

2003

Kelly Smith and Lisa Nielsen, Individually and as  
heirs of Jason Kelly Smith, Deceased, Appellants, vs.  
Hales and Warner Construction Inc., Corporation  
of the Presiding Bishop of the Church of Jesus  
Christ of Latter Day Saints (the CPB), Appellees. :  
Brief of Appellee

Utah Court of Appeals

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### Recommended Citation

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

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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 (the CPB),  
Appellees.

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**COURT OF APPEALS CASE NO. 20030901-CA**

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**BRIEF OF APPELLEE CPB**

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

---

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**FILED  
UTAH APPELLATE COURTS  
APR - 8 2004**

## **COMPLETE LIST OF ALL 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 (hereafter the CPB).
- d. Third Party Defendant: Brent Reynolds Construction, Inc.

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## **STATEMENT OF JURISDICTION**

This court has jurisdiction pursuant to Rule 24(a)(4), Utah Rules of Appellate Procedure; the Utah Supreme Court had jurisdiction pursuant to Utah Code Ann. 78-2-2(3)(j).

## **ISSUES PRESENTED ON APPEAL**

Whether an owner of real property is entitled to summary judgment where the employee of a sub-subcontractor is personally injured during the construction of a building on the owner's property, and it is undisputed that (1) the owner retained a general contractor to construct the building, (2) the owner did not retain control over the manner, methods, operative details or particulars of performance of (a) the construction in general, (b) the general type of work being performed at the time of injury, or (c) the specific activities which caused the injury; and (3) the owner did not exercise supervision or control over the manner, methods, operative details or particulars of performance of (a) the general type of work being performed at the time of injury, or (b) the specific activities which caused the injury.

Whether the owner of real property may be held liable, under the retained control doctrine of *Thompson v. Jess*, 1999 Utah 22, 979 P.2d 322 (Utah 1999), for injury to an employee of a sub-subcontractor assisting on construction of a building on the owner's property, where the owner only retained control over the finished product, that is, sufficient control to ensure conformity with the plans and

specifications, but did not exercise supervision or control over the manner, methods, operative details or particulars of performance of the work.

Whether an owner of real property, who contracts with a general contractor to build a building on the owner's property, may be held liable for work-place injuries even if the court should find that the owner retained some degree of general control contractually, but the owner is passive and does not exercise actual control over the manner, methods, operative details or particulars of the performance of the specific injury-causing work, or that type of work generally.

### **STATEMENT OF THE CASE**

(General facts)

1. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints (hereafter the CPB) owned property in Highland, Utah, on which a chapel for the Church of Jesus Christ of Latter Day Saints was to be built (hereafter referred to as the Property).

2. On or about May 7, 1999, this Appellee, as "owner" of the Property entered into a construction contract with Appellee Hales & Warner Construction, Inc. (hereafter the Contractor), a general contractor, for the construction of the chapel on the Property. R. at 273.

3. The Contract consisted of an agreement, general conditions, and other documents (hereafter collectively the Contract). R. at 273, entitled "the Contract Documents," which provides that the general conditions, the agreement and other documents "form the contract" between the parties.



4. The Appellants' decedent was fatally injured while raising a pre-fabricated wall or wall frame, when the wall began to tip, falling on top of the decedent. R. at 8.

(Facts Regarding Lack of Retention of Control Over the Manner, Methods, Operational Details or Particulars of the Construction in General)

5. Under the Contract, the Contractor had sole and exclusive responsibility and control over the manner, methods and particulars of the work. Paragraphs 6-17, below.

6. Under the Contract, this Appellee, the CPB, is the "Owner" and the co-Appellee Hales & Warner Construction, Inc. is the "Contractor." R. at 273.

7. Article I of the Contract provides that the Contractor will furnish all materials and perform all labor: "Contractor shall furnish all of the materials and equipment and perform all of the labor necessary to complete all of the work as required in the contract documents entitled Highland 4, 20 wards;". R. at 273, Article I, Exhibit A at page 1.

8. Under the general conditions of the Contract, the Contractor is solely responsible for all of the particulars of the work:

#### "3.2 SUPERVISION OF CONSTRUCTION PROCEDURES

A. The Contractor shall supervise and direct the Work using the best skill and attention. The Contractor shall be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portion of the Work."

R. at 266, paragraph 3.2, at page 3 of 12. (Emphasis added).

9. The general conditions further provide:

“3.3 LABOR AND MATERIALS

- C. The Contractor is fully responsible for the Project and all materials and work connected therewith until the Owner has accepted this Work in writing.”

R. at 266, paragraph 3.3, C., page 3 of 12. (Emphasis added). See para. 13, below, regarding acceptance of the work when all work is completed.

10. The general conditions further provide:

“3.3 LABOR AND MATERIALS

- A. Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for all labor, materials, equipment, tools, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work.”

R. at 266, paragraph 3.3, A., page 3 of 12. (Emphasis added).

11. The general conditions further provide:

“3.7 CONTRACTOR’S ON SITE REPRESENTATIVE

The Contractor shall employ a competent representative to supervise the performance of the Work.”

R. at 266, paragraph 3.7, page 3 of 12. (Emphasis added).

12. The general conditions also state:

“1.2 EXECUTION, CORRELATION, AND INTENT

1. The intent of the Contract Documents is to include all labor, material, equipment and other items necessary for the proper execution and completion of the Work.”

R. at 267, paragraph 1.2, B. (Emphasis added).

13. Under the Contract, Article IX:

“The Work shall only be inspected for acceptance upon notice from the Contractor and Architect that all work is complete: [the Work shall be inspected for acceptance by Owner promptly upon receipt of notice from Contractor and Architect, that all work is complete and ready for inspection. The building and all materials and work connected therewith shall be a Contractor’s risk until accepted by Owner in writing.”

R. at 272, Article IX, page 2. (Emphasis added).

14. The Contract provides that between the Owner and the general Contractor, shall be another independent Contractor, the Architect. R. at 264, Exhibit B, Section 4, page 5 of 12. The general conditions provide that “communication between the Contractor and the Owner, relating to the Work, shall be through the Architect.” R. at 264, Section 4.2, C., page 5 of 12.

15. The role of the Architect, as intermediary between the Owner and the general Contractor, is only to monitor progress and quality of the work generally, not to control the particulars of the work or safety; the Architect will only become “generally” familiar with the progress and quality of the work. For example, the general conditions provide the following:

“B. The Architect will make frequent visits to the site to familiarize itself, generally, with the progress and quality of the Work, and to determine if the Work is proceeding in accordance with the Contract Documents. . . . Although the Architect is required to make periodic inspections, it is not required to make exhaustive or continuous on-site inspection. On the basis of its observations while at the site, the Architect will keep the Owner informed of the progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work.”

R. at 264, paragraph 4.2, B., page 5 of 12. (Emphasis added).

16. Further indicating even the Architect's lack of control over the details of the work, the following is illustrative:

"4.2. G.

. . . The Architect's review of the submittals shall be for the limited purpose of checking for general conformance with the Contract Documents and shall not be conducted for the purpose of determining the accuracy and completeness of details such as dimensions and quantities or for substantiating instruction for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor."

R. at 264, paragraph 4.2, G., page 5 of 12. (Emphasis added).

17. The Contractor remains responsible, not only for its own work, but for the work of all subcontractors. The general conditions provide:

#### "5.2 SUBCONTRACTUAL RELATIONS

A. The Contractor's responsibility of the Work includes the work and materials of all Subcontractors including those recommended or approved by the Owner. The Contractor shall be responsible to the Owner for proper completion and guarantee of all workmanship and materials under any subcontract."

R. at 264, paragraph 5.2, A., page 5 of 12.

(Facts Relating to Lack of Actual Exercise of Control Over the Manner, Methods, Operative Detail or Particulars of Performance of the Specific Activities Which Caused the Injury, or Such Activities in General)

18. The CPB, as owner of the ground and building being constructed, did not control the particulars of the specific activities which caused the death at issue.

19. The only representative of the CPB associated with the project was Dean Schick. R. at 895, Schick depo. at 49-50.

20. Mr. Schick only visited the project once every two or three weeks. R. at 897 and 894, Schick depo. at 33, 56.

21. Mr. Schick's visits were only to ensure that the building would be built according to plans and specifications R. at 900-899, Schick depo. at 24-27.

22. Mr. Schick was not even in the state of Utah at the time the wall was being erected which resulted in the death; he was on vacation at the time. R. at 896, Schick depo. at 40.

23. Concerning the lack of control over particulars of the work, Mr. Schick testified:

“Q. Okay. Did you oversee or control or interfere with the day-to-day details, methods, manner or techniques that were used by the subcontractors”

A. No.

Q. Did you oversee, control or interfere with the safety of the workers on the job site?

A. No.”

R. at 894-893, Schick depo. at 56:21 to 57:2.

(The Findings of the Lower Court That the CPB Neither  
Retained nor Exercised Control)

24. The District Court in its order of summary judgment found the following:

a. “The CPB did not hire, train, or educate Jason Smith [appellants’ decedent], Michael Lewis, or Jose Louis [the decedent’s co-workers] as to the work they were performing at the time of the accident.” R. at 1040.

b. The decedent “Jason Smith was an employee of Egbert Construction prior to and at the time of the accident.” R. at 1040.

c. “. . . [J]ason Smith, Michael Lewis and Jose Louis were under the direction, supervision, instruction and control of Egbert Construction at the time of the accident. R. at 1040.

d. “[T]he 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. R. at 1039.

e. “. . . Jason Smith, Michael Lewis and Jose Louis were not under the direction, supervision, instruction or control of . . . the CPB prior to and at the time of the accident.” R. at 1040. (Emphasis added).

f. There was “no evidence that Jason Smith, Michael Lewis and Jose Louis were under the direction, supervision, construction or control of . . . the CPB. R. at 1040. (Emphasis added).

g. “... [T]here is no evidence that ... 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.” R. at 1040.

h. “... [T]here is no evidence that ... the CPB exerted control over the means utilized by Jason Smith, Michael Lewis or Jose Louis in doing the work Jason Smith, Michael Lewis or Jose Louis were performing at the time of the accident, or that ... the CPB interfered with that work.” R. at 1040-1039.

(Emphasis added)

i. “... [T]here 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.” R. at 1039.

### **SUMMARY OF THE ARGUMENTS**

The Utah Supreme Court has clearly established that in order for a general contractor, let alone an owner of property, to be liable for work-place injuries at a construction site, the general contractor must have actively participated in controlling, determining, or interfering with, the manner, methods, operative details or particulars of performance of the specific work, which resulted in injury. If a general contractor, and even less an owner, does not so interfere, there is no duty and no liability.

Retention of control over the general result of work to be performed, such as the ability to ensure that the building conforms to plans and specifications is insufficient to create a duty on the part of the general contractor, let alone on an owner, with respect to construction site injuries. The Utah Supreme Court has stated that “passive non-participation” is insufficient to result in liability even if control is retained by contract.

The general contractor engaged by this Appellee was an independent contractor because it was engaged for a specific project and it controlled how it would complete the project. Vicarious liability does not apply to make an owner liable for injuries to an employee of a sub sub-contractor on a work site even if those injuries are caused by the general contractor, which, in this case, they were not.

There is no evidence that the CPB exercised any control over the manner, methods, operative details or particulars of performance of any of the following: (1) the injury causing aspects of the work, (2) the type of work generally being performed at the time of the injury, (3) any of the work on the project at issue remotely related to the injury, (4) any other aspect of the manner, methods, operative details or particulars of any work. There is simply no dispute of material fact in that regard, and Appellants have called this court’s attention to nothing to the contrary.



## ARGUMENT

### POINT I

AN OWNER OF REAL PROPERTY WHO CONTRACTS WITH A CONTRACTOR TO CONSTRUCT A BUILDING ON THE OWNER'S PROPERTY, IS NOT LIABLE FOR WORK-PLACE INJURIES TO EMPLOYEES OF SUB-SUBCONTRACTORS WHERE THE OWNER DOES NOT RETAIN OR EXERCISE CONTROL OVER THE MANNER, METHODS, OPERATIVE DETAILS OR PARTICULARS OF PERFORMANCE OF THE SPECIFIC ACTIVITIES WHICH CAUSED THE INJURY, OR EVEN OVER THE GENERAL TYPE OF WORK BEING PERFORMED AT THE TIME.

The general rule, in Utah and elsewhere, recognizes that an owner of property, who engages an independent contractor, and does not control the particulars of the manner, methods, operative details or particulars by which the contractor's work is performed, owes no duty of care to employees of the contractor or subcontractors on the job and may not be held liable to them or to their employees for work-place injuries.

In *Thompson v. Jess*, 979 P.2d 322 (Utah 1999), the Supreme Court affirmed summary judgment in favor of the landowner when a worker at a construction site lost his leg as a result of a construction related injury. In affirming the lower court's grant of summary judgment, the Supreme Court recognized that landowners are generally not liable for injuries caused during construction on their land. Similar to the case at issue, in *Thompson* the worker was erecting a large vertical pipe for a sign when he lost control of it and it hit his leg resulting in the leg's amputation. The Court stated:

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).

*Id.* at [P13] (Emphasis added). The Court continued:

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 (5<sup>th</sup> ed. 1984).

*Id.* (Emphasis added). The Court stated the reason for the rule:

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.”

*Id.* quoting W. Prosser and W. Keaton, The Law of Torts 509 (5<sup>th</sup> ed. 1984).

(Emphasis added).

There are exceptions to this rule when an employer of an independent contractor exercises sufficient control over or interferes with the work which gives rise to a limited duty of care, but not enough control to become an employer or master of those over whom the control is asserted. This is called the “retained control” doctrine. See *Thompson v. Jess*, 979 P.2d at 326 [P14].

In *Thompson*, the Supreme Court devoted one subsection of the case, subsection A., to the “retained control” doctrine. See *Thompson*, at 326-328. As set out in Appellants’ brief, the court discussed four federal court cases applying

Utah law, then adopted the standards set out in those cases as Utah law.

Concerning those cases, the Supreme Court stated:

“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.”

*Id.* at 327 [P18]. (Emphasis added). The Court then continued:

“For instance, in *Simon v. Deery Oil*, 299 F. Supp. 257, 258 (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 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 (10<sup>th</sup> Cir. 1979), . . . *Texaco, Inc. v. Pruitt*, 396 F.2d 237, 240 (10<sup>th</sup> Cir. 1968); *Erwin v. Kern River Gas Transmission Co.*, 1997 TEX. App. LEXIS 6685, (addressing Utah law on issue).

*Id.* at 326-327 [P18] (Emphasis added). The court then specifically adopted the

“active participation” standard as law of the State of Utah:

“We believe the standard relied upon in these cases is correct, and we formally adopt the same.”

*Id.* at 327 [P18].

Not only was the “active participation” standard adopted by the Court, but the Court went on to elaborate thereon, stating: “elaboration on the contours of the standard is needed, however.” *Id.* at 327 [P18]. Because that elaboration was elaboration on the contours of the standard as adopted, that elaboration became

part of the standard, unlike Appellants' argument that the elaboration was mere superfluous guidance or dicta.

In elaborating on the contours of the standard, the Court held that under the "active participation" standard a principal employer is not liable for injuries in the work-place to an employee of an independent contractor, unless the employer, "is actively involved in, or asserts control over, the manner of performance of the contracted work." *Id.* at 327 [P19]. In further elaborating, the Court cited the Restatement of Torts § 414 that the active participation must be with respect to the specific activities or equipment which causes the injury:

"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.* at 327 [P20] (Emphasis added).

The Supreme Court gave examples, illustrating the fact that the interference by the general contractor must be with respect to the methods of work causing the injury. For example, the court cited *Lewis v. N.J. Riebe Enterprises, Inc.*, 170 Ariz. 384, 825 P.2d 5, 7-8 (Ariz. 1992) stating about that case that it involves "imposing liability where a subcontractor's employee was injured as a result of new, less safe methods of work required by the general contractor." *Id.* at 327 [P19] (Emphasis added). That is, the interference was with the actual work causing the injury, making that work less safe and thus contributing to the injury.

The Supreme Court later returned to the example of the *Lewis* case, above, stating that, “the requisite level of control over the contractor’s work is well illustrated . . .” in *Lewis*, that is, interference with the injury-causing aspects of the work as indicated in the previous paragraph. *Id.* at 327 [P22]. The Court then recited the facts of *Lewis* finding that the general contractor’s superintendent, “instructed the Garges [subcontractor’s] employees to use a different, faster method of dislodging the plywood . . .”. *Id.* at 328 [P22]. The Court then stated that, “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.” *Id.* at 328 [P22]. The court held that the general contractor could be held liable because, “a worker was injured as a direct result of the dangerous condition created by the general contractor’s method.” *Id.* at 328 [P23] (emphasis added). The worker had stepped on the loose plywood and had fallen.

Thus, where a contractor interferes with or controls the work which causes the injury, then and only then is the “requisite level of control, “reached for liability to attach”. The same would be true of an owner, such as the CPB.

The fact that the active participation must be in the activities which caused the injuries was further illustrated in *Thompson* when the Supreme Court applied the above-mentioned standards to the facts of the *Thompson* case itself. The Court stated, “Thompson’s injury was caused by the manner of performance implemented by Jensen, over which Jess [the general contractor] exercised no direction, control or supervision.” *Id.* at 328 [P24]. Thus, the general contractor

was found not to have exercised direction, control or supervision over the manner of performance of the injury-causing aspect of the work, therefore, it could not be held liable. The Court further demonstrated that control over the injury-causing aspect of the work is what is critical by stating that, “Jensen alone chose to attempt installation of the pipe without a backhoe,” therefore the general contractor was not liable. *Id.* at 328 [P25].

The Court also stated, in discussing the facts of *Thompson* that the general contractor, “did not actively participate in or otherwise exercise affirmative control over the manner or method of performance utilized by . . . the injured party, so the contractor owed to the injured party, ‘no duty of care under the retained control doctrine.’” *Id.* at 328 [P26] (Emphasis added).

(Control of the Desired Result on a Construction Project is  
Insufficient to Result in a Duty and Liability)

Control generally over the desired result even with regard to the specific type of work which resulted in the accident is insufficient to result in liability. In *Thompson*, the Court found no liability because the control which the general contractor exerted was merely, “in directing that the pipe be installed over the pipe stub.” *Id.* at 328 [P22]. The Court held that, “this amounted merely to control over the desired result, which is insufficient to come within the retained control doctrine.” *Id.* at 328 [P24] (Emphasis added).

The Court also quoted from the Restatement of Torts, § 414 again for the proposition that:

“It is not enough that he [the employer] 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 alternations 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 327 [P20] (Emphasis added). The mere retention of such control is insufficient to create a duty and liability. See also Point II, below.

(Interference with the Manner, Methods, Operative Details or Particulars of Performance Generally Does Not Result in Liability Unless that Interference caused the Accident at Issue)

In its brief, Appellants argue that the standard should be that wherever a general contractor actively participates in certain aspects of the contracted for work, then the general contractor can be liable even if the interference did not result in the injury. See for example, Appellants' brief at 19-20 wherein they state that, “Appellees became liable under the retained control doctrine if they actively participated in the contracted for, or subcontracted for work,” in general even though that active participation had no cause and effect relationship on the accident itself. See also Appellants' brief at 23 wherein they allege that Appellees are liable, “if they actively participated or exerted control over the framing process, even if they did not exert control over method or choice to lift the particular wall that fell upon and killed Jason Smith.” Appellants' brief at 23. As

indicated above in this point, the Supreme Court has specifically indicated that the interference must be with the methods or manner of the work which particularly caused the injury.

Appellants appear to assert that once the Supreme Court, in *Thompson*, adopted the standard set out in the four federal cases mentioned, then that was the end of the discussion and any “elaboration” which the Supreme Court made concerning the “contours of the standard”, was mere guidance and superfluous dicta, even though the Supreme Court stated that such elaboration was “needed”. See for example Appellants’ statement that the Supreme Court’s references to the Restatement, § 414 are mere guidance. Appellants’ brief at 29.

When the Supreme Court says they are necessarily going to elaborate on the contours of something, then that elaboration is more than mere guidance.

Admittedly, if litigants quote from the Restatement, they may be asking the Supreme Court to use the Restatement as guidance. Where, however, the Supreme Court states that it is elaborating on the contours of its own adopted standard, and cites the Restatement as part of such elaboration, then such elaboration becomes part of the contours of the standard and is more than mere guidance. Where the Supreme Court in its elaboration on the contours of the standard quotes the Restatement that, “the degree of control necessary for the creation of the 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”, *Thompson* at 327 [P20] (Emphasis added), that elaboration



establishes the contours of the standard, and is the law in the state of Utah. To state otherwise would be to declare that the Supreme Court was writing its opinions to confuse or even deceive persons in the construction industry, potential litigants, and lawyers relying on its cases. Such a proposition imputes little reason and sense to the Supreme Court and should be rejected by this Court.

## POINT II

RETAINING CONTROL OVER WORK GENERALLY BY CONTRACT IS INSUFFICIENT TO CREATE A DUTY OR ESTABLISH LIABILITY WHERE THE CONTRACT RIGHTS ARE NOT IN FACT EXERCISED OVER THE WORK RESULTING IN THE INJURY.

In its brief, Appellants identify only one issue with respect to the CPB. It is as follows:

“whether a principal employer is subject to liability . . . under ‘retained control doctrine’ by virtue of the existence of a contract in which the principal employer retained sufficient control over the manner or method of work, without respect to whether such control rights were in fact exercised.

Appellants’ brief at 5-6. (Emphasis added).

Appellants argue that, “. . . [U]nder the Contract Documents, Appellee CPB retained control over the construction and particulars of the work such that it was not insulated from liability.” Appellants’ brief at 39.

The Supreme Court, in elaborating on the contours of the retained control doctrine in *Thompson* recognized that the term “retained control,” “is somewhat of a misnomer.” *Id.* at 328 [P26] n.3. The Court went on to describe why “retained control” is a misnomer, stating that, “‘retained,’ to the extent the word implies

passivity or non-action, is inapt.” *Id.* Elsewhere the court stated very clearly that, “no duty arises from ‘passive, non-participation’”. *Id.* at 327 [P19], discussing the case of *Conklin v. Colin*, 287 So. 2<sup>nd</sup> 56, 60 (Fla. 1973).

The Court in *Thompson* discussed the retained control doctrine as stated in the Restatement of Torts:

§ 414. NEGLIGENT IN EXERCISING CONTROL RETAINED BY EMPLOYER

One who entrusted 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.

*Id.* at 326 [P 16], citing the Restatement (Second) of Torts § 414 (1965) (Emphasis added). Thus it is not the passive retention of control which creates the duty, contrary to Appellants’ position against the CPB, but the exercise of that retained control negligently which results in possible liability. The Court stated that it has not formerly adopted rule 414, but adopted the equivalent doctrine described in Point I, above, that is, active participation. Thus, the sole issue in this case, described by Appellants as relating to the CPB, that is, whether an owner is liable “without respect to whether such contractual rights were in fact exercised,” (Appellants’ brief at 5-6) must be answered in favor of Appellee, and the judgment below should be affirmed.

Even if, somehow, an owner could be held liable where some form of control is retained “without respect to whether such contractual rights were in fact

exercised,” the CPB did not even retain control over the manner or methods of the work performed, but only retained the right to insure that the construction of all parts of the building as completed, conformed to the plans and specifications as to size, location, quality of construction, etc. See Facts, above, paragraphs 5-23. See also Point IV, below.

At pages 39 through 45 of their brief, Appellants characterize parts of the contract between the CPB and the general contractor, Hales & Warner Construction, trying to establish that even though contractual rights may not have been exercised over the work which resulted in the injury, the CPB retained, generally, sufficient control over the project to make the CPB liable for the actions of the sub-subcontractor and its employees in raising a pre-fabricated wall. The following paragraphs, beginning with letters of the alphabet, correspond to the same letters of the alphabet used by the Appellants at pages 39 through 43, and respond to those corresponding paragraphs.

a. The CPB established the property lines and benchmarks for grading. The owner was responsible for the general layout of the building on the ground with respect to property lines and benchmarks for grades. Such is not the type of “retained control” over the particulars of manner and methods of work which would result in liability to the owner for injuries caused during raising of a wall.

b. The CPB has furnished information or services it was required to furnish to avoid delay in the orderly progress of the work. Liability does not result just because the owner agrees to provide information timely such as color of desired

wall coverings, color of paint, or other information, or provide services it ought to provide such as ordering its own pews and carpet. See para. 1. below, and see Exhibit 1 to Appellants' brief, page 28 to Plaintiff's deposition where Mr. Schick of the CPB states that, "... [T]he pews and the carpet we order, ...". The providing of information by the owner and furnishing of services where the owner may order some parts such as carpets and pews, does not mean that the owner interfered with the manner, methods or particulars of the job to the extent that liability should result for injuries while raising a wall.

c. The owner retained the right to inspect the property at any time. It is the owner's property and the owner has an interest in insuring that the building conforms to plans and specifications. It is not improper for an owner to retain such a right, and such a right does not subject an owner to liability. An owner should be able, for example, to insure that rooms are placed at the proper locations, windows or doors are located correctly, wall covering was of the proper type, etc., without being exposed to work-place injury liability. Merely because an owner has an interest in the progress of the building, and an interest that the building is completed according to plans, should not subject the owner to liability.

d. CPB's architect inspected the work. The architect inspected for general conformity of finished parts to the plans and specifications. See FACTS, above, paras 15-16. That should not expose an owner of property to liability for work-place injuries, or the negligence of others.

e. Dean Schick of the CPB inspected the work approximately once every two to three weeks. See paragraph c., above.

f. The owner allegedly can stop work at any time. Appellants' characterization here is not quite correct. The reference by Appellants is to paragraph 2.3 of the contract which states, "if the Contractor fails to carry out the Work in accordance with the Contract Documents or fails to correct Work which is not in accordance with Contract Documents in a timely manner the Owner may order the Contractor in writing to stop the work . . .". R. at 267. If the Contractor's work is not in conformity with the plans and specifications, the mere fact that an owner can stop the work and require conformity is not equivalent to controlling the manner, methods or particulars of how the work is performed, but only the end product. For example, if plans and specifications call for red brick and contractor starts using yellow or pink, the owner should have a right to inspect the property, stop work, and demand that the project conform to the plans and specifications. Such a right does not interfere with the manner in which the work is performed which could cause injury, such as how the scaffolding is put up for the brick work, or the way hod carriers carry their heavy loads, etc. The right to stop the work if the contractor is not conforming to plans and specifications should not result in liability to the owner for the negligent actions of others.

g. The owner and architect had access to the work. Paragraph 3.12 of the contract states that, "the Contractors shall provide the Owner and the Architect access to the work wherever located." Again, the right of an owner to be able to

inspect the finished parts of the work for conformity to plans and specifications does not mean that the owner is interfering with the manner and means of the methods by which such parts are actually constructed. See para. c., above.

h. The contractor, architect and/or the engineer has the right to condemn and require removal of work which does not conform to the contract documents. That should be a right without exposing an owner to liability for work-place injuries during construction of the non-conforming work.

i. The architect can stop work. Here Appellants improperly use a word which is not in the paragraph of the contract which Appellants reference. Appellants argue that the architect can stop work because of the “manner” of the work. The paragraph to which Appellants refer indicates that the architect may stop work to ensure the proper performance of the work, that the manner thereof.

j. The citations to the record here state that the Contractor shall not subcontract with any Subcontractor who has been rejected by the owner, and provides a mechanism for engaging subcontractors if the owner refuses to allow a certain subcontractor to be on site. Deponents stated, during discovery, that the retention of that right was so that if the owner was aware a certain contractor did not perform in accordance with contract documents or was known to delay performance, that subcontractor could be rejected. That does not give the owner the right to interfere with the particulars of the work being performed by any subcontractor who has not been refused. Thus, again, liability for work-place injuries should not result to the owner.

k. The reference of Appellants here state that, “the owner reserves the right to perform work itself or to award other contracts in connection with other portions of the project.” That retention should not result in liability to the owner where that right has not been exercised and the owner has not performed any work, especially not any related to the injury at issue, nor interfered with the particulars of the manner and methods of the work of others.

l. Appellants assert that the CPB installed its own carpet and pews. The reference cited states, “on this project, I can’t be for sure, but they typically install their own pews, carpeting . . .”. Evan’s depo. at 81. Even if Appellants could establish that the CPB installed its own pews and carpet, which Appellants have not done, participating in some aspects of a project totally unrelated to the work site injury does not subject the owner to liability.

m. The allegation by the Appellants here gives a different impression from the contract. The contract states, “If a dispute arises among the contractor and separate subcontractors as to the responsibility . . . for maintaining the project free from waste materials and rubbish, the owner may clean up the project and allocate the cost . . .”. Such a right to quickly and expeditiously resolve disputes to keep a project clean is a proper, logical right to be retained which should not result in liability to the owner, especially where the accident had nothing to do with a failure to clean up the project after a dispute in that regard arose among the contractor and separate subcontractors.

n. Change orders may issue. Change orders are a natural outgrowth of construction. Partway through a project, an owner may decide to have a different style of countertop or molding or an extra window or an upgrade of some type of installation such as a sink or toilet, etc. The right to have changes made during the project as long as the owner pays for such change orders should not subject the owner to liability for the manner and methods by which work is accomplished on the job. Such changes are not changes in or interference with the methods, manner or means of performing the work.

o. The Contract, at the paragraph referenced by the Appellants, states that, “in case of an emergency endangering life or threatening the safety of any person or property, the contractor may, without waiting for specific authorization from the architect or owner, act at its own discretion to safeguard persons and property.” This paragraph is a common sense paragraph to insure that whatever needs to be done in an emergency to protect life and property, that can be done by a contractor. That should not result in liability to an owner, and nor should that imply that only in an emergency can a contractor act to protect life and property without authorization from the owner to do so. The owner was not responsible for safety on site. See R. at 259 para. 10.3. Also, under the facts of this case, any emergency first occurred when the wall at issue started to tilt as it was being raised, at that point the CPB had nothing to do with the project; his representative was not even there.



p. Appellants state here that the CPB could select the materials used in the construction. The contract provision here cited talks in terms of tests and inspections and basically states that tests may be conducted to insure that materials “meet Contract Document requirements.” Materials may be sampled and tested at the owner’s expense, again only to ensure that the materials conform to specifications. Here again, the owner is just maintaining the right to control the end product, not the manner, methods or means by which materials are installed or work performed.

Lastly, without using a separate lettered paragraph, Appellants argue that a variety of indemnification provisions allegedly exist citing specific references. The following are the citations to the contract taken from page 44 of Appellants’ brief along with the text:

Contract paragraph 3.2c: “The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor’s employees, Subcontractors and their agents and employees, . . .”

3.13: “The Contractor shall defend and hold the Owner harmless from all suits or claims for infringement of any patent or license rights or any laws on account thereof.”

3.14A: “The Contractor shall indemnify and hold harmless the Owner, the Architect . . ., from and against any and all claims, . . . arising out of or resulting from performance of the work, . . . but only to the extent caused in whole or in part

by the negligent acts or omissions of the contractor and the subcontractor, in any way directly or indirectly employed by them, . . .”.

3.14B talks in terms of, “the Contractor shall be liable to defend the Owner in any lawsuit filed by any subcontractor.

Sections 3.14C, D and E also provide that the Contractor will be responsible to indemnify the owner.

Appellants impute unfounded reasons that the CPB included such indemnification provisions in the Contract. For example, Appellants argue that these provisions “were included because Appellee CPB . . . contemplated that Appellee CPB would be liable for various acts and omissions committed by the general contractor and subcontractors.” Appellants’ brief at 43. Appellants also argue that, “if Appellee CPB truly believed and fully expected that it would incur no liability because it had no control over the activities of the Appellee H&W and that Appellee H&W was in fact an independent contractor, it would not have inserted or agreed to the insertion of these indemnity provisions.” Appellants’ brief at 44. See also similar argument at page 45 of Appellants’ brief.

Such argument is unfounded. Even if the CPB felt that it could incur no liability for work-place injuries if it did not interfere with the manner, means and particulars of the work being performed which might result in injury, workers can still attempt to sue, can still name an owner as a party, can still cause defense costs to be incurred. This very lawsuit is a prime example. Although the CPB did not retain or exercise control over the particulars of the work performed, and did not

do anything else which might result in liability under the *Thompson* decision, yet the CPB was named herein, was forced to go through lengthy depositions, has had to prepare motions for summary judgment and now has had to prepare an appellate brief, all of which occurred notwithstanding the clear statements of the Supreme Court in *Thompson* which demonstrate a lack of liability on the part of the CPB, and notwithstanding the fact that the CPB may feel it is in no way liable for the very unfortunate injury in this case. This very lawsuit counters plaintiff's argument. Notwithstanding how strongly a party may believe that they should not and cannot be held liable, people may still sue. Therefore, provisions requiring a general contractor to indemnify and hold an owner harmless are very rational, effective provisions to protect the owner, and should not be used to imply that the owner feels that the owner can and should be held liable.

In addition, all of the above rights retained by the CPB are those which the Supreme Court in *Thompson* states are insufficient to result in liability. See quotes from *Thompson*, at 18-19 of this brief.

### **POINT III**

#### **AN OWNER OF PROPERTY IS NOT VICARIOUSLY LIABLE FOR THE ACTIONS OF ITS GENERAL CONTRACTOR ON A CONSTRUCTION PROJECT.**

Appellants argue that the co-Appellee, Hales & Warner Construction Company was an employee of the CPB. Appellants' brief at 46-48. Appellants argue that the Appellee CPB was an employer because it "retained and exercised the right to choose those employees and subcontractors who would perform the

work . . .”. Appellants’ brief at 47. Appellants further argue that the Appellee CPB, “had the authority to hire and fire employees and subcontractors. Appellants’ brief at 47. Appellants argue that the CPB, “controlled, directed, supervised or retained the right to control, direct or supervise the entity employed. . .”. Appellants’ brief at 47-48. In so arguing, the Appellants cite a 1925 and a 1977 Utah Supreme Court case.

First, the CPB did not retain the right to choose employees of subcontractors or of the general contractor, as Appellant’s argue as will be discussed below.

Second, the law with respect to a determination of whether a relationship is that of independent contractor or employer/employee has been far more clearly defined since 1977. In *Glover v. Boy Scouts of America*, 923 P.2d 1383 (Utah 1996), the Supreme Court went into a lengthy recitation of the law concerning independent contractor and employer/employee relationships. The court declared that one of the basic factors for a determination is “whether the alleged employer had the right to control the employee.” *Id.* at 1385 citing *Averett*, 909 P.2d at 247. The Court stated that the right of control concept is most frequently applied in the Workers Compensation Act arena with respect to remedies available to an injured party. The Court then went on to list factors in that context which have been held determinative:

“In that context, we have identified several ‘main facts’ which are helpful in determining whether an employer had the right to control an alleged employee. *Averett*, 909 P.2d at 249. These factors

include (i) whatever covenants or agreements exist concerning the right of direction and control over the employee; (ii) the right to hire and fire; (iii) the method of payment (i.e., wages v. payment for a completed job or project); and (iv) the furnishing of equipment.”

*Id.* at 1385-1386, citing *Harry L. Young & Sons v. Ashton*, 538 P.2d 316, 318

(Utah 1995). The Court added some additional factors such as, “the intent of the

parties and the business of the employer, in addition to compensation, direction,

and control and that ‘no single factor is completely controlling’.” *Id.* at 1386

citing *Gourdin*, 845 P.2d at 244. The Court then noted that the right of control has

also been looked at in other contexts than workers compensation, such as, “under

the common law doctrine of *respondeat superior*.” *Id.* at 1386 citing *Foster v.*

*Steed*, 19 Utah 2d 435, 432 P.2d 60, 62 (Utah 1967). The Court held that the

analysis under *Foster*, above, with respect to *respondeat superior*, was based on

the general analytical model of the workers compensation situation.

In analyzing *Foster*, the unanimous Supreme Court held that a franchisee service station was not an employee of the franchisor, Texaco Corporation because

Texaco, “did not retain day to day control of the franchisee ‘but, rather, merely influenced the result to be achieved.’” *Id.* at 1386 citing *Foster* at 432 P.2d at 63.

(Emphasis added). In the case at bar, the CPB did not retain day to day control, but only influenced the end result.

In analyzing *Foster*, the Court considered such factors as, “the station [franchisee] paid its operating expenses . . .” and, “could hire and fire employees, set its own hours of operation, and was not required to report to Texaco.” *Id.* at

1386. The above was true even though under the franchise agreement Texaco had an “obligation to deliver products to the station [franchisee]”. *Id.* at 1386.

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.

Under the contract, the contractor has the following duties which clearly establish him as an independent contractor:

“Contractor shall furnish all of the materials and equipment and perform all of the labor necessary to complete all of the work . . .”

Facts, above, paragraph 7.

“The Contractor shall supervise and direct the work . . . the Contractor shall be solely responsible for all construction means, methods, techniques, sequences and procedures . . .”.

Facts, above, paragraph 8.

“Contractor is fully responsible for the project and all materials and work connected therewith . . .”.

Facts, above, paragraph 9.

“Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for all labor materials, equipment, tools, water, heat, utilities, transportation and other facilities and services necessary for proper execution and completion of the Work.”

Facts, above, paragraph 10.

“The intent of the Contract Documents is to include all labor, material, equipment and other items necessary for the proper execution and completion of the work.

Facts, above, paragraph 12.

“The Contractor’s responsibility of the work includes the work and materials of all subcontractors . . .”.

Facts, above, paragraph 17. All of the above indicate that this was not a case of the CPB hiring someone for wages, but hiring an entity to provide all necessary material, labor, etc. to complete an entire project. The general contractor was clearly an independent contractor.

Appellants assert that the CPB had the right to hire and fire “subcontractors and employees.” See the quotes at the beginning of this Point. That is not correct. The CPB retained the right to refuse to allow a subcontractor to do work on the project. See Point II, above, at 26, paragraph j. The contract provides that, “the Contractor shall not contract with any Subcontractor who has been rejected by the Owner.” The contract says nothing about the right of the CPB to hire and fire employees of any subcontractor or any employees of the general contractor, as asserted by Appellants. The only right which was retained by the CPB was to reject a specific subcontractor in total.

What was additionally retained was only the ability to inspect the project periodically to insure that the work completed conformed to specifications. For example, the owner’s representative onsite, the architect, “will make frequent visits to the site to familiarize itself generally with the progress and quality of the

work and determine if the work is proceeding in accordance with the Contract Documents.” Facts, above, paragraph 15. The architect, “is not required to make exhaustive or continuous onsite inspections”. Facts, above, paragraph 15. The architect will only, “endeavor to guard the owner against defects and deficiencies in the work.” Facts, above, paragraph 15. The Contract goes on to state that:

“the Architect’s review of submittals shall be for the limited purpose of checking for general conformance with the Contract Documents and shall not be conducted for purposes of determining the accuracy and completeness of details such as dimensions and quantities or for substantiating instruction for installation or performance of equipment or a system all of which remain the responsibility of the contractor.”

Facts, above, paragraph 16.

The CPB only had one representative periodically associated with the project. Facts, above, paragraph 19. He only visited the project once every two or three weeks. Facts, above, paragraph 20. His visits were only to insure that the building would be built according to plans and specifications. Facts, above, paragraph 21. He did not control or interfere with the day to day details, methods, manner or techniques that were used by the subcontractors, nor did he control or interfere with safety of workers on the job site. Facts, above, paragraph 23.

From the above, it is clear that the relationship between the owner and the general contractor was that of independent contractor and not that of employer/employee. Therefore the CPB would not be vicariously liable for the acts of the general contractor, Hales & Warner even if, somehow, Hales & Warner could be held liable.



#### **POINT IV**

THERE IS NO EVIDENCE THAT THE CPB RETAINED OR EXERCISED CONTROL OVER THE MANNER, METHODS, OPERATIVE DETAIL OR PARTICULARS OF PERFORMANCE OF EVEN THE GENERAL TYPE OF ACTIVITIES, PART OF WHICH CAUSED THE INJURY

The lower court could find no evidence that the CPB retained or exercised control over the manner, methods, operative details or particulars of performance of the general work which caused the injury, either retained, or exercised, or of the precise activity which the injured party was performing at the time of the injury. The lower court found no evidence that the CPB: (1) hired, trained or educated the injured party or his co-workers; (2) directed, supervised, instructed or controlled the decedent or his co-workers; (3) exerted control over the means utilized by the decedent or his co-workers in doing the work which resulted in the injury; (4) controlled the means utilized or the manner of performance of the work being performed by the decedent at the time of injury; or (5) instructed the decedent or his co-employees or their employer to perform work in a different manner or by way of a different method. See FACTS, above, paragraph 24.

In addition, the lower court found that Egbert Construction was controlling the means utilized and the manner of performance of the work being performed by the decedent and his co-workers. See FACTS, above, paragraph 24 d. In addition, no employee or representative of the CPB was even on site at the time of the accident, nor had any involvement whatsoever in the work being performed by the

decedent and his co-workers at the time of the accident. See FACTS, above, paragraph 24 i.

Although the Appellants state that the only issue with respect to the CPB is whether or not the CPB retained sufficient control by contract “without respect of whether such contractual rights were in fact exercised” (See POINT II, above), the Appellee CPB has scoured plaintiff’s brief to see if there are any allegations of the Appellants that the CPB exercised any control. The only facts relating to the CPB mentioned by the Appellants in their brief other than those in Point II, above, did not establish the exercise of control over the manner, method, operative detail or particulars of performance of the work generally or specifically which resulted in the accident at issue. The following are the only statements the CPB could find with respect to its participation of the CPB, as opposed to passive non-participation.

Appellants state that, “the Appellee CPB along with Paul Evans, the architect whom the Appellee CPB hired to assist it, reviewed the list [of subcontractors] and approved of each contractor”. Appellants’ brief at 9. Even if that occurred, approving a subcontractor generally is not active participation in the manner, means, method, operative detail or particulars of performance of the activities of those subcontractors during construction. In addition, it is interesting to note that the allegation is that the CPB approved the subcontractor on a list. However, the original subcontractor for framing was BRC, which hired Egbert Construction Company, as a subcontractor, whose employee was the injured

employee. See Appellants' Brief at 9. Egbert Construction was not on a list the CPB may have seen.

Appellants assert that the CPB, "did not object or disapprove of the use of Egbert Construction," as the contractor. Appellants' brief at 10. Again, failure to object or disapprove of the use of a specific subcontractor, even if CPB was aware of its existence, was not "active participation" in the means or methods used by Egbert Construction, as required by the Supreme Court to create liability.

The Appellants allege that the CPB's architect instructed the general contractor, "to tell the framers to build the wall to a specified height." Appellants' Brief at 13. First, no reference to the architect telling the framers to build a wall to a specified height could be found at the citation mentioned in Appellants' brief. Appellants' brief at 13, para. M. Appellants' citation to the instructions by the architect with respect to the height of the wall is Exhibit 6, deposition page 46 which says nothing on that subject. Exhibit 6, paragraph 49 does indicate that the first wall built by the subcontractor was "too tall," but that was called to the deponent's attention by a person named Arlice, not the architect Paul Evans. Exhibit 6, page 49.

Second, instructions as to a lower height of a wall are instructions as to the desired result which the Supreme Court specifically stated was insufficient to establish duty and liability. See the quote from the Utah Supreme Court that, "this amounted merely to control over the desired result which is insufficient to come within the retained control doctrine." See above, at page 18.

The Appellants allege that the architect, “was aware of H&W’s [the general contractor’s] interference into the framing process, which he reported to CPB.” Appellants’ brief at 14, para. o. First, there is no indication in the pages of the depositions cited by Appellants that the architect reported to the CPB any alleged interference with the framing process by the general contractor. The citation there is to the deposition of the architect Evans, (Appellants’ exhibit 8, at pages 63-72), and that reference does not contain any indication that alleged interference with the framing was reported to the CPB. The only reference to the CPB in those pages is that the architect would review daily reports from the general contractor. He reviewed those for, “general progress of the project and if there were problems.” Appellants’ brief, Exhibit 8, page 63. The architect would make a report to Mr. Schick of the CPB, as to “progress on” the project, not any alleged interference with the framing process. *Id.* Thus, the CPB was aware of general progress on the building via the architect, and Appellants’ allegation is incorrect and unreliable.

The Appellants state that Dean Schick, employee of the CPB, “stated that nothing was installed incorrectly on the project”, citing his deposition at page 24. Appellants’ brief at 14, para. p. Observing the finished product after a contractor or subcontractor has used whatever means or methods they might choose to erect something, to ensure it is proper, does not constitute interference with those means and methods of installation. Observing that a final installation is correct, after the

fact, is not interference with the means, methods and details of the manner of performance of the work, therefore, that does not result in liability.

No other references or claims could be found as to alleged activities of the CPB, and those mentioned do not establish duty or liability. Appellant has failed to establish any activities which would result in liability, after a full discovery.

### **CONCLUSION**

The district court's grant of summary judgment in favor of the CPB should be affirmed.

Dated this 8<sup>th</sup> day of April, 2004.

KIRTON & McCONKIE

A handwritten signature in black ink, appearing to read "R. Wallace", is written over a horizontal line.

Robert R. Wallace  
Attorney for Appellees

## CERTIFICATE OF SERVICE

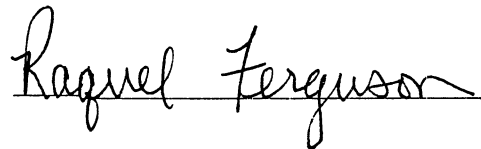
I hereby certify that on this 9<sup>th</sup> day of April, 2004 a true and correct copy of the foregoing was served upon the persons named below, at the addresses set out below their name, by depositing a true and correct copy of said document in a properly addressed envelope, postage prepaid to the following

Eric K. Davenport  
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A handwritten signature in cursive script, reading "Raquel Ferguson", written over a horizontal line.