Judge Claudia Laycock
	)	

\_\_\_\_\_

BE IT REMEMBERED that this matter came on for hearing  
before the above-named court on November 19, 2002.

WHEREUPON, the parties appearing and represented by  
counsel, the following proceedings were held:

CERTIFIED TRANSCRIPT  
(From Electronic Recording)

ORIGINAL

FILED 12/19/02  
Fourth Judicial District Court  
of Utah County, State of Utah  
CARMMA B. SMITH, Clerk  
Deputy



1           THE JUDGE:   Really?

2           MR. DAVENPORT:   Yes.  I think he understands that  
3 a control, being controlled by someone.  I think he can  
4 understand that it was Egbert Construction personnel that was  
5 controlling his action at the time.  They're the ones that  
6 told him what to do, versus a Hales and Warner employee  
7 telling him what to do.  I think a construction worker can  
8 understand what affirmative means as it relates to that  
9 control.

10           But let me just make one other point.  I think it  
11 does go to facts.  But, even if you were to strike out that  
12 fact we still have the affidavit of Michael Lewis saying that  
13 I was told to do this by Egbert Construction personnel.  
14 They instructed me to go put that wall into place.  There is  
15 no evidence here that Hales and Warner told them how to put  
16 that wall into place.  There is evidence here before the  
17 Court that Egbert Construction told them to put the wall into  
18 place.

19           Now, I'd say as it relates to the other affidavits  
20 submitted we are not here to the extent it has a, a statement  
21 at the end saying it's my opinion that Hales and Warner were  
22 not at fault.  We're not relying on that type of language.  
23 Or to the extent it says based upon discussions with other  
24 people it's my understanding that they don't know of  
25 anybody.  We're not relying on those hearsay statements.

1 defendant Hales and Warner, wasn't in the vicinity of the  
2 accident, didn't see how it happened. And I don't see how  
3 those facts will help this Court determine that not one or  
4 more of the defendants did not exercise affirmative control  
5 over the manner, method and means of the injury causing  
6 aspect of the work. And those are terms I'm sure we're  
7 going to get into with the a, summary judgment motion.

8 With regard to Thomas and the, the alleged hearsay  
9 statements that were introduced and that the Utah, I think  
10 it's the Supreme Court considered, those witnesses were  
11 deposed, they were asked questions about well how do you know  
12 that and who, who exactly told you to do such and such. We  
13 haven't that opportunity. And the attorney planning,  
14 planning meeting order gives us until January 31 to do fact  
15 discovery and June to do, complete discovery and we haven't,  
16 straying into our 56(f) motion, we haven't had an opportunity  
17 to do what the plaintiffs got to do in Thomas.

18 THE JUDGE: Okay. Well, at this point let me  
19 make a decision at least as to these two affidavits. I  
20 would like to look at the case law on the other.

21 The affidavit of Michael Lewis, and this is the  
22 first one that was submitted, by stipulation of the parties  
23 and also by my finding that it's hearsay, I will strike the  
24 second sentence of paragraph four that reads:

25 "It is my understanding from

1 then June 30 for everything else. Why would the order do  
2 that if that, if that amount of time was more than adequate,  
3 more than sufficient. I submit that the order sets out what  
4 the parties have agreed is sufficient, and we should have  
5 what the parties agree is sufficient.

6 The Downtown Athletic Club case, Downtown Athletic  
7 Club versus Harmon the court, a court shouldn't grant summary  
8 judgment if discovery is incomplete. Our discovery is  
9 incomplete.

10 THE JUDGE: Tell me exactly what you think  
11 you're going to find in your discovery, or that you should  
12 find in your discovery that's going to get you past the case  
13 law.

14 MR. BADARUDDIN: Well, the case law doesn't say  
15 you can't sue a general, well, it doesn't say you can't  
16 recover against a general contractor or an owner.

17 THE JUDGE: Right.

18 MR. BADARUDDIN: It says if the general contractor  
19 actively participates or exercises control over the means,  
20 method, manner of accident causing injury, accident causing  
21 work, the plaintiff can recover. Those, those are the sort  
22 of facts we hope to establish. We, I guess we get our start  
23 with the contract itself which we've objected to. But it  
24 provides the defendant CPB a variety of rights that are  
25 inconsistent with its, its insulation from liability.

Tab 9

Service: **Get by LEXSEE®**  
Citation: **979 p.2d 322**

*1999 UT 22, \*; 979 P.2d 322, \*\*;  
364 Utah Adv. Rep. 64; 1999 Utah LEXIS 25, \*\*\**

Trevor Thompson, Plaintiff and Appellant, v. Connie Jess, aka Connie Stroup, dba Motel 9/Rio  
Damian Motel, and Does 1 through 10, Defendants and Appellee.

No. 980127

SUPREME COURT OF UTAH

1999 UT 22; 979 P.2d 322; 364 Utah Adv. Rep. 64; 1999 Utah LEXIS 25

March 12, 1999, Filed

**SUBSEQUENT HISTORY: [\*\*\*1]**

As Corrected November 1, 1999. Released for Publication June 24, 1999.

**PRIOR HISTORY:** Eighth District, Duchesne County. The Honorable John R. Anderson.

**DISPOSITION:** Affirmed.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant workman, an employee of an independent contractor, sought review of an order of the Eighth District, Duchesne County (Utah), granting summary judgment to appellee motel owner in appellant's action for damages sustained while appellant worked on the property.


**OVERVIEW:** Appellee motel owner asked that a pipe be delivered to her motel property. When appellant workman, an employee of an independent contractor, arrived, appellee asked him to install the pipe. Appellant said that he did not have the preferred tools, but agreed to attempt installation. The pipe fell during installation and caused appellant's leg to be amputated. Appellant sued, claiming that appellee was negligent in her control of the situation and in failing to take special precautions. The trial court granted appellee's motion for summary judgment. On appeal, the court affirmed. Appellee had no duty under the "retained control" doctrine because she did not actively participate in the performance of the work; she did not impose means or methods of achieving the work, but merely stated her desired result: the pipe's installation. The "peculiar risk" and "inherently dangerous work" doctrines did not provide theories of relief for appellant, as they only applied to innocent third parties injured as a result of the independent contractor's negligence.


**OUTCOME:** The court affirmed the grant of summary judgment; appellee was not liable under the "retained control" doctrine because she did not actively participate in the and the "peculiar risk" and "inherently dangerous work" doctrines were inapplicable to appellant, as he was an employee of the independent contractor.


**CORE TERMS:** pipe, contractor, independent contractor, retained control, precautions, install, workers' compensation, physical harm, inherently dangerous, duty of care, plywood, backhoe, stub, contracted, peculiar risk, subject to liability, subcontractor, hired, owed, duty, motel, performing, summary judgment, third parties, installed, chain, general contractor,


beams, hires, agreeing


**LexisNexis (TM) HEADNOTES - Core Concepts - ♦ [Hide Concepts](#)**


[Civil Procedure](#) > [Summary Judgment](#) > [Summary Judgment Standard](#) 


**HN1**  Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. [More Like This Headnote](#)


[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [De Novo Review](#) 


**HN2**  The appellate court reviews the district court's grant of summary judgment for correctness, according no deference to the court's legal conclusions. [More Like This Headnote](#)


[Labor & Employment Law](#) > [Employer Liability](#) > [Tort Liability](#) > [Independent Contractors](#) 


**HN3**  Utah adheres to the general common law rule that the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants. This general rule recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety of the manner or method of performance implemented. The most commonly accepted reason for this rule is that, where the principal employer does not control the means of accomplishing the contracted work, the contractor is the proper party to be charged with the responsibility for preventing the risk arising out of the work, and administering and distributing it. [More Like This Headnote](#)


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**HN4**  The retained control doctrine is a narrow theory of liability applicable in the unique circumstance where an employer of an independent contractor exercises enough control over the contracted work to give rise to a limited duty of care, but not enough to become an employer or a master of those over whom the control is asserted. The duty in such situations is one of reasonable care under the circumstances and is confined in scope to the control asserted. [More Like This Headnote](#)


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**HN5**  Under the retained control doctrine, one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care. [More Like This Headnote](#)


[Labor & Employment Law](#) > [Employer Liability](#) > [Tort Liability](#) > [Independent Contractors](#) 


**HN6**  A principal employer is not subject to liability for injuries arising out of its contractor's work unless the employer actively participates in the performance of the work. [More Like This Headnote](#)


[Labor & Employment Law](#) > [Employer Liability](#) > [Tort Liability](#) > [Independent Contractors](#) 


**HN7**  Under the "active participation" standard, a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work. Such an assertion of control occurs, for example, when the principal employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished. It is not enough that he has merely a general right to order the


work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. [More Like This Headnote](#)


[Labor & Employment Law](#) > [Employer Liability](#) > [Tort Liability](#) > [Independent Contractors](#) 


**HN8**  To have "actively participated" in the contracted work, a principal employer must have exercised affirmative control over the method or operative detail of that work. The degree of control necessary for the creation of a legal duty must involve either the direct management of the means and methods of the independent contractor's activities or the provision of the specific equipment that caused the injury. Although the requisite level of control over the contractor's manner or method of work does not rise to the level of creating a master-servant relationship, the principal employer must exert such control over the means utilized that the contractor cannot carry out the injury-causing aspect of the work in his or her own way. A typical instance in which such an exertion of control might occur is when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. [More Like This Headnote](#)


[Labor & Employment Law](#) > [Employer Liability](#) > [Tort Liability](#) > [Independent Contractors](#) 


**HN9**  Under [Restatement \(Second\) of Torts § 413](#) (1965), one who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer fails to provide in the contract that the contractor shall take such precautions, or fails to exercise reasonable care to provide in some other manner for the taking of such precautions. [More Like This Headnote](#)


[Labor & Employment Law](#) > [Employer Liability](#) > [Tort Liability](#) > [Independent Contractors](#) 

**HN10**  Under [Restatement \(Second\) of Torts § 416](#) (1965), one who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise. [More Like This Headnote](#)

[Labor & Employment Law](#) > [Employer Liability](#) > [Tort Liability](#) > [Independent Contractors](#) 

**HN11**  Under [Restatement \(Second\) of Torts § 427](#) (1965), one who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger. [More Like This Headnote](#)

[Labor & Employment Law](#) > [Employer Liability](#) > [Tort Liability](#) > [Independent Contractors](#) 

**HN12**  The purpose of the "peculiar risk" doctrine and the "inherently dangerous work" doctrine, under [Restatement \(Second\) of Torts §§ 413, 416, and 427](#) (1965), is to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for the injuries. This purpose is not advanced when these

exceptions are applied in favor of a contractor's employees who are covered by workers' compensation. Thus, the doctrines have no application when the injured person is an employee of the independent contractor undertaking the allegedly dangerous work. [More Like This Headnote](#)

**COUNSEL:** John Paul Kennedy, Salt Lake City, and David J. Bennion, San Jose, Cal., for plaintiff.

Stephen G. Morgan, Joseph E. Minnock, Salt Lake City, for defendant.

**JUDGES:** RUSSON, Justice. Chief Justice Howe, Associate Chief Justice Durham, Justice Stewart, and Justice Zimmerman concur in Justice Russon's opinion.

**OPINIONBY:** RUSSON

**OPINION:**

**[\*\*323]** RUSSON, Justice:

**[\*P1]** Trevor Thompson appeals from the district court's grant of summary judgment in favor of Connie Jess, owner of four motels in Duchesne, Utah. The district court ruled, as a matter of law, that Thompson could not recover from Jess for injuries sustained while erecting a steel pipe for use as a sign post at one of Jess's motels. We affirm.

#### BACKGROUND

**[\*P2]** On or about March 9, 1995, Jess phoned AmeriKan Sanitation to arrange for the purchase and delivery of a used steel pipe. Jess requested a hollow pipe approximately 20 feet in length with an 8-inch diameter, one that would fit vertically over an **[\*\*324]** existing pipe stub secured to the ground in front of one of her motels, **[\*\*\*2]** which stub would support the larger pipe for use as a sign post. After agreeing upon a price, Jess requested that the pipe be delivered to her motel.

Two employees of AmeriKan Sanitation, Dennis Jensen and Trevor Thompson, delivered the pipe. When Jensen inquired where to place the pipe, Jess told him she wanted it installed over the existing pipe stub. Jensen responded that he had been instructed only to deliver the pipe and that he was not equipped to erect it in the best manner. Jess then asked Jensen if he would install the pipe, and he agreed to do so, believing he could improvise by hoisting the pipe with the winch truck and tools he had with him.

**[\*P4]** At that point, Jess's involvement in erecting the pipe ceased, and she went inside the motel. Jensen, who had hoisted similar pipes more than a hundred times before, determined on his own the manner and method of lifting and installing the pipe. For leverage, Jensen set up stabilizing poles in an A-frame formation. He then attached to the pipe a "system-seven" chain and a hook using a "trucker's hitch" or "logger's hitch"--a method of fastening pipe, which Jensen had used many times prior, whereby the weight of the pipe **[\*\*\*3]** pulls the chain tight. Jensen connected the chain to a winch cable that was strung over the A-frame and proceeded to hoist the pipe with the winch attached to his truck. Thompson stood near the back of the truck and attempted to guide the elevated pipe onto the pipe stub protruding from the ground.

**[\*P5]** After lifting the pipe as high as this method would allow, Jensen and Thompson discovered they were approximately two inches short of being able to raise the pipe over the top of the pipe stub. They decided to lower the pipe to the ground and obtain different equipment that would lift the pipe the requisite height. In the process of lowering the pipe,



however, slack developed in the chain, and the pipe slipped out, bouncing on the ground and striking Thompson in the leg. As a result of the injuries sustained from this incident, Thompson's leg was amputated below the knee. n1

----- Footnotes -----

n1 Shortly after the accident, Thompson applied for and began receiving workers' compensation benefits through his employer, Amerikan Sanitation.

----- End Footnotes----- **\*\*\*4**

**[\*P6]** The day following the accident, Jensen returned to the site with a backhoe and erected the pipe without problem using the same chain-hitch method. Both Jensen and Thompson, as well as their employer, Amerikan Sanitation, testified after the accident that had they known in advance they would be asked to raise and install the pipe, they would have arrived prepared with a backhoe or crane in the first instance. However, after agreeing to install the pipe for Jess, neither Jensen nor Thompson informed her that a backhoe or crane was necessary to do the job. Rather, as reflected by the record, Jensen simply told Jess that although he lacked the best equipment, he would nonetheless erect the pipe. Jensen devised his own technique for the task, and Thompson helped him in the attempt.

**[\*P7]** In April 1997, Thompson filed suit against Jess, alleging that she was negligent in the control she exercised over installation of the pipe and in failing to take or require special precautions in the performance of the job. After the parties conducted discovery, Jess moved for summary judgment, arguing that (1) she did not direct or otherwise control the manner or method of installing the pipe, and therefore **\*\*\*5** owed no duty of care to Thompson or Jensen to insure they raised the pipe safely, and (2) she cannot be held vicariously liable for the negligent acts of the independent contractor she hired, regardless of whether the work involved peculiar risks or was inherently dangerous, because the injuries were suffered by an employee of that independent contractor. The district court granted Jess's motion for summary judgment, ruling that under Dayton v. Free, 46 Utah 277, 284-85, 148 P. 408, 411 (1914), Jess owed Thompson no duty of protection or warning concerning performance of the task because she did not exercise control over the manner or method utilized to install the pipe.

**[\*P8]** On appeal, Thompson contends that the district court erred in granting summary judgment. Thompson argues that by requesting **\*\*\*325** that he and Jensen erect the pipe when they were not obligated to do so, and by directing them to install the pipe over the existing pipe stub, Jess asserted control over the work and thereby assumed a duty of care to him under the "retained control" doctrine set forth in section 414 of the Restatement. n2 Thompson also submits that, under section 413 of the Restatement, the work Jess **\*\*\*6** requested posed "a peculiar unreasonable risk of physical harm to others" and that, consequently, Jess had a duty to take appropriate safety precautions. By not taking measures to ensure the safety of the work, asserts Thompson, Jess breached her duties of care under these provisions. Thompson argues that Jess knew or should have known from erecting sign posts at her other motels that a crane or backhoe was required to install the pole safely.

----- Footnotes -----

n2 All Restatement references herein are to Restatement (Second) of Torts (1965).

----- End Footnotes-----

**[\*P9]** As an alternative theory of liability, Thompson posits that even if Jess was not directly negligent herself, she nonetheless should be held vicariously liable for the contractor's negligence--in this case, the negligence of Thompson's co-worker, Jensen--because Jess knew the work she requested involved a peculiar risk of physical harm to others. On this point, Thompson urges this court to adopt and apply in his favor sections 416 and 427 of the Restatement. Section 416 imposes vicarious **\*\*\*7** liability on the principal employer for the contractor's negligence if the employer knows or should know that the work involves "a peculiar risk of physical harm to others." Section 427 imposes the same liability for work involving "a special danger to others . . . inherent in or normal to the work."

**[\*P10]** In response, Jess counters that the trial court did not err in granting summary judgment because (1) she did not control the manner or method in which Thompson and Jensen attempted to lift and install the pole, and therefore owed them no duty of care under the "retained control" doctrine; and (2) sections 413, 416, and 427 of the Restatement provide causes of action to "others"--meaning innocent third parties--not to employees of the independent contractor hired to perform the allegedly dangerous work.

**[\*P11]** Thus, the principal issues before us are (1) whether Jess owed Thompson a duty of care under the "retained control" doctrine, and (2) whether the "peculiar risk" and "inherently dangerous work" doctrines under sections 413, 426, and 427 of the Restatement provide causes of action in favor of employees of the contractor hired to perform the work at issue.

#### STANDARD OF REVIEW

**[\*P12]** <sup>HN1</sup> **\*\*\*8** Summary judgment is proper only when "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Doit, Inc. v. Touche, Ross & Co., 926 P.2d 835, 841 (Utah 1996). <sup>HN2</sup> We review the district court's grant of summary judgment for correctness, according no deference to the court's legal conclusions. See id.

#### ANALYSIS

<sup>HN3</sup> **[\*P13]** Utah adheres to the general common law rule that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." Restatement § 409; see Gleason v. Salt Lake City, 94 Utah 1, 16, 74 P.2d 1225, 1232 (1937) (noting applicability of said general rule and certain exceptions to it). This general rule recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety of the manner or method of performance implemented. See W. Prosser & W. Keaton, *The Law of Torts* 509 (5th ed. 1984). The most commonly accepted reason for this rule is that, where the principal employer does not control the means of accomplishing **\*\*\*9** the contracted work, the contractor "is the proper party to be charged with the responsibility for preventing the risk [arising out of the work], and administering and distributing it." Id.

**[\*P14]** In the case at bar, Thompson does not contend that by agreeing to install the pipe over the existing pipe stub, he and Jensen **\*\*\*326** became Jess's employees. Rather, Thompson relies entirely on certain exceptions to the general rule of nonliability of an employer of an independent contractor: namely, the "retained control" doctrine, and the "peculiar risk" or "inherently dangerous work" doctrine. We address each in turn.

#### A. "Retained Control" Doctrine

**[\*P15]** Thompson charges that Jess should be subject to liability because, by requesting that the pipe be erected and instructing that it be installed over the existing pipe stub, she controlled and directed the work that caused his injuries. <sup>HN4</sup> In so arguing, Thompson on the retained control doctrine, which, as set forth more fully below, is a narrow theory of liability applicable in the unique circumstance where an employer of an independent contractor exercises enough control over the contracted work to give rise to a limited duty of care, **[\*\*\*10]** but not enough to become an employer or a master of those over whom the control is asserted. The duty in such situations is one of reasonable care under the circumstances and is confined in scope to the control asserted.

**[\*P16]**

In 1965, the American Law Institute promulgated the retained control doctrine as section 414 of the Restatement, which states:

§ 414. Negligence in Exercising Control Retained by Employer

<sup>HN5</sup>

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts § 414 (1965). This doctrine has not been adopted formally in Utah, although similar principles were discussed in this court's early decision of Dayton v. Free, 46 Utah 277, 148 P. 408, 411-12 (Utah 1914).

**[\*P17]** In Dayton, this court addressed whether a company that employed an independent contractor was liable for injuries sustained by an employee of that contractor during the blasting of an underground tunnel. See **[\*\*\*11]** 148 P. at 411-12. Citing a number of authorities from other states, the injured employee claimed that because the company, by contract, reserved to itself certain rights pertaining to overall management of the contract work, "the relation between the company and the contractors was not that of independent, but nonindependent, contractors." 148 P. at 411. As a result, argued the injured employee, he should be allowed to recover against the company. The court disagreed, stating:

[The cited authorities] relate to instances and cases where the proprietor or employer reserved or exercised the right to superintend, direct or control the work, not only with respect to results, but also with reference to methods of procedure or means by which the result was to be accomplished, where the will and discretion of the contractor as to the time and manner of doing the work or the means and methods of accomplishing the results were subordinate and subject to that of the owner or proprietor. We do not find anything in the contract or the evidence [identified by the plaintiff] which brings this case within such a rule.

Id. The court concluded that the injury had been caused by the manner **[\*\*\*12]** in which the work was performed rather than by the nature of the work itself. See 148 P. at 412. Because the company exercised no control over the contractor's manner of work, it owed the plaintiff no duty to warn or guard him "against dangers incident to or created by the prosecution of the work, and certainly not to guard or protect him against the negligence of those who had employed him or with whom he labored." Id.

**[\*P18]** This court has not had opportunity to determine the precedential value of Dayton with respect to the retained control doctrine. Several federal courts applying Utah law, however, have been called upon to do so. <sup>HN6</sup> Those courts uniformly have determined that under Dayton, a principal employer is not subject to liability for injuries arising out of its contractor's work unless the employer "actively participates" in the performance of the work.

For instance, in *Simon v. Deery Oil*, 699 F. Supp. 257, 258 **[\*\*327]** (D. Utah 1988), the court cited *Dayton* for the proposition that a principal employer "retaining an independent contractor to render services has no duty to warn or train employees of the contractor, nor must the principal protect the contractor's **[\*\*\*13]** employees from the contractor's own negligence, unless the principal has 'actively participated' in the project." See also *Sewell v. Phillips Petroleum Co.*, 606 F.2d 274, 276 (10th Cir. 1979), cert. denied, 444 U.S. 1080, 62 L. Ed. 2d 763, 100 S. Ct. 1031 (1980); *Texaco, Inc. v. Pruitt*, 396 F.2d 237, 240 (10th Cir. 1968); *Erwin v. Kern River Gas Transmission Co.*, 1997 Tex. App. LEXIS 6685, \*8 (addressing Utah law on issue). We believe the standard relied upon in these cases is correct, and we formally adopt the same. Elaboration on the contours of the standard is needed, however.

**[\*P19]** Under the "active participation" standard, a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work. See *Conklin v. Cohen*, 287 So. 2d 56, 60 (Fla. 1973) (holding that under "active participation" standard, principal employer must directly influence manner in which work is performed; no duty arises from "passive nonparticipation"). Such an assertion of control occurs, for example, when the principal employer directs that **[\*\*\*14]** the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished. See, e.g., *Lewis v. N.J. Riebe Enterprises, Inc.*, 170 Ariz. 384, 825 P.2d 5, 7-8 (Ariz. 1992) (imposing liability where subcontractor's employee was injured as result of new, less safe method of work required by general contractor); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) (imposing liability where subcontractor was ordered to operate backhoe dangerously close to plaintiff).

**[\*P20]** The comments to section 414 of the Restatement provide guidance as to the "active participation" requirement:

In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled **[\*\*\*15]** as to his methods of work, or as to operative detail.

Restatement (Second) of Torts § 414 cmt. c. (1965) (emphasis added). **HN8** In other words, to have "actively participated" in the contracted work, a principal employer must have exercised affirmative control over the method or operative detail of that work. See *Grahn v. Tosco Corp.*, 58 Cal. App. 4th 1373, 1997 Cal. App. LEXIS 897, \*37-38, rev. denied, 1998 Cal. LEXIS 494. "The degree of control necessary for the creation of a legal duty must involve either the direct management of the means and methods of the independent contractor's activities or the provision of the specific equipment that caused the injury." *Id.*

**[\*P21]** Although the requisite level of control over the contractor's manner or method of work does not rise to the level of creating a master-servant relationship, cf. Restatement § 414 cmt. a, the principal employer must exert such control over the means utilized that the contractor cannot carry out the injury-causing aspect of the work in his or her own way. Cf. *id.* cmt. c. A typical instance in which such an exertion of control might occur is "when a principal contractor entrusts a part of the **[\*\*\*16]** work to subcontractors, but himself or through a foreman superintends the entire job." *Id.* cmt. b.

**[\*P22]** The requisite level of control over the contractor's work is well illustrated in *Lewis*, 825 P.2d at 7-8. There, the general contractor, Riebe, hired the subcontractor, Garges, to install a pitched roof constructed of beams and sheets of plywood nailed to the beams. After

Garges had already put the plywood in place, Riebe's on-site superintendent told Garges the roof was improperly installed and ordered it redone, specifying the use of H-clips to secure the plywood. Pursuant to this **[\*\*328]** instruction, Garges employees began removing the nails from each row of plywood, installing H-clips, and then renailing the plywood to the beams. Soon thereafter, however, Riebe's superintendent instructed the Garges employees to use a different, faster method of dislodging the plywood by banging it from underneath. Because this method resulted in plywood being dislodged faster than H-clips could be installed, numerous sheets of plywood were left lying loose on top of the beams. A Garges employee stepped on the loose plywood and fell through the roof, incurring serious injuries. See *id.*

**[\*P23]** **[\*\*\*17]** Thus, in Lewis, the general contractor interfered with the subcontractor's method of performing the work and instructed that a quicker but less safe method be implemented. A worker was injured as a direct result of the dangerous condition created by the general contractor's method. The court concluded, on the basis of these facts, that the general contractor exercised sufficient control over the means used in performing the contracted work to subject it to retained control liability. See 825 P.2d at 14-15.

**[\*P24]** Applying these standards to the case at hand, we conclude that Jess did not actively participate in the manner in which Thompson and Jensen attempted to lift and install the steel pipe. After agreeing to erect the pipe, Jensen, not Jess, determined the method for bringing about the desired result. Jensen decided to proceed with the equipment he had with him, and by Jensen's own design, he and Thompson set up the A-frame for use as leverage, fastened the chain to the pipe using the "trucker's hitch" or "logger's hitch" technique, and hoisted the pipe with the winch on Jensen's truck. When this method was unsuccessful, Jensen and Thompson attempted to lower the pipe to the **[\*\*\*18]** ground and, in the course of doing so, lost control of the pipe. Thompson's injury was caused by the manner of performance, implemented by Jensen, over which Jess exercised no direction, control, or supervision. The only control Jess exerted was in directing that the pipe be installed over the pipe stub. This amounted merely to control over the desired result, which is insufficient to come within the retained control doctrine.

**[\*P25]** Particularly revealing is the fact that Jensen returned to the site with a backhoe the day after the accident and erected the pipe without incident using the same chain-hitch method. Nothing precluded Jensen from retrieving the backhoe before attempting to hoist pipe in the first instance. The backhoe was stored only two to three miles away at the time, and nothing suggests that Jess required Jensen to install the pipe at the moment of delivery. Jensen alone chose to attempt installation of the pipe without a backhoe.

**[\*P26]** Thus, because Jess did not actively participate in or otherwise exercise affirmative control over the manner or method of performance utilized by Jensen and Thompson, she owed Thompson no duty of care under the retained control doctrine. **[\*\*\*19]** n3 The trial court was correct in so ruling.

- - - - - Footnotes - - - - -

n3 We note that the term "retained control" doctrine is somewhat of a misnomer. Under the standards announced herein, a duty of care is imposed if the principal employer asserts affirmative control over or actually participates actively in the manner of performing the contracted work. "Retained," to the extent the word implies passivity or nonaction, is inapt.

The term "retained control" may have a more syntactically correct application to sophisticated parties who, by contract, stipulate which party will control the manner or method of work or the safety measures to be taken--such as in contracts between general contractors and subcontractors involved in construction projects. See Dayton, 148 P. at 411

(noting that under terms of contract, principal employer did not reserve right to direct or control prosecution of work or any of contractor's workers). The issue, however, of whether a duty of care may be imposed solely as a result of a such a contractual reservation is not before us.

----- End Footnotes----- **\*\*\*20]**

#### B. "Peculiar Risk" or "Inherently Dangerous Work" Doctrine

**[\*P27]** Thompson also relies on sections 413, 416, and 427 of the Restatement and urges this court to adopt those sections in his favor as exceptions to the general rule that one who employs an independent contractor is not liable for injuries arising out of the contract work. These sections are similar in wording and are commonly referred to as the "peculiar risk" doctrine, see, e.g., Privette v. Superior Court, 5 Cal. 4th 689, **\*\*\*329]** 854 P.2d 721, 725 (Cal. 1993) (en banc), or the "inherently dangerous work" exception, see, e.g., Wagner v. Continental Cas. Co., 143 Wis. 2d 379, 421 N.W.2d 835, 840 (Wis. 1988).

**[\*P28]** Section 413 is premised on direct liability for a principal employer's negligence in failing to insure that special precautions are taken in the contractor's work. That section provides:

§ 413. Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor

HN9

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special **\*\*\*21]** precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

(a) fails to provide in the contract that the contractor shall take such precautions, or

(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

Restatement (Second) of Torts § 413 (1965).

**[\*P29]** Sections 416 and 427 impose vicarious liability on the principal employer for the contractor's negligence, even if the employer reasonably provides for precautions in the contract work. Those sections state:

§ 416. Work Dangerous in Absence of Special Precautions

HN10

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

....

§ 427. Negligence as to Danger Inherent in the Work

HN11

One who employs **\*\*\*22]** an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the

work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Restatement (Second) of Torts §§ 416, 427 (1965). <sup>HN12</sup>✦ The purpose of these sections is "to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for the injuries." Privette, 854 P.2d at 725. Privette held that this purpose is not advanced when these exceptions are applied in favor of a contractor's employees who are covered by workers' compensation. See *id.* at 726-30; see also Wagner, 421 N.W.2d at 840-44 (detailing reasons for not adopting sections 413, 416, and 427 in favor of employees of independent contractors).

**[\*P30]** We agree with Privette and Wagner and decline to apply section 413, 416, **[\*\*\*23]** or 427 of the Restatement in the manner Thompson proposes. Whether based on direct negligence under section 413 or vicarious liability under sections 416 and 427, these provisions have no application when the injured person is an employee of the independent contractor undertaking the allegedly dangerous work. The majority of jurisdictions that have examined this issue have decided likewise. n4

----- Footnotes -----

n4 See Morris v. City of Soldotna, 553 P.2d 474, 481-82 (Alaska 1976); Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 403 P.2d 330, 337-39 (Ariz. Ct. App. 1965); Jackson v. Petit Jean Elec. Coop., 270 Ark. 506, 606 S.W.2d 66, 69 (Ark. 1980); Privette, 854 P.2d at 726-31; Ray v. Schneider, 16 Conn. App. 660, 548 A.2d 461, 466 (Conn. App. Ct. 1988); Peone v. Regulus Stud Mills, 113 Idaho 374, 744 P.2d 102, 105-06 (Idaho 1987); Johns v. New York Blower Co., 442 N.E.2d 382, 386-88 (Ind. Ct. App. 1982); Dillard v. Strecker, 255 Kan. 704, 877 P.2d 371, 385 (Kan. 1994); King v. Shelby Rural Elec. Coop. Corp., 502 S.W.2d 659, 661-63 (Ky. 1973); Parker v. Neighborhood Theatres, 76 Md. App. 590, 547 A.2d 1080, 1082-83 (Md. Ct. Spec. App. 1988); Vertentes v. Barletta Co., 392 Mass. 165, 466 N.E.2d 500, 502-03 (Mass. 1984); Zueck v. Oppenheimer Gateway Properties, 809 S.W.2d 384, 390 (Mo. 1991) (en banc); Sierra Pacific Power Co. v. Rinehart, 99 Nev. 557, 665 P.2d 270, 273-74 (Nev. 1983); Donch v. Delta Inspection Services, Inc., 165 N.J. Super. 567, 398 A.2d 925, 927-29 (N.J. Super. Ct. App. Div. 1979); New Mexico Electric Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634, 637-38 (N.M. 1976); Whitaker v. Norman, 75 N.Y.2d 779, 551 N.E.2d 579, 580, 552 N.Y.S.2d 86 (N.Y. 1989); Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445, 449-54 (N.D. 1994); Curless v. Lathrop Co., 65 Ohio App. 3d 377, 583 N.E.2d 1367, 1376-78 (Ohio Ct. App. 1989); Cooper v. Metropolitan Government of Nashville, Davidson County, 628 S.W.2d 30, 32-33 (Tenn. Ct. App. 1981); Humphreys v. Texas Power & Light Co., 427 S.W.2d 324, 330-31 (Tex. Civ. App. 1968); Tauscher v. Puget Sound Power & Light Co., 96 Wash. 2d 274, 635 P.2d 426, 428-31 (Wash. 1981) (en banc); Wagner, 421 N.W.2d at 839-44; Stockwell v. Parker Drilling Co., 733 P.2d 1029, 1031-33 (Wyo. 1987).

----- End Footnotes----- **[\*\*\*24]**

**[\*\*330]** P31 Along with Privette and Wagner, Zueck v. Oppenheimer Gateway Properties, 809 S.W.2d 384 (Mo. 1991) (en banc), is representative of those decisions. As expounded in Zueck, if employees of an independent contractor are allowed to avail themselves of the peculiar risk doctrine or inherently dangerous work exception, the principal employer is placed in an untenable position: he or she must anticipate activities that are "inherently dangerous" to the contractor's employees and, if the dangers inhere to the manner in which the work is done, protect against such dangers despite the fact that the employees are best able to identify and address whatever hazards are involved in their own method of

performance. Oftentimes, both the risks involved and the protections necessary to avoid the risks are beyond the principal employer's knowledge or capacity. Thus, to avoid the liability imposed by the peculiar risk doctrine or inherently dangerous work exception, the principal employer has an incentive to direct his or her own employees to do the work despite their lack of expertise. Such a choice would limit the principal employer's exposure to that under the Workers' Compensation **\*\*\*25** Act but, at the same time, increase the risk of injury to the principal's employees and innocent third parties. Placing principal employers in such a position distorts the objectives of tort law, and for that reason, the peculiar risk doctrine or inherently dangerous work exception should not apply in favor of employees of the independent contractor performing the work. See Zueck, 809 S.W.2d at 387-88.

**[\*P32]** In addition, sections 413, 416, and 427 each speak of liability for injury "to others," which implies third parties rather than employees of the independent contractor carrying out the contracted work. An early draft of the Restatement included a special note which, though ultimately not adopted, provided guidance on this point:

**Special Note.** The rules stated in this Chapter are, in general, not applicable to make the defendant who hires an independent contractor liable to two classes of persons.

One consists of the employees, or servants, of the defendant himself. . . .

The other class of plaintiffs not included in this Chapter consists of employees of the independent contractor. . . . One reason why such responsibility has not developed has been that the **\*\*\*26** workman's recovery is now, with relatively few exceptions, regulated by workmen's compensation acts. . . . While workmen's compensation acts do not infrequently provide for third-party liability, it has not been regarded as necessary to impose such liability upon one who hires the contractor, since it is expected that the cost of the workmen's compensation insurance will be included by the contractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him.

Restatement (Second) of Torts (Tent. Draft No. 7, Apr. 16, 1962) ch. 15, special note at 17-18. The American Law Institute omitted this note due to lack of uniformity of the effect of the various state workers' compensation acts but indicated nonetheless that "certainly the prevailing point of view is that there is no liability on the part of the employer of the independent contractor." 39 A.L.I. Proc. 244, 247 (1962); see also Monk v. Virgin Islands Water & Power Auth., 53 F.3d 1381, 1390-91 (3d Cir.), cert. denied, 516 U.S. 914, 116 S. Ct. 302, 133 L. Ed. 2d 207 (1995) (referring to same language of tentative draft of Restatement).

**[\*P33]** The rationale set forth in the special note quoted above is **\*\*\*27** persuasive and provides **\*\*\*31** additional support for our holding that sections 413, 416, and 427 of the Restatement have no application to employees of independent contractors performing the work at issue. The phrase "to others" in these sections does not encompass such employees, but rather, innocent third parties. This is consistent with the analysis in Dayton and with Tenth Circuit case law applying Dayton to this issue. See Eutsler v. United States, 376 F.2d 634, 636 (10th Cir. 1967) (concluding that phrase "to others" as contained in Restatement § 413 does not include employees of independent contractors); see also United States v. Page, 350 F.2d 28 (10th Cir. 1965), cert. denied, 382 U.S. 979, 86 S. Ct. 552, 15 L. Ed. 2d 470 (1966) (acknowledging that general law on subject reaches same conclusion as to Restatement § 427).

**[\*P34]** Holding otherwise would create unfair and anomalous results under Utah's workers' compensation system:

Courts and legal commentators have expressed concern that to allow an independent contractor's employees who incur work-related injuries compensable under the workers'



compensation system to also seek damages under the doctrine of peculiar risk from the person who **\*\*\*28** hired the contractor would give those employees an unwarranted windfall. As these authorities point out, to permit such recovery would give these employees something that is denied to other workers: the right to recover tort damages for industrial injuries caused by their employer's failure to provide a safe working environment. This, in effect, would exempt a single class of employees, those who work for independent contractors, from the statutorily mandated limits of workers' compensation.

Privette, 854 P.2d at 729. Furthermore, given that the exclusive remedy provision of the workers' compensation scheme limits the liability of independent contractors to coverage premiums, permitting an employee of the contractor to recover tort damages against the nonnegligent landowner who employed the contractor would allow for the inequitable result that a nonnegligent person's liability for an injury is greater than that of the person whose negligence actually caused the injury. n5

----- Footnotes -----

n5 We note that in Utah, this unfairness is exacerbated by the fact that an employee who recovers against a third party is obligated to reimburse the workers' compensation insurer for any amounts paid to or on behalf of the employee. See Utah Code Ann. § 34A-2-106(5) (1997). Thus, if Thompson recovered from Jess for any negligence of Jensen in raising the pipe, he would be required to reimburse AmeriKan Sanitation's insurer for benefits received. Such a reallocation would result in Jess's being exclusively liable for Thompson's injuries.

----- End Footnotes----- **\*\*\*29**

**\*P35** In the present case, there is no question that Thompson was an employee of the independent contractor, AmeriKan Sanitation, at the time of his injury. He was involved in attempting to install the pipe and, indeed, has been receiving workers' compensation benefits through AmeriKan Sanitation since the accident. We have no reason to question the determination (already made as a prerequisite to Thompson's qualifying for such benefits) that Thompson was acting within the course of his employment when injured. See Allen v. Industrial Comm'n, 729 P.2d 15, 18 (Utah 1986) (noting that to qualify for workers' compensation benefits, injury must be "by accident" and must arise "in the course of employment"). Accordingly, the trial court correctly determined as a matter of law that Thompson's sole recourse is workers' compensation benefits.

## CONCLUSION

**\*P36** In view of the foregoing analysis, summary judgment in favor of Jess was proper.

Affirmed.

**\*P38** Chief Justice Howe, Associate Chief Justice Durham, Justice Stewart, and Justice Zimmerman concur in Justice Russon's opinion.

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