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Kelly Smith and Lisa Nielsen, Individually and as
Heirs of Jason Kelly Smith, Deceased v. Hales and
Warner Construction, Inc., and Corporation of the
Presiding Bishop of the Church of Jesus Christ of
Latter Day Saints : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS
STATE OF UTAH

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

vs

HALES & WARNER CONSTRUCTION, INC.,
and
CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS
CHRIST OF LATTER DAY SAINTS,
Appellees.

COURT OF APPEALS CASE NO. 20030901-CA

REPLY BRIEF OF THE APPELLANTS TO THE BRIEF OF APPELLEE CPB

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

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UTAH APPELLATE COURTS

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REPLY ARGUMENT AND CITATION TO AUTHORITY

I. An Owner of Property may become Vicariously Liable for the Actions of its General Contractor.

Appellee CPB possessed the contractual right and power, (and exercised same), to accept or reject any subcontractor or employee selected by Appellee Hales and Warner. In doing so, CPB became liable under Utah law for the negligence of Hales & Warner and the death of Jason Smith.

CPB argues (1) under Utah law, a Property owner's possession of the right to accept or reject any subcontractor or employee does not, on its own, subject the Property owner to liability for the negligent acts of its statutory employees; and (2), even if possession of such a right to choose employees of subcontractors or general contractors on its own does subject a Property owner to liability, CPB argues that it never possessed such a right in the first place. Appellee CPB is wrong on both elements.

Ludlow v. Industrial Commission, 65 UT 168, 179, 235 P. 884, 888 (Utah 1925) and Lodge v. Industrial Commission, 562 P.2d 227, 228 (Utah 1977) both hold that "(a)n independent contractor can employ others to do the work and accomplish the contemplated result without the consent of the

contractee, while an employee cannot substitute another in his place without the consent of the employer..." Appellee CPB criticizes these cases based on their age. Of course, while the age of a case should be considered in assessing its precedential value, the longer a case withstands the test of time, the more solid its precedential value. See Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1 Cranch 137 (1803) (200 years old and equally authoritative today as it was the day it was issued). Likewise, Ludlow and Lodge remain good law and have never been overturned. In fact, Utah Home Fire Ins. Co. v. Manning, 1999 UT 77, ¶14, 985 P.2d 243, 247, cites Ludlow and its exact same above-quoted language in order to find that a general contractor was the actual employer of its subcontractor—just as in present case. Central to the decision reached in Utah Home Fire Ins. Co. was the fact that the subcontractor needed to obtain the approval of the general contractor with respect to each worker the subcontractor hired:

"Holmes & Narver (the general contractor) also required that Green (the subcontractor) obtain its approval with respect to each worker Green employed. In fact, on one occasion, Holmes & Narver prevented Green from hiring a particular individual."

Id. at ¶14, 247.

Further, and being entirely consistent with Utah's legal history, in Osman Home Improvement v. Industrial Comm'n, 342 Utah Adv. Rep. 7, ¶10-11, 958 P.2d 240, 244 (Utah App. 1998), this Court once again said "that the difference between an employee and an independent contractor is: (a)n independent contractor can employ others to do the work and accomplish the contemplated result without the consent of the contractee, while an employee cannot substitute another in his place without the consent of the employer. Osman Home Improvement then applied such law to find that a General Roofing contractor was liable for the injuries of its subcontractor's employees because the General Contractor retained the authority to fire roofers, and to require roofers to obtain its permission before hiring any assistants. Id.

Aside from the recent cases cited above, the law of Utah remains as it always has: a Property Owner or General Contractor is an employer of its purported independent contractors and their employees, if the latter cannot substitute another in his place without the consent of the former. A long history exists for this precedent. See Chatelain v. Thackeray, 98 Utah 525, 100 P.2d 191 (Utah

1940), Luker Sand & Gravel Co. v. Industrial Comm'n, 82 Utah 188, 23 P.2d 225 (Utah 1933). Appellee CPB's argument ignores eight decades of Utah Supreme Court precedent and seeks to impose an alternative analysis.

Appellants' acknowledge that Appellee CPB's cited case Glover v. Boy Scouts of America, 299 Utah Adv. Rep. 10, ¶5-6, 923 P.2d 1383, 1385, (Utah 1996) establishes whether an employer-employee relationship existed between the parties depends on whether the alleged employer had the right to control the employee. The "right to control the employee" is determined in Glover by analyzing several factors which include:

1. (W)hatever covenants or agreements exist concerning the right of direction and control over the employee;
2. the right to hire and fire;
3. the method of payment (i.e., wages versus payment for a completed job or project); and
4. the furnishing of equipment.

The court states that the intent of the parties and the business of the employer may be considered, in addition to compensation, direction, and control and that no single factor is completely controlling. However, the court has consistently held that whether an employer-employee relationship exists depends upon the employer's right to control the employee.

Id. at 1385-1386.

Appellee fails to address the legal holdings of the six above-cited cases in their brief or how they remain good

law despite Glover. Nonetheless, this Court must reconcile Glover with the Supreme Court Cases cited above.

In this case, Glover stands for the proposition that when CPB met the factors outlined above, then they retained control over their employees Hales and Warner, Brent Reynolds and Egbert Construction and became liable for Jason Smith's death. However, Ludlow, supra stands for the proposition that even if the other factors of Glover were somehow not met, (Appellant argues below that they were satisfied), CPB still became the employer of Hales & Warner, when they retained and exercised the right to reject any of the subcontractors or employees Hales & Warner might have wished to substitute in its place. This is because no employee may substitute another in its place without the consent of its employer. See Ludlow, supra.

Both Ludlow, supra, and Glover, can be reconciled if Ludlow, supra, is interpreted to demonstrate, as it expressly says, that the right to hire and fire is the *sine qua non* of an independent contractor. Without that power, the *sine qua non*, an entity cannot be an independent contractor. With that authority, an entity might be an independent contractor, or might not. The Glover factors must be analyzed to make that determination.

The situation in Utah Home Fire Ins. Co., supra (a post-Glover Utah Supreme Court case), bears a striking resemblance to the issue presented to the Court by the case at bar. In Utah Home Fire Ins. Co. case, the general contractor held the right to refuse its subcontractor from hiring employees or other subcontractors. The same was true in Osman Home Improvement, supra. In the case at bar, Appellee CPB admits that "CPB retained the right to refuse to allow a subcontractor to do work on the project." Appellee's brief at 35. CPB's contract provides as follows:

- B. The Contractor shall not contract with any Subcontractor who has been rejected by the Owner.**
The Contractor will not be required to contract with any Subcontractor against whom it has a reasonable objection¹.
- C. If the Owner refuses to accept any Subcontractor proposed by the Contractor, the Contractor shall propose an acceptable substitute to whom the Owner has no reasonable objection.
- D. The Contractor shall not make any substitution for any Subcontractor which has been accepted by the Owner and the Architect without the prior written approval of the Owner and the Architect².**

See Brief of Appellant, Exhibit 2, Section 5, 5.1 (B-D). Footnote comments and bold added.

¹ In the converse, CPB clearly requires here that Hales & Warner, et. al. shall work with any subcontractors that CPB chooses so long as Hales & Warner does not have a reasonable objection.

² This language is identical to the critical language from Ludlow supra. See, Osman Home Improvement v. Industrial Comm'n, 342 Utah Adv. Rep. 7, ¶ 10-11, 958 P.2d 240, 244 (Utah App. 1998).

Comparing Section 5.1 (D) of the contract in this case, to the language of Osman Home Improvement, demonstrates that Hales & Warner was clearly an employee, not an independent contractor, of Appellee CPB:

An independent contractor can employ others to do the work and accomplish the contemplated result without the consent of the contractee, while **an employee cannot substitute another in his place without the consent of the employer.**

Osman Home Improvement v. Industrial Comm'n, 342 Utah Adv. Rep. 7, ¶10-11, 958 P.2d 240, 244 (Utah App. 1998) (emphasis supplied).

As an employer, CPB became vicariously liable for the negligent actions of its general contractor, Hales & Warner.

II. Appellee CPB is Liable for Work-place Injuries to Employees of Sub-Subcontractors Because CPB is an Owner of Real Property who Contracts with a Contractor to Construct a Building on the Owner's Property.

There are at least two circumstances in which an owner of property, like CPB, may become liable for the injuries of subcontractor employees. Under the first circumstance, CPB may become liable for Jason Smith's death if they retained control over the work of their general contractor. See Thompson v. Jess, 1999 Utah 22, 979 P.2d 322 (Utah 1999). Under the second circumstance, CPB would become liable

because Utah Law imposes a duty on a possessor of land (CPB) to warn an invitee (Jason Smith) about two general types of hazards: (1) those that are present on the land when the invitee enters which the possessor should expect the invitee will not discover or realize; and (2) those that the possessor creates after the invitee's entry; and that the possessor of land (CPB) breached that duty. See Hale v. Beckstead, 2003 UT App 240, 74 P.3d 628 (2003).

1. CPB is liable for Jason Smith's Death Because CPB "Retained Control" (The First Circumstance).

In Utah, employees covered by Worker's Compensation, like Jason Smith, can sue third parties, like CPB, for their negligence. Utah Code Ann. § 34A-2-106 states that injuries or deaths caused by wrongful acts or neglect of persons other than employer, officer, agent, or employee of employer; may entitle the injured or family of the deceased to maintain an action for damages against the third person. Utah Code Ann. § 34A-2-106 (4) specifically provides that such an action may be maintained against the following persons who do not occupy an employee-employer relationship with the injured or deceased employee at the time of the injury or death: a subcontractor, a general contractor, an

independent contractor, a property owner, or a lessee or assignee of a property owner. CPB is a property owner.

For example, Utah Code Ann. § 34a-2-106 would have allowed an injured employee-plaintiff of a general contractor to bring a civil action for negligence against a defendant subcontractor, because the subcontractor was considered a third party subject to suit by the statute. Shupe v. Wasatch Electric, Co., 546 P.2d 896, 898 (Utah 1976). Nonemployers may be sued for common law damages for injuries to workers caused by the negligence of the nonemployer. Gherisi v. Salazar, 251 Utah Adv. Rep. 5, 883 P.2d 1352, 1355 (Utah 1994). The Supreme Court has held that an injured subcontractor employee could sue the general contractor for the general contractor's negligence. Riddle v. Mays, 118 Utah Adv. Rep. 45, 780 P.2d 1252 (Utah 1989). In Pate v. Marathon Steel Co., 110 Utah Adv. Rep. 3, 777 P.2d 428 (Utah 1989)³, the Court ruled that under Utah Code Ann. § 35-1-62 [now renumbered as § 34a-2-106] a worker can recover against those persons who might be his or her statutory employers under § 35-1-42 [renumbered as §

³ In Pate, an injured plaintiff-employee of a sub contractor to a sub contractor was allowed to sue the defendant general contractor and the general's subcontractor (the one that employed plaintiff's subcontractor) for negligence.

34a-2-103]. The Pate Court concluded that "the legislature has in clear and unmistakable language evinced an intention to allow suits by an injured worker against those persons who might be his or her statutory employer as defined in § 35-1-42 [renumbered as 34a-2-103]⁴. Pate at 431. Only the immediate, or common law, employer, who actually pays compensation, and its officers, agents, and employees are shielded by the exclusive remedy immunity conferred by Utah Code Ann. § 35-1-60 [renumbered as § 34a-2-105]. *Id.*

In a case similar to the case at bar, the Supreme Court found that where an injured employee plaintiff was employed by a subcontractor who provided Worker's Compensation benefits to that plaintiff, the plaintiff was still allowed to bring a claim for negligence against the defendant general contractor because they had not been required to pay plaintiff's workers' compensation benefits and that the latter does not partake of the immunity afforded by Section 35-1-60 [renumbered as 34a-2-105]. Bosch v. Busch, 110 Utah Adv. Rep. 6, 777 P.2d 431, 432 (Utah 1989).

⁴ Furthermore, the 10th Circuit also holds that as a result of the 1974 amendments to Utah's Worker's Compensation Act, the Utah legislature has in clear and unmistakable language evinced an intention to allow suites by an injured worker against persons who might be his or her statutory employer as defined in § 35-1-42 [renumbered as § 34a-2-103]. Goheen v. Yellow Freight Sytems, 32 F.3d 1450, 1453 (10th Cir, 1994).

The policy behind this law is that the state worker's compensation act should no longer be construed to provide tort immunity to statutory employers who have not been required to pay benefits thereunder to the injured worker. Lamb v. W-Energy, Inc., 884 F.2d 1349, 1349 (10th Cir. 1989). Utah's exclusive remedy provisions in the Worker's Compensation Act did not extend to statutory employers who had not in fact been required to pay workers' compensation benefits to an injured plaintiff-employee. Snyder v. Celsius Energy Co., 866 F. Supp. 1349, 1361 (D. Utah 1994). Thus, a property owner like CPB⁵ may be liable once Appellants establish CPB's negligence.

Nonetheless, 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. Thompson v. Jess, 1999 Utah 22, ¶13, 979 P.2d 322, 325 (Utah 1999). The scope and limits of Thompson was briefed and argued extensively in Appellants primary brief, and Appellants endeavor not to restate those arguments. However, Appellants briefly address the issues raised in Appellee CPB's brief and response argues as follows:

⁵ CPB did not pay Jason Smith's worker's compensation benefits.

The general rule of Thompson 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. However, the owner of property will be liable if they retained control. 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. Id. at ¶15, 326. There was a genuine issue of material fact with regard to whether the Appellee CPB could be liable under Thompson theory.

In addition, if CPB, as a land owner, retained control over their general contractors, and failed to take reasonable care to protect its contractor's employees, then CPB can be held liable. The Worker's Compensation Act will not act as a bar to recovery by Plaintiff.

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 or 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 (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. Thompson, at ¶29, 328. There is a genuine issue of material fact with regard to whether the Appellee CPB could be liable under § 413, and the trial court erred in dismissing the Plaintiffs' case.

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. Thompson, at ¶29, 329. There is a genuine issue of material fact with regard

to whether the Appellee CPB could be liable under § 416, and the trial court erred in dismissing the Plaintiffs' case.

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. Thompson, at ¶29, 329. Again, there is a genuine issue of material fact with regard to whether the Appellee CPB could be liable under § 427, and the trial court erred in dismissing the Plaintiffs' case.

From Thompson, we know that if CPB retained control over any part of the work, then they subjected themselves to liability for Jason Smith's death when they failed to exercise their control with reasonable care. But, we also know that CPB will not be liable for Jason Smith's death unless CPB actively participated in the performance of the work. Thompson defines active participation as when an

employer is actively involved in, or asserts control over, the manner of performance of the contracted work. Active participation occurs, for example, if CPB 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.

Here, CPB retained complete control over its contractors through its contract with Hales & Warner. Brief of Appellants, pages 39-44, (identifying facts). Hales & Warner could not even substitute another contractor in its place without CPB's permission. Brief of Appellants, page 41, (identifying facts in paragraphs h, i, and j). CPB actively participated in the work done by leaving for itself several of the intricate, detail jobs to be done by CPB on its own. Brief of Appellants, page 42, at paragraph 1. CPB also interfered in the framing process (the same process in which Jason Smith died) by dictating how high specific framed walls would be and what the specific methods for framing were. Brief of Appellants, page 13, at paragraph m. Finally, once CPB retained control, they failed to exercise their powers and authority in a reasonable way, because they did absolutely nothing to stop

the unsafe work conditions that led to Jason Smith's death. Brief of Appellees, page 9, at paragraph 23. CPB knew of these unsafe work conditions that killed Jason Smith, because CPB received daily reports. Brief of Appellants, page 14, at paragraph o.

2. CPB is Liabile Because it Failed to Warn its Invitee, Jason Smith, (The Second Circumstance).

"...Thompson contains no analysis with regard to the duty owed by a possessor of land to an invitee." Hale v. Beckstead, 2003 UT App 240, note 2, 74 P.3d 628 (2003). A duty is imposed on a possessor of land to warn an invitee about two general types of hazards: (1) those that are present on the land when the invitee enters which the possessor should expect the invitee will not discover or realize; and (2) those that the possessor creates after the invitee's entry. Id. at ¶9, 630.

The open and obvious danger rule remains viable in Utah law governing a homeowner's duty to an invitee. Hale, *supra*, at ¶9, 630. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he: (1) knows or by the exercise of reasonable care would discover the

condition, and should realize that it involves an unreasonable risk of harm to such invitees; (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (3) fails to exercise reasonable care to protect them against danger. Id. at ¶12, 631. A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them. Id. at ¶13, 631.

There are significant exceptions to the open and obvious danger rule which can, in some cases, limit the protection the rule affords to landowners. Hale, supra, at ¶15, 631-632. A possessor of land is not liable to his invitee for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. Id. However, there are cases in which the possessor of land can, and should, anticipate that a dangerous condition will cause physical harm to an invitee notwithstanding its known or obvious danger. Id. at P15 and 632. In such cases the possessor is not relieved of the duty of reasonable care which he owes

to the invitee for his protection. Id. Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted⁶, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Id. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. Id.

The existence of exceptions to the open and obvious danger rule avoids the rigidity of the traditional common-law rule by permitting the courts to hold that a plaintiff's knowledge of a danger does not necessarily absolve the occupier of liability, and permits a plaintiff to recover if it appears and is found that a risk was one which would not be anticipated or appreciated by the invitee, or where the landowner can and should anticipate that the dangerous condition will cause harm to the invitee

⁶ For example, Jason Smith was distracted on CPB's jobsite because Jason Smith was told to work as fast as he could, or risk being fired. Jason was never given any training on how to work safely. Brief of Appellants, page 14, at paragraph q.

notwithstanding its known or obvious danger. Hale, *supra*, at note 3. Hence, the open and obvious danger rule is not necessarily a strict all-or-nothing rule. Id.

From Hale, we know that a duty is imposed on CPB, a possessor of land, to warn an invitee, Jason Smith, about two general types of hazards: (1) those that are present on the land when the invitee enters which the possessor should expect the invitee will not discover or realize; and (2) those that the possessor creates after the invitee's entry. Also from Hale, a possessor of land becomes subject to liability for physical harm caused to his invitees by a condition on the land if, he: (1) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such invitees; (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (3) fails to exercise reasonable care to protect them against danger.

CPB is a possessor of land and therefore owes a duty to its invitees. In this case, CPB was informed regularly through daily reports of the status and condition of its jobsite by its statutory employee Hales & Warner. Brief of

Appellants, page 14, at paragraph o; page 40, at paragraphs d-e. Hales & Warner knew that Egbert Construction was hiring untrained, young and inexperienced workers to work with dangerous framing walls. Brief of Appellants, page 12-13, at paragraphs h-l; page 15-16, at paragraph t. Hales & Warner knew this because they told their statutory employee Egbert Construction to get proper supervision for their young and inexperienced workers. Brief of Appellants, pages 15-16, at paragraph t. Hales & Warner kept CPB informed daily on everything that took place on the construction site. Brief of Appellants, page 14, at paragraph o. Moreover, Hales & Warner, was CPB's statutory employee and CPB's agent on the job site. See Brief of Appellants, pages 37-48. Therefore, whatever Hales & Warner knew, must also be imputed to CPB, because "under longstanding Utah law, the knowledge of an agent concerning the business which he is transacting for his principal is to be imputed to his principal." Wardley Better Homes & Gardens v. Cannon, 2002 UT 99, ¶16, 61 P.3d 1009, 1014 (Utah 1999). Even if this Court rejects the notion that Hales & Warner is not CPB's statutory employee, CPB held constructive and actual knowledge that unsafe, untrained

and young workers were working with dangerous framing walls. Brief of Appellants, pages 12-16. This was a dangerous and hazardous condition occurring on CPB's land prior to and during when Jason Smith came on CPB's land. From receiving daily reports and being on site, CPB knew this when Jason Smith arrived on the job site. Id.; See Also Brief of Appellants, page 14, at paragraph o; page 40, at paragraphs d-e. Neither CPB, nor Hales & Warner ever took any action to prevent the inexperienced and young workers from working with the dangerous framing walls. Brief of Appellee CPB, page 9, at paragraph 23. Jason Smith died as a result. Brief of Appellants, pages 14-15, at paragraphs q-r. Because of his inexperience and ignorance, the danger to Jason Smith on CPB's land was not known or obvious to Jason Smith. Brief of Appellants, page 14, at paragraph q. However, CPB held the knowledge and the power to stop work on the job site in order to ensure the safety of the men and women working there. Brief of Appellants, page 41, at paragraph i. CPB remains liable for Jason Smith's death.

Thus, there exist two, or more, recognized theories of liability, supported by facts in the record, that authorize and

require Plaintiffs' case to proceed. Under the first theory, CPB retained control over its general and sub contractors and therefore became responsible for the contractors' negligent acts that killed Jason Smith. Under the second theory, CPB knew that its contractors were operating an unsafe construction site and that those contractors were performing dangerous activities—namely using untrained, unsupervised workers to erect inherently dangerous framing structures. Despite knowledge of these dangerous activities, CPB did nothing, and admits it did nothing, to protect Jason Smith once he was invited onto CPB's land. Jason Smith died as a proximate result.

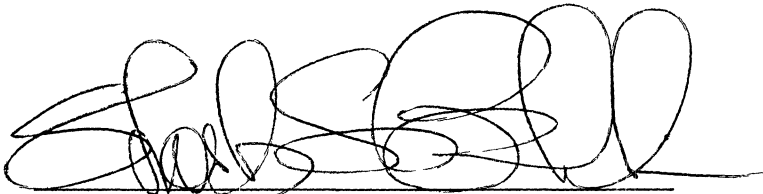
II. Appellee is Liable Because it Retained Control Over the Work Both by Contract and by Conduct.

Appellants argue in the Brief of the Appellants, pages 39-46, that liability may be imposed by virtue of the contractual rights alone, without respect to whether those rights were exercised. Appellants note that the additional affirmative acts committed by Appellee CPB, as noted above, in addition to the terms of the contract, give rise to liability under the retained control doctrine

III. CONCLUSION

The district court erred when it granted the Appellees' respective motions for summary judgment. Questions of law still remain for a Utah jury to decide and this Court should reverse the trial court and instruct it to deny the motions and allow Appellants' case to proceed for trial on the merits.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Shandor S. Badaruddin', written over a horizontal line.

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V. CERTIFICATE OF SERVICE

I hereby certify that on this 5th 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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