

2003

Kelly Smith and Lisa Nielson v. Hales & Warner Construction : Brief of Appellant

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

BRIEF OF APPELLANTS

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
MAR 17 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.
- d. Third Party Defendant: Brent Reynolds Construction,
Inc.

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I. STATEMENT OF JURISDICTION

Pursuant to Utah R. App. P. 24(a)(4), Appellant states as follows: The Court of Appeals of Utah has appellate jurisdiction over cases transferred to the Court of Appeals from the Supreme Court. Utah Code 78-2a-3(2)(j). The Supreme Court had jurisdiction pursuant to Utah Code 78-2-2(3)(j) as this case presents an order, judgment, or decree of a court of record over which the Court of Appeals did not have original appellate jurisdiction.

II. STATEMENT OF ISSUES & STANDARD OF REVIEW

Pursuant to Utah R. App. P. 24(a)(5), Appellant states the issues presented for review, the standard for review, and demonstrates that each issue was preserved below.

With respect to Appellee Hales and Warner Construction, Inc., hereinafter "Appellee H & W", the issue presented for review is:

1. In Thompson v. Jess, 1999 Utah 22, 979 P.2d 322, 327 (Utah 1999), the Supreme Court held that a principle employer is subject to liability for injuries arising out of an independent contractor's work if the employer is "actively involved in, or asserts control over, the manner of performance of the contracted for work." The issue presented

by this appeal is whether "active participation" exists when the principal employer becomes actively involved in or exerts control over the performance and manner of the work of the contractor, or sub-contractor, or whether active participation exists only when the employer exerts control over the method and choice to engage in the specific act that results in the injury.

Citation to record showing that the issue was preserved in the trial court: Appellants preserved this issue by raising and arguing same in their Supplemental Memorandum in Opposition to Motion for Summary Judgment of the Defendant Hales & Warner Construction, Inc.'s and Supplemental Memorandum in Opposition to Motion for Summary Judgment of the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints (alternatively referred to as "CPB"), See Record, hereinafter referred to as "R," at 884.

Standard of Review: The record of this case must be viewed in a light favorable to Appellants. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Hill v. Seattle First Nat'l Bank, 827 P.2d 241 (Utah 1992); Jones v. Bountiful City Corp., 834 P.2d 556, 558 (Utah App.

1992). This Court must examine a trial court's grant of summary judgment for correctness, with "no deference to the trial court's legal conclusions." Jones, 834 P.2d at 558. This is true whether the issue presented on summary judgment is one of law or equity. See Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah App. 1992) (applying summary judgment standard on review of an injunction); Vergote v. K Mart Corp., 158 Mich. App. 96, 404 N.W.2d 711 (Mich. App. 1987) (applying summary judgment standard on claim for specific performance). When reviewing a grant of summary judgment, the Court reviews the record, including all inferences arising therefrom, in the light most favorable to the party opposed to the motion. Hill, 827 P.2d at 242. As a matter of law, this case's entire record, including any inferences that might arise from the facts in favor of Appellant's argument, must be viewed in a light most favorable to Appellants. See Richards v. Security Pac. Nat'l Bank, 208 Utah Adv. Rep. 81, 849 P.2d 606, 608 (Utah 1993).

With respect to the Appellee CPB the issues presented for review are:

2. Whether a principle employer is subject to liability for injuries arising out of an independent contractor's work under the "retained control doctrine" by virtue of the existence of

a contract in which the principle employer retained sufficient control over the manner or method of the work, without respect to whether such contractual rights were in fact exercised.

Citation to record showing that the issue was preserved in the trial court: Appellants preserved this in the same manner as they preserved Issue No. 1 above, (by raising and arguing same in their Memorandum in Opposition to the Motions for Summary Judgment), See R. 884.

Standard of Review: The standard of review for this second issue is the same as stated above for Issue No. 1.

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

Citation to record showing that the issue was preserved in the trial court: Appellants preserved this in the same manner as they preserved Issue No. 1 above, (by raising and arguing same in their Memorandum in Opposition to the Motions for Summary Judgment), See R. 884.

Standard of Review: The standard of review for this second issue is the same as stated above for Issue No. 1.

III. STATEMENT OF THE CASE

Pursuant to Utah R. App. P. 24(a)(7), Appellant states as follows:

i. Nature of the Case: The Appellant brought a wrongful death action on behalf of its decedent Jason Smith, against the Appellee H & W and Appellee CPB. Jason Smith died on a construction site. Appellee H & W was the general contractor of the construction project, and Appellee CPB was the owner of land as well as the building that Appellees constructed.

2. Course of Proceedings: The Appellant filed its complaint. The Appellees each filed Answers. Immediately after discovery commenced, the Appellees each filed Motions for Summary Judgment. Plaintiff filed a request pursuant to Utah R. Civ. P. 56(f) to postpone consideration of the Motions, as well as substantive responses. The court granted the Rule 56(f) requests and discovery proceeded. At the conclusion of discovery the Appellees renewed their Motions for Summary Judgment and those motions were heard and decided by the Hon. Claudia Laycock of the Fourth Judicial District Court.

3. Disposition below and previously: The district court granted Appellee's respective motions for summary judgment and this appeal followed. The Appellees each filed Motions for

Summary Disposition in this Court, and each respective motion was denied by this Court.

IV. STATEMENT OF THE FACTS

Pursuant to Utah R. App. P. 24(a)(7), Appellant states as follows: The Appellee CPB entered into a contract for the construction of a house of worship known as the Highland 4 and 20 Project. Deposition of Dean Schick, hereinafter "Schick Depo," at page 9, excerpts attached as Exhibit 1 to the Addendum; Contract documents attached to the Addendum as Exhibit 2 ("Agreement"), and Exhibit 3 ("Conditions of the Contract"). There was an invitation to bid on the project and subsequently a bid opening. CPB chose Appellee H & W as general contractor for the project. Hales and Warner entered into a contract with the Appellee CPB for the construction of the Highland 4 and 20 Project. The Appellee CPB retained the right to approve or reject any subcontractor or employee engaged by Appellee H & W to complete the work or any part of the work. Conditions of the Contract, attached as Exhibit 3, at Paragraph 5.1(B) through (C), page 5 of 12, and Paragraph 6.1(A), page 6 of 12. Appellee H & W commenced work on the project.

The Appellee H & W submitted a list of subcontractors that it intended to use to perform the majority of the work required

by the project and the Appellee CPB, along with Paul Evans, the architect whom the Appellee CPB hired to assist it, reviewed the list and approved of each subcontractor. Schick Depo at pages 30,31-32, attached as Exhibit 1; Deposition of Paul Evans, hereinafter "Evans Depo," at pages 33-34, 80, excerpts attached as Exhibit 8 to the Addendum.

The subcontractor chosen for the framing of the Highland 4 and 20 project was Third Party Defendant Brent Reynolds Construction, Inc., hereinafter "BRC." BRC hired Egbert Construction to perform the actual framing, but supplied the materials necessary for the framing. See deposition of Brent Reynolds, hereinafter "Reynolds Depo," at page 8, excerpts attached as Exhibit 4 to the Addendum. Defendant BRC, in the course of the framing project, sent its own employees to assist in the framing. Reynolds Depo at page 10, attached as Exhibit 4. The Egbert Construction foreman, Ken Egbert, took direction and instruction from Brent Reynolds, President of Brent Reynolds Construction, Inc. Reynolds Depo at pages 25-27, attached as Exhibit 4. Brent Reynolds testified that H & W Superintendent Maurice Egbert continually interfered with the framing process from beginning to end, and in the event that there was a dispute with regard to framing methods or details, Brent Reynolds

instructed Ken Egbert to do it the Hales & Warner way. Reynolds Depo at pages 25-27 and 33, attached as Exhibit 4.

Appellants' decedent, Jason Smith, among others, became employed by Ken Egbert to frame the Highland 4 and 20 Project. Appellee CPB knew that Egbert Construction was the primary framer on the Highland 4 and 20 Project and did not object or disapprove of the use of Egbert construction. On August 13, 1999, while framing a wall, Jason Smith was killed when a wall fell upon him and crushed his skull.

The Appellee H & W was actively involved in the framing process, asserted control over the framing process, and asserted control over the manner of performance of the contracted for work. The following facts in the record demonstrate this active participation and control:

a. Brent Reynolds, President of Third Party Defendant Brent

Reynolds Construction, Inc., stated as follows to Clifford

Hales, President of Appellee Hales & Warner:

From the very beginning, your superintendent, [Maurice Egbert], interfered with the framing process, telling [the framers] that they couldn't do it [the] way they were used to framing and caused the framers many problems, costing extra time and material. This interference continued through out the framing of the building...

See Letter from Defendant BRC to Appellee H & W, Attached as Exhibit 5 to the Addendum.

- b. Brent Reynolds testified about at least three different specific instances where H & W manifested control over the work of Egbert Construction's employees. Reynolds Depo at pages 46-47, attached as Exhibit 4.
- c. Brent Reynolds stated that Maurice Egbert, the superintendent of the project for Appellee H & W Construction, Inc., wouldn't let his men frame walls the way they wanted to frame them. Reynolds Depo, at page 25, attached as Exhibit 4;
- d. Brent Reynolds stated that he, or Ken Egbert, (a framer more particularly identified below, with little or no relationship to Maurice Egbert), told Appellee H & W that it was not effective to frame the building the way that Appellee H & W wanted to frame it, but Appellee H & W made Brent Reynolds Construction, Inc., and Egbert, frame the building "the Hales & Warner way." Reynolds Depo at pp 25-26, attached as Exhibit 4;
- e. Brent Reynolds said that Appellee H & W would not let him and/or Ken Egbert frame the building in the **manner** they wanted to frame the building. See Reynolds Depo at 25, attached as Exhibit 4, (emphasis supplied);
- f. Appellee H & W began interfering with the framing process on the day that the framing began. See Reynolds Depo at page 29, attached as Exhibit 4;

- g. Brent Reynolds could not recall whether there was a single aspect of the framing process with which Appellee H & W did **not** interfere. See Reynolds Depo at page 28, attached as Exhibit 4, (emphasis supplied);
- h. The Appellee H & W's superintendent, Maurice Egbert, stated that he "found problems" with the framing, including the heights of walls, and that he made the framers tear one wall apart and rebuild it the way Appellee H & W wanted it built. See Deposition of Joel Warner, hereinafter "Warner Depo," at pages 49-50, excerpts attached as Exhibit 6 to the Addendum; Deposition of Maurice Egbert, hereinafter "Egbert Depo," at page 56, excerpts attached as Exhibit 7 to the Addendum.
- i. H & W Superintendent Maurice Egbert testified how he became especially watchful of the framers' work and directly ordered much correction for the work of all of the framing employees. Egbert Depo at pages 56-57, 65-66, 69, 70-71, 72-74, 76-77, 79, attached as Exhibit 7. Maurice Egbert says that several times he would find error in the framers' work, and order them to redo the job the way the way H & W wanted. Id., at 70-71.
- j. During Egbert Construction's first day on the job site, H & W's Joel Warner questioned Ken Egbert at length about his work experience, framing ability, his crew and all other aspects of

his ability to do the framing job. Warner Depo at pages 39-42, attached as Exhibit 6.

k. H & W's superintendent (Maurice Egbert) learned that the framers had no experience framing churches, and this is why the framers got behind schedule. Maurice Egbert Depo at page 56, attached as Exhibit 7.

l. Maurice admits talking to Ken Egbert about framing and learning that Egbert Construction was an inexperienced company, and he therefore watched the framers very closely. Maurice Egbert Depo at 76-77, attached as Exhibit 7. Maurice Egbert also told Joel Warner about the framers inexperience and errors, and Joel Warner then told Maurice to closely watch the framers and to check their work. Id. at 79.

m. Joel Warner alleged that the Appellee CPB, through its architect, Paul Evans, instructed Appellee H & W to tell the framers to build the wall to a specified height. See Warner Depo at 46, attached as Exhibit 6.

n. The architect, Paul Evans, testified that he never observed any walls that needed to be torn down and did not give any instruction to destroy any walls. Evans Depo at page 48, attached as Exhibit 8.

- o. The architect, Paul Evans, admits receiving information about interference by H & W into the framing process. Evans Depo at pages 69-70, attached as Exhibit 8. Evans read H & W's daily reports and was aware of H & W's interference into the framing process, which he reported to CPB. Evans Depo at pages 63-72, attached as Exhibit 8.
- p. Dean Schick, an employee of the Appellee CPB, also stated that nothing was installed incorrectly on the project. Schick Depo at page 24, attached as Exhibit 1.
- q. Michel Lewis was an Egbert Construction employee and fellow wall-lifter with Jason Smith. Michael Lewis admits that Egbert Construction employees were supposed to wear hard hats, but nobody corrected them on their decision to not wear the hats. Deposition of Michael Lewis, hereinafter "Lewis Depo," at pages 17-18, excerpts attached as Exhibit 19 to the Addendum. Jason Smith died partly as a result of not wearing a hard hat. Mr. Lewis states that Jason Smith was never trained on how to do anything, and was just told to start performing dangerous work without any supervision or training. Lewis Depo at pages 24-25, attached as Exhibit 19. H & W's Maurice Egbert gave daily orders to all the framers. Lewis Depo at page 54, attached as Exhibit 19.

r. H & W bears responsibility for Jason Smith's death because aside from manifesting control over all aspects of the framing process that caused the death of Jason Smith, H & W held the power to stop workers from working if they were too young or inexperienced. Maurice Egbert Depo at pages 73-74, attached as Exhibit 7. Jason Smith was too young and inexperienced for the job site. Lewis Depo at pages 24-25, attached as Exhibit 19. When Jason Smith suffered his injury and death, it was Maurice Egbert who called for 911. Lewis Depo at pages 12-13, attached as Exhibit 19.

s. H & W's VP Joel Warner admits that H & W general contractor had a duty to keep a safe and clean site. Warner Depo at pages 84-85, attached as Exhibit 6.

t. Appellee H & W told the framers (i) how many men to employ, (ii) told the framers the time frame within which they had to complete, or substantially complete, the framing, and (iii) dictated the experience level of the men hired to actually do the framing. This assertion is supported as by the following:

1. On August 11, 1999, Clifford Hales, President of the Appellee H & W, sent a letter to Brent Reynolds which stated as follows:

...You promised to have 12 men on the job. This has not happened. If you continue with the same number of framers,

you will not meet the 7 week framing schedule. We feel you need to immediately increase the number of framers, and provide proper supervision so as to meet the 7 week framing schedule. Please provide us a written framing schedule outlining manpower and target dates such as wall framing, roof framing, completion, etc.

See Letter dated August 11, 1999, attached to the Addendum as Exhibit 9; (Also identified as Deposition Exhibit 34).

2. What Appellee H & W meant by "proper supervision" was that they wanted "experienced" men/framers. Warner Depo at page 79, attached as Exhibit 6 .

3. On August 25, 1999, Clifford Hales again made the following statement in a letter to Brent Reynolds:

This is a follow up to the letter dated August 11, 1999. You still have not had 12 men on the job as promised, and the job is getting further behind. Therefore, you are hereby notified that you are in breech [sic] of [our agreement]. Specifically, you have failed to employ sufficient competent help to complete the work in a reasonable time...Please...have sufficient men on the job site (12 or more men) by August 27, 1999, and continue to have sufficient men on each job day thereafter.

See Letter dated August 25, 1999, attached to the Addendum as Exhibit 10; (Also identified as Deposition Exhibit 35).

4. Appellee H & W also gave oral instructions to Brent Reynolds to put 12 or more framers on the job. Warner Depo at page 32, attached as Exhibit 6.

5. Appellee H & W, through Joel Warner, controlled the time schedules for the construction project. Warner Depo at pages

18-19, attached as Exhibit 6. Thus, Joel Warner controlled the time for beginning and completing the framing.

6. The contract between Appellee H & W and Brent Reynolds Construction, Inc., did not provide for a specific number of men (framers) to be on site. Warner Depo at 32, attached as Exhibit 6.

Because Appellee H & W actively participated in, and controlled the framing work, Appellee H & W is liable to Appellants for the injuries arising from the work. Appellee CPB is liable to the same extent as Appellee H & W.

V. SUMMARY OF THE ARGUMENT

Pursuant to Utah R. App. P. 24(a)(8), Appellants state as follows: The district court erred when it granted the Appellee H & W's Motion for Summary Judgment because Appellee H & W, the principle employer/general contractor, actively involved itself in, and asserted control over, the manner of performance of the contracted for work of its independent contractor, Brent Reynolds Construction, Inc. Appellee H & W is therefore subject to liability for the damages suffered by Plaintiff, which are injuries arising out of the independent contractor's, Brent Reynolds Construction, Inc.'s, work. The district court erroneously interpreted Thompson v. Jess, 1999 Utah 22, 979 P.2d

322 (Utah 1999) in a narrow and restrictive fashion. It imposed a standard not required by Utah Law and granted the motions because Appellant failed to demonstrate that one or both Appellee's were on site assisting, instructing or directing Appellants' decedent at the time he was killed. Thompson does not impose such onerous requirements.

The district court erred when it granted the Appellee CPB's Motion for Summary Judgment because the Appellee CPB was liable under the retained control doctrine as defined in Thompson. Appellee H & W did not have an independent contractor relationship with respect to Appellee CPB because Appellee CPB retained sufficient control over the manner and/or method of the work to be performed by Appellee H & W. Because Appellee CPB held an employer/employee relationship with Appellee H & W, it became liable to the same extent as Appellee H & W.

Regardless of the retained control doctrine, Appellee H & W was an employee of Appellee CPB, and not an independent contractor because Appellee CPB had the contractual right to accept or reject any subcontractor or employee selected by Appellee H & W. Pursuant to Ludlow v. Industrial Commission, 65 Utah 168, 179, 235 P. 884, 888 (Utah 1925), and Lodge v. Industrial Commission, 562 P.2d 227, 228 (Utah 1977), no

independent contractor relationship can exist under these circumstances.

Thus, Appellee H & W is liable to the Appellants because they actively participated in the framing process. Appellee CPB is vicariously liable to the Appellants by virtue of the acts and omissions of its employee Appellee H & W.

VI. ARGUMENT AND CITATION TO AUTHORITY

Pursuant to Utah R. App. P. 24(a)(9), Appellant states as follows:

1. Appellees H & W and CPB are liable under the retained control doctrine because one or both were actively involved in, and asserted control over, the manner of the performance of the framing.

The parties agreed below, and in the Motion for Summary Disposition Pleadings, that the case of Thompson v. Jess, 1999 Utah 22, 979 P.2d 322 (Utah 1999), controls the issues presented in this appeal. A copy of the Thompson case is attached as Exhibit 11 to the Addendum. The issue presented is upon which the trial court's decision turned, and which Appellant seeks to present on appeal. The issue is whether Appellee H & W (and/or Appellee CPB), became liable under the "retained control doctrine." Appellees became liable under the retained control

doctrine if they actively participated in the contracted for, or subcontracted for, work. The work in this case was the framing of the Highland 4 and 20 project. Thompson describes the "retained control doctrine" and "active participation" standard as follows:

This Court has not had opportunity to determine the precedential value of Dayton v. Free, 46 Utah 277, 148 P. 408 (Utah 1914), with respect to the retained control doctrine. Several federal courts applying Utah law, however, have been called upon to do so. Those courts uniformly have determined that under Dayton, a principal employer is not subject to liability for injuries arising out of its contractor's work unless the employer "actively participates" in the performance of the work. For instance, in Simon v. Deery Oil, 699 F. Supp. 257, 258 (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 for 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, 1979 U.S. App. LEXIS 12266 (10th Cir. 1979), cert. denied, 44 U.S. 1080, 62 L.Ed.2d 763, 100 S.Ct. 1031 (1980); Texaco, Inc. v. Pruitt, 396 F.2d 237, 240 (10th Cir. 1968); Erwin v. Kern River Gas Transmission Co., 1997 Tex. App. LEXIS 6685, *8, (addressing Utah law on issue). We believe the standard relied upon in these cases is correct, and we formally adopt same. Elaboration on the contours of the standard is needed, however.

Thus, by "formally adopting same," the law, as articulated in Simon, Sewell, Texaco, and Erwin, became the law of Utah. The district court below did not correctly interpret and apply Thompson, Simon, Sewell, Texaco, and Erwin. The district court,

based on its interpretation of Thompson, granted summary judgment based on the following facts:

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

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

The Court finds that there is no evidence that [H & W] or the CPB instructed Egbert Construction or its employees (or [Brent Reynolds Construction] or its employees) to do the work being performed **at the time of the Accident** in a different manner or by way of a different method.

The Court finds that there is no evidence that [H & W] or the CPB exerted control over the means utilized by Jason Smith, Michael Lewis, or Jose Louis, in doing the work Jason Smith, Michael Lewis and Jose Louis were performing **at the time of the Accident** or that [H & W] or the CPB interfered with **that** work. The Court finds that the employee of [H & W] on the site at the time of the Accident was in the construction trailer and had no involvement as the work being performed, and the wall being put into place, by Jason Smith, Michael Lewis and Jose Louis **at the time of the Accident**.

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

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

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

See Order of Summary Judgment in favor of H & W Construction, Inc., and the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, hereinafter referred to as "Order of Summary Judgment," attached as Exhibit 12 to the Addendum, at page 3-5, (emphasis supplied). See Also Order for Summary Judgment, R. 1043.

The district court concluded, based on Thompson, that:

[T]he exertion of control over the means utilized must relate to the 'injury causing aspect of the work.' [citing Thompson]. [H & W] and the CPB did not exert control over the means utilized as to the 'injury causing aspect of the work' of Jason Smith., rather, Egbert Construction controlled the means utilized **as to the work Jason Smith was performing at the time of the Accident.** The activities of [H & W] and the CPB to which Appellants refer did not relate to, and were not an exertion of control over, **the work Jason Smith was performing at the time of the accident**, and did not cause the accident and death of Jason Smith.

Order for Summary Judgment, at page 7, attached as Exhibit 12, (emphasis supplied). See Also R. 1043.

Simon, Sewell, Texaco, and Erwin, do not support the district court's conclusion. The district court interpreted Thompson in a manner unsupported by the precedent relied upon and "formally adopted" as the law of Utah: Simon, Sewell,

Texaco, and Erwin. In short, the district court's focus and reliance on the acts and omissions that occurred *at the time of the accident*, and limiting the consideration to the exertion of control that occurred over the manner of means utilized by Jason Smith in the process of lifting a specific wall onto a set of particular bolts, was too narrow and unsupported by the holdings of Thompson, Simon, Sewell, Texaco, and Erwin.

Appellees are liable under Thompson 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 (a particular and specific element of the framing process) at the day and time that the procedure and resulting injury occurred. Thompson, and its adopted precedent, Simon, Sewell, Texaco, and Erwin, require that, if an entity like H & W wants to avoid liability for the harm caused to another by the acts and omissions of an independent contractor, such as the framers in this case, it must not exert control over, or actively participate in, the manner, method or means by which the independent contractor performs the work of framing. Thompson, and its precedents, do not require that Appellants demonstrate that one or both of the Appellees stood next to Jason Smith and

ordered him to pick up the wall and then stood underneath it as it fell upon his head. The district court erred when it so held. All that Thompson requires is that Appellants demonstrate that Appellees were actively involved in the framing process. Based on the facts above, Appellant demonstrated this participation and the district court did not find otherwise.

Simon, a copy of which is attached to the Addendum as Exhibit 13, provides for liability on behalf of Appellees because they participated in the framing project, as detailed above. Simon held the employer of an independent contractor was not liable unless he "actively participated in the project." Simon, 699 F. Supp. at 258, citing Dayton, Sewell, and U.S. v. Page, 350 F.2d 28, 31 (10th Cir. 1965). Simon made no mention, express or implied, that the employer might participate to some extent, short of participating in the particular aspect of the work that caused the injury, and still avoid liability. In fact, Simon was not even limited to a particular type of work, but imposed liability as soon as the employer participated in the "project." Simon does not support the district court's conclusion that liability could only be imposed against Appellees if there was active participation in the manner and means by which Jason Smith lifted or dropped the wall that fell upon and killed him.

Instead, Appellees sacrificed protection from liability when they actively participated in the "framing project." As detailed above, Appellee H & W actively participated in the framing project and are therefore liable under Simon, and the district court erred when it failed to appreciate the meaning and import of Simon.

The Sewell decision, which is attached as Exhibit 14 to the Addendum, provides little detail or procedural history, and merely holds that the lower court committed harmful error because it gave a jury instruction on retained control that failed to explain the necessity for active participation by the defendant/principal employer. Sewell, 606 F.2d at 276. Sewell is most persuasive because of what it did NOT hold. Sewell, formally adopted by the Supreme Court as the law of Utah, did not require the lower court to explain, in its jury instruction, that active participation must be shown with respect to the particular aspect of the work from which the injury arose, but rather, Sewell held only that active participation was required. Like Simon, there was no limitation or requirement that the participation at issue relate to the particular injury causing aspect of the work. Active participation or control, in any respect, was all that was required. Sewell, as well as Simon,

was not as restrictive as the district court thought them to be. Contrary to the conclusion of the district court, they merely require active participation in some aspect of the (framing) project. Appellants demonstrated that Appellees were involved in the framing of the project, and thus, they are not insulated from liability under Thompson.

Texaco, which is attached as Exhibit 15 to the Addendum, was the first case to explain with specificity the degree of the participation on behalf of the principal employer that will create liability. Texaco held that the principal employer must exercise direction or control of the particular work being performed. Texaco, 396 F.2d at 240. Texaco suggests that if an employer in a construction project exercises direction or control over the landscapers, it will not owe any duty to the bricklayers, but only to the landscapers. Similarly, Appellees exercised direction and control over the framers and thus owe a duty to the framers, but not the other independent (sub)contractors. The district court did not attempt to reconcile its unduly restrictive interpretation of Thompson, with the clear holding of Texaco, or Simon and Sewell for that matter. Neither Thompson, nor Texaco, supported the district court's restrictive conclusion that Appellee H & W might only be

liable to Appellants if, and only if, an agent of Appellee was standing behind Jason Smith and barking orders and instructions. Thompson is not so restrictive, and should not be interpreted so restrictively. This Court should not allow the district court's order to stand.

Last, Erwin, attached as Exhibit 16 to the Addendum, held that a principal employer is liable to employees of an independent contractor, if, and only if, the employer reserved the contractual right to direct, control, or superintend the independent contractor's work, or in fact directed or controlled the time and manner of the work, or the means and methods by which the results were accomplished. Erwin, 1997 Tex. App. LEXIS 6685 at page 9. Again, as with Simon, Sewell, and Texaco, there is no language or *dicta* in the holding to support the restrictive interpretation that the "active participation" must relate directly to the aspect of the work that resulted in the injury, as concluded by the district court below.

As noted by the Thompson Court, immediately after adopting the cases of Simon, Sewell, Texaco, and Erwin as the law of Utah, "elaboration of the contours of the standard is needed." Thompson, 979 P.2d at 327. The Thompson Court elaborated as follows:

Under the "active participation" standard, a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work. See Conklin v. Chen, 287 So.2d 56, 60, 1973 Fla. LEXIS 4019 (Fla. 1973) (holding that under "active participation" standard, principal employer must directly influence manner in which work is performed; no duty arises from "passive nonparticipation").

This passage provides no support for the restrictive interpretation of Thompson rendered by the district court. Appellants demonstrated that Appellants were actively involved in, and asserted control over, the framing process and framing project (the work). The Thompson Court further elaborated the "contours" of the active participation standard as follows:

Such an assertion of control occurs, for example, when the principal employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which **the work** is to be accomplished. See e.g. Lewis v. N.J. Riebe Enterprises, Inc., 170 Ariz. 384, 825 P.2d 5, 7-8 (Ariz. 1992) (imposing liability where subcontractor's employee was injured as a result of the new, less safe method of work required by general contractor); Redinger v. Living, Inc., 689 S.W.2d 415, 418, 1985 Tex. LEXIS 825, 28 Tex. Sup. J. 404 (Tex. 1985) (imposing liability where subcontractor was ordered to operate backhoe dangerously close to plaintiff).

Thompson, 979 P.2d. at 327. (emphasis supplied).

The Thompson Court referred consistently to "the work." In the case at bar, "the work" is framing. Thompson does not express, or imply, any limit, such as that imposed by the trial court, that the participation in "the work," or in the framing,

relate to the particular aspect of the framing that ultimately caused the plaintiff's damages. Furthermore, the above quote ended the Thompson Court's elaboration of the contours of the active participation standard. The Thompson Court did go on to state that the comments to § 414 of the Second Restatement of Torts provided **guidance**, but did not, as it did with Simon, Sewell, Texaco, and Erwin, "formally adopt" the comments to § 414 as the law of Utah. It is from the comments, particularly, comment c, that the district court based its erroneous conclusion that it was the particular detail of the work, (lifting the specific wall onto the particular bolts), that the Appellant must prove the Appellee was actively participating, in order to survive Appellees' summary judgment motion. The nature of the district court's error was two fold. First, the lower court misunderstood the Restatement (Second) of Torts §414 (1965), attached as Exhibit 20 of the Addendum, to be the law of Utah. The Thompson Court specifically did not adopt the Restatement as the law of Utah, but the district court nevertheless assumed the Restatement to be the law. Second, ignoring the non-controlling legal nature of the Restatement, the district court misinterpreted the meaning of the Restatement and its comments.

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The Restatement (Second) of Torts § 414 has never been adopted as the law of Utah. Thompson, 1999 UT at P16. Thompson specifically declined to formally adopt this persuasive-only material. Id. In the other 49 States of the Union, Restatements are secondary authority only, and are not the law, unless specifically adopted by a State's legislature or Supreme Court. See Hoffman Constr. Co. v. Active Erectors & Installers, Inc., 969 F.2d 796, 800 (9th Cir. 1992); Picker Fin. Group L.L.C. v. Horizon Bank, 293 B.R. 253, 257, 2003 U.S. Dist. LEXIS 8716, 16 Fla. L. Weekly Fed. D 376 (M.D. Fla. 2003); Dee v. Marriott Int'l, Inc., 1999 U.S. Dist. LEXIS 16159, 10 (E.D. Pa. 1999). § 414, like any Restatement, is useful as a research tool or study aid, but nothing more until adopted by a State's Supreme Court. See Hoffman, *supra*. The lower court therefore erred when it applied comment (c) to § 414 to this case as if it was the law of Utah.

Second, as illustrated in the following passage, comment (c) of § 414 of the Restatement, (upon which the district court so heavily relied), concerns itself with a general contractor's interference with **any part** of the work of the subcontractor, not just the specific task that caused the injury. § 414, attached as Exhibit 20, provides:

One who entrusts work to an independent contractor, but who retains the control of **any part of the work**, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts § 414, at 388 (1965). Emphasis Added.

H & W's consistent and extensive exercise of control over the framing process constituted control over "any part of the work." H & W is therefore liable under § 414.

Comment (a) of the Restatement 2d imposes liability that exceeds the law of Agency:

If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in the Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.

Restatement (Second) of Torts §414, comment a, at 388 (1965).

The lower court never even considered whether H & W's control over the framing process was performed with reasonable care as to prevent the causing of injury to others, but instead

incorrectly focused on whether H & W actually directed the lifting of the wall that killed Jason Smith. See Order for Summary Judgment, attached as Exhibit 12, (continuous references to the "time of the Accident").

Comment (b) of the Restatement 2d provides that H & W is liable if they (1) superintended the job, (2) knew or should have known that its subcontractors were performing their work in a manner unreasonably dangerous to others, and (3) injury or death results from that dangerous work:

The rule stated in this Section is usually, though not exclusively, **applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job.** In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so.

Restatement (Second) of Torts §414, comment b, at 388 (1965).
(Emphasis Added).

This is clearly what happened in this case. H & W's superintendent Maurice Egbert superintended the entire job. The H & W Superintendent, Maurice Egbert, knew or should have known that inexperienced and young subcontractor employees were being

hired to perform extremely dangerous work. The inexperience of these employees resulted in death and injury to Jason Smith. The lower court didn't consider these factors and instead, narrowly focused only on whether H & W directly ordered young Jason to lift the wall that killed him.

Finally, the "retained control" concept is explained in comment (c) to § 414, which provides:

In order for the rule stated in this Section to apply, **the employer must have retained as least some degree of control over the manner in which the work is done.** It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved for employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Restatement (Second) of Torts §414, comment c, at 388 (1965), (Emphasis Added).

Accordingly, if the general contractor entrusts the work to the subcontractor, but retains control of the work being done to the degree provided for in the Restatement, it owes a duty of care for the safety of the subcontractor's employees. Here, H & W went far beyond a "general right" of merely inspecting progress, receiving reports or making suggestions. H & W took the burden and liability upon itself to directly order specific

work tasks on at least three different occasions. At the very least, the lower court should have considered whether or not the H & W orders to Egbert Construction, on at least three different occasions, exceeded the "general right" referred to in the Restatement.

The above several paragraphs illustrate the lower court's failure to properly interrupt and apply Restatement (Second) of Torts §414 (1965). However, Appellants note again that its argument regarding the misapplication of the Restatement is academic because the Restatement has not been adopted by the Utah Supreme Court or the Utah Legislature, and therefore, unlike Simon, Sewell, Texaco, and Erwin, is not the law of Utah.

The amount of control and participation of Appellee H & W was adequate to create a genuine dispute of material facts such that summary judgment was inappropriate. There was a genuine issue as to whether the control and participation demonstrated amounted to "active" under Thompson, such that a reasonable jury could impose liability upon Appellee H & W. In the case at bar, Appellee H & W entrusted a part of the work to a subcontractor, Brent Reynolds Construction, Inc., (who hired Egbert Construction and its employees to perform the work), but through its employee, Maurice Egbert, superintended the entire framing

job. Appellee H & W *interfered* in the framing process "from the very beginning." See Letter from Brent Reynolds, attached as Exhibit 5 to the Addendum; See Also Brent Reynolds Depo at page 20, attached as Exhibit 4 to the Addendum. Appellee H & W would not let the framers "frame some of the walls the way they wanted to frame them." Reynolds Depo at pages 25-26, attached as Exhibit 4 to the Addendum. After Brent Reynolds and/or Ken Egbert told Appellee H & W that it was not effective to frame the walls the way that Appellee H & W wanted them framed, Appellee H & W told Brent Reynolds (and the framers), that the framers "could **not** frame [the walls] in the **manner** that they wanted." Reynolds Depo at page 25, attached as Exhibit 4 to the Addendum, (emphasis added). In the event of a dispute regarding the framing process or an aspect of framing, and there were such disputes, *the framers did it the Hales & Warner way*. Reynolds Depo at page 26, attached as Exhibit 4, (emphasis supplied). In fact, Brent Reynolds could not recall whether there was single aspect of the framing process with which Appellee H & W did not interfere. Reynolds Depo at page 20, attached as Exhibit 4.

Joel Warner, an executive of Appellee H & W, kept a daily log of the activities and happenings on the construction site. On August 5, 1999, Joel Warner noted as follows:

Ken Egbert (framer) is concerned with the **manner** in which **we, [Appellee H & W]**, want the [building] framed..Brent Reynolds with whom our contract is with (framing) told Ken he shouldn't do it that way because of extra labor cost. At my, [Joel Warner's] request, Ken [Egbert, and] Brady (another framer who always does his Church framing this way) met to discuss this **method** of framing. Ken [and] I also went up to a Church with the same floor plan directly North of us to see the framing of it. Ken is proceeding as we, [Appellee H & W], have requested until final decision from Brent Reynolds is given.

See Log for August 5, 1999, attached as Exhibit 17 to the Addendum, (emphasis supplied); also referred to as Deposition Exhibit 30.

Other aspects of participation and control exercised by H & W included the following:

- i. Appellee H & W established the time frame within which the work would be completed, and also established the time frame for various stages of the framing to be completed, See Warner Depo at pages 18-19, attached as Exhibit 6 to Addendum.
- ii. Thus, Appellee H & W determined the pace of the framing as well as the date on which the framing would begin and end. Deposition of Clifford Hales, hereinafter "Hales Depo," at page 28, attached as Exhibit 18 to the Addendum.
- iii. Appellee H & W dictated the number of framers that would be on site doing the framing (12 or more men). See Letter dated August 11, 1999, attached as Exhibit 9 to the Addendum; See Also Letter dated August 25, 1999, attached as Exhibit 10 to

the Addendum; See Also Warner Depo at page 32, attached as Exhibit 6 to the Addendum;

- iv. Appellee H & W dictated the general qualifications of the framers and mandated, or attempted to mandate, that they be "experienced." Warner Depo at page 79, attached as Exhibit 6 to the Addendum.

Whether the amount of control exercised or retained is sufficient control over the performance of the relevant item of subcontracted for work is a question of fact that should ordinarily be left to the jury. Lewis v. N.J. Riebe Enterprises, Inc., 170 Ariz. 384, 825 P.2d 5, 7-8 (Ariz. 1992), cited with approval by, Thompson, *supra*¹. Because there is **some** evidence of control and participation, the district court erred when it granted summary judgment and this honorable Court should reverse the ruling of the district court.

2. Appellee CPB remains liable to Appellant under the "retained control doctrine" because there was a contract in which the Appellee CPB, as principle employer, retained sufficient control over the manner or method of the work.

¹ Lewis, in turn, cited the following cases as authority for this principle: Barker v. General Petroleum Corp., 72 Ariz. 187, 195, 232 P.2d 390, 395 (1951); Hughes v. Shanafelt, 203 Okla. 80, 218 P.2d 350, 352 (1950); Rabar v. E.I. du-Pont de Nemours & Co., 415 A.2d 499, 507-508, (Del. Super. 1980); Weber v. Northern Illinois Gas Co., 10 Ill.App.3d 625, 641, 295 N.E.2d 41, 49 (1973); Corsetti v. Stone Co., 396 Mass 1, 11, 483 N.E.2d 793 (1985); Dowell v. General Tel. Co., 85 Mich.App. 84, 94-95, 270 N.W.2d 711, 716 (1978); Riggins v. Bechtel Power Corp., 44 Wash.App. 244, 252, 722 P.2d 819, 823 (1986).

In Thompson v. Jess, the Supreme Court addressed the retained control doctrine as discussed at length above, and after articulating the elements and details of the "active participation" standard, stated and explained as follows:

We note that the term "retained control" is somewhat of a misnomer. Under the standards announced herein, a duty of care is imposed if the principal employer asserts affirmative control over or actually participates actively in the manner of performing the contracted for work. "Retained," to the extent the word implies passivity or nonaction, is inapt.

The term "retained control" may have a more syntactically correct application to sophisticated parties who, by contract, stipulate which party will control the manner or method of work or the safety measures to be taken--such as in contracts between general contractors and subcontractors involved in construction projects. See Dayton v. Free, 46 Utah 277, 148 P. 408, 411-12 (Utah 1914)], at 411, (noting that under terms of contract, principal employer did not reserve right to direct or control prosecution of work or any of contractor's workers). The issue, however, of whether a duty of care may be imposed solely as a result of such a contractual reservation is not before us.

Thompson, 1999 Utah at 26, note 3, 979 P.2d at 328, note 3.

The district court's findings on this issue were as follows:

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

Order for Summary Judgment, at Page 7, attached to the Addendum as Exhibit 12; See Also R. 1043.

Appellee CPB's motion for summary judgment should have been denied because, under the contract documents, Appellee CPB retained control over the construction and particulars of the work such that it was not insulated from liability. Appellants identify the following contractual provisions that demonstrate Appellee CPB retained adequate control such that it may be liable to Appellants:

- a. The Contract provided that Appellee CPB would establish the property lines and benchmarks for grading. See Conditions of the Contract, at Paragraph 2.1(A), page 2 of 12, attached as Exhibit 3 to the Addendum. Appellee did in fact assert this right. See Schick Depo at page 22, attached as Exhibit 1 to the Addendum; See Also Evans Depo at page 24, attached as Exhibit 8 to the Addendum.
- b. The contract provided that the Appellee CPB furnished information and services that were required for the orderly progress of the work. See Conditions of the Contract, at Paragraph 2.1(B), page 2 of 12, attached as Exhibit 3 to the Addendum. Appellee furnished numerous information and services through its agent, Dean Schick, and its architect, Paul Evans. See Schick Depo at page 22, attached as Exhibit 1 to the Addendum.

- c. The Contract provided that the Appellee CPB could inspect the work and progress of the work at any location and at any time. See Conditions of the Contract, at Paragraph 2.2, page 2 of 12, attached as Exhibit 3 to the Addendum.
- d. The Appellee CPB's architect inspected the work no less than once a week. See Deposition Exhibit 27, weekly and monthly reports authored by Paul Evans); See Also Evans Depo at pages 44-45, attached as Exhibit 8 to the Addendum.
- e. The Appellee CPB's Project director, Dean Schick inspected the work approximately once every two or three weeks. Schick Depo at page 33, attached as Exhibit 1 to the Addendum.
- f. The contract gave the Appellee CPB a right to stop the activities of the Appellee H & W Construction, Inc., or any portion its activity, until the Appellee CPB determined that Appellee H & W Construction, Inc. was performing its obligations in the manner that Appellee CPB deemed appropriate. See Conditions of the Contract, at Paragraph 2.3, page 2 of 12, attached as Exhibit 3 to the Addendum.
- g. The contract provided that the Appellee CPB, and its agent, "the Architect," (Paul Evans), had access to the work wherever located. See Conditions of the Contract, at Paragraph 3.12, page 4 of 12, attached as Exhibit 3 to the Addendum.

- h. The contract provided that the Appellee CPB could condemn and remove any portion of the work that Appellee CPB determined did not comply with the contract or which Appellee CPB determined was unsuitable because of a method of installation or protection that the Appellee CPB determined was inappropriate. See Conditions of the Contract, at Paragraph 4.2(E), page 5 of 12, attached as Exhibit 3 to the Addendum.
- i. The contract provided that the Appellee CPB, through its agent "the Architect," (Paul Evans), had the authority to stop work in order to ensure the performance of the work in a manner the Appellee CPB deemed proper. See Conditions of the Contract, at Paragraph 4.2(F), page 5 of 12, attached as Exhibit 3 to the Addendum.
- j. The contract provided that the Appellee CPB had final and ultimate authority to reject any subcontractor and/or employees, chosen by Appellee H & W Construction, Inc., and no substitutions of Subcontractors could be made without approval of the Appellee CPB. See Conditions of the Contract, at Paragraph 5.1(B) through (C), page 5 of 12, attached as Exhibit 3 to the Addendum. (Appellant discusses in the section below, Section V(3), facts regarding the approval and rejection of subcontractors and employees).

- k. The contract provided that the Appellee CPB could perform any an all portions of the construction project, or enter into a separate contract with other parties to perform any portion of the work otherwise required by the contract. See Conditions of the Contract, at Paragraph 6.1(A), page 6 of 12, attached as Exhibit 3 to the Addendum.
- l. The Appellee CPB installed its own seating (pews), carpet and possibly certain other materials, (marker boards). Evans Depo at page 81, excerpts attached as Exhibit 8 to the Addendum.
- m. The contract provided that the Appellee CPB could enter the job site and conduct any cleaning or removal of waste, and allocate the cost of such clean up to whomever it wanted. See Conditions of the Contract, at Paragraph 6.3, page 6 of 12, attached as Exhibit 3 to the Addendum.
- n. The contract provided that the Appellee CPB could instruct the Appellee H & W, to make any changes of any nature in the work so long as it paid for the additional cost of such changes. See Conditions of the Contract, at Paragraph 7.1(A) through (F), page 6 of 12; Paragraph 7.5(A), page 7 of 12; Paragraph 7.6(A) through (E), page 8 of 12, attached as Exhibit 3 to the Addendum.

- o. The contract provided that the Appellee H & W had to obtain specific permission from Appellee CPB to take measures to safeguard persons or property, except in cases of emergency. See Conditions of the Contract, at Paragraph 10.3, page 10 of 12, attached as Exhibit 3 to the Addendum.
- p. The contract provided that the Appellee CPB could select the materials used in the construction of the building. See Conditions of the Contract, at Paragraph 15.4, page 12 of 12, attached as Exhibit 3 to the Addendum.

Last, Appellee CPB and the Appellee H & W included a variety of indemnity provisions in the contract they entered with one another. These provisions were included because Appellee CPB and Appellee H & W contemplated that Appellee CPB would be liable for various acts and omissions committed by the general contractor and subcontractors. This expectation was based on the control that Appellee CPB retained, by contract, over the methods, means and details of the work. The provisions existed not to limit or remove the Appellee CPB's control, but to allocate the cost (as opposed to liability and duty) of the damages proximately caused by these acts and omissions to the Appellee H & W. For assuming this indemnification obligation, as well as other obligations, Appellee H & W was paid

\$1,633,900.00. See Agreement, at Article III, attached as Exhibit 2 to the Addendum.

The indemnification provisions are located as follows in the Contract, (Conditions of the Contract), attached as Exhibit 3 to the Addendum: Paragraph 3.2(C), page 3 of 12; Paragraph 3.13, page 4 of 12; Paragraph 3.14(A) through (E), page 4 through 12. These provisions should be read as important and meaningful. If Appellee CPB truly believed and fully expected that it would incur no liability because it had no control over the activities of 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. The district court, in granting the Appellees' Motion for Summary Judgment, impliedly concluded that these provisions were meaningless and unnecessary.

Additional provisions that demonstrate Appellee's understanding and expectation that it was exercising sufficient control over Appellee H & W, such that it would be liable for any acts and omissions committed by Appellee H & W, include provisions similar to the indemnification provisions identified above. These provisions provide that Appellee H & W would be "responsible to" Appellee CPB for losses and acts and omissions

that cause damages to persons. See Conditions of the Contract, at Paragraph 10.1, page 10 of 12, attached as Exhibit 3 to the Addendum. Again, if Appellee CPB actually anticipated that it would incur no liability because it had no control over the activities of Appellee H & W, it would not have inserted, or agreed to the insertion of, these provisions.

Appellee CPB's contemplated liability is also demonstrated by the fact that Appellee CPB required Appellee H & W to name Appellee CPB as an "insured" under the insurance policies Appellee H & W, had to obtain. See Conditions of the Contract, at Paragraph 11.1(A)(3)(c) and Paragraph 11.1.(B)(1)(a), page 10 of 12, attached as Exhibit 3 to the Addendum. Again, if the contract and the contracting parties actually contemplated that Appellee CPB would have no liability by virtue of any purported lack of control, these provisions would not have been placed in the contract.

The amount of control, and the extent of the rights, retained in the contract, and otherwise exercised by Appellee CPB, is such that the Appellee CPB remains liable under the retained control doctrine as articulated by Thompson. The district court erred when it ruled that "the contracts and their

provisions do not preclude summary judgment in favor of H & W and the CPB.

3. Appellee CPB did not hold a relationship of principle-employer and independent-contractor with Appellee H & W. Appellee CPB possessed the right to right to accept or reject any subcontractor or employee selected by Appellee H & W.

Appellants argued to the district court that the Appellee H & W was an employee or agent of the Appellee CPB, and is therefore liable for any acts or omissions committed on behalf of Appellee H & W, as well as any acts and omissions committed by itself. The district court erroneously found otherwise and ignored clear Utah precedent. (See Order for Summary Judgment, at page 7, attached as Exhibit 12); See Also, R. at 1043.

In Ludlow v. Industrial Commission et. al., 65 Utah 168, 179, 235 P. 884, 888 (Utah 1925), the Supreme Court of Utah held that "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 his employer." This principle was affirmed by the Supreme Court in Lodge v. Industrial Commission, 562 P.2d 227, 228, 1977 Utah LEXIS 1082 (Utah 1977). Pursuant to the contract documents executed between

Appellee CPB, and as revealed in the discovery identified below, (and attached as Exhibits 2 and 3 to the Addendum), the Appellee CPB retained and exercised the right to choose those employees and subcontractors who would perform the work, or any portion of the work, as well as reject any subcontractor chosen by Appellee H & W. See Conditions of the Contract, attached as to the Addendum as Exhibit 3, at Paragraph 5.1(B) through (C), page 5 of 12, and Paragraph 6.1(A), page 6 of 12.

The Supreme Court impliedly held that this employment power was the *sine qua non*² of an independent contractor and it is this authority and power that Appellee CPB withheld from Appellee H & W Construction, Inc. (See Ludlow, *supra* at 179, in which the Court describes the authority to employ others as the "crux" of the case; See Also Lodge, *supra* at 228, in which the Lodge Court quotes the Ludlow Court). Thus, because Appellee CPB had the authority to hire and fire employees and subcontractors of Appellee H & W, it lacked the *sine qua non* of the independent contractor relationship with Appellee H & W.

Other determinative factors in the independent contractor analysis is whether the employer, (Appellee CPB), controlled, directed, supervised or retained the right to control, direct or

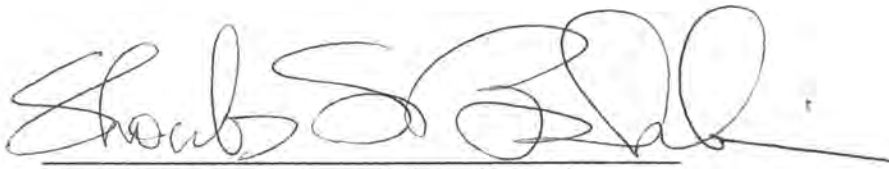
² *sine qua non* is a Latin phrase meaning "that without which the thing cannot be; an indispensable requisite or condition." Black's Law Dict.

supervise, the entity employed, (Appellee H & W Construction, Inc.). Lodge, supra, citing Sommerville v. Industrial Commission, 113 Utah 504, 196 P. 2d 718, 720 (Utah 1948). These elements mirror those articulated by Thompson, and Plaintiffs identify above, in Section V(2), the contractual provisions and acts of Appellee CPB that indicate control, direction and supervision over Appellee H & W. Thus, Appellee CPB did not hold an independent contractor relationship with Appellee H & W, and the district court erred when it found that such a relationship existed.

VII. CONCLUSION

The district court erred when it granted the Appellees' respective motions for summary judgment. 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', with a horizontal line drawn underneath it.

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VIII. CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 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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IX. ADDENDUM AND INDEX THERETO

The Addendum follows this brief immediately after the signatures and certificate of service. The Addendum contains the following, as described in the Table of Contents:

Exhibit 1	Excerpts from the Deposition of Dean Schick (Schick Depo)
Exhibit 2	The Agreement (Contract Document)
Exhibit 3	Conditions of the Contract (Contract Document)
Exhibit 4	Excerpts from the Deposition of Brent Reynolds (Reynolds Depo)
Exhibit 5	Letter from Brent Reynolds to Hales & Warner
Exhibit 6	Excerpts from the Deposition of Joel Warner (Warner Depo)
Exhibit 7	Excerpts from the Deposition of Maurice Egbert (Egbert Depo)
Exhibit 8	Excerpts from the Deposition of Paul Evans (Evans Depo)
Exhibit 9	Letter dated August 11, 1999 from Clifford Hales to Brent Reynolds
Exhibit 10	Letter dated August 25, 1999 from Clifford Hales to Brent Reynolds
Exhibit 11	Copy of <u>Thompson v. Jess</u> , 1999 Utah 22, 979 P.2d 322 (Utah 1999)
Exhibit 12	Order for Summary Judgment

- Exhibit 13 Copy of Simon v. Deery Oil, et. al., 699
F. Supp. 257 (Utah Dist. 1988) (Anderson,
J.)
- Exhibit 14 Copy of Sewell v. Phillips Petroleum
Company, 606 F.2d 274 (10th Cir. 1979)
- Exhibit 15 Copy of Texaco, Inc. v. Pruitt, 396 F.2d
237 (10th Cir. 1968)
- Exhibit 16 Copy of Erwin v. Kern River Gas
Transmission Co., Court of Appeals of
Texas, 1st Dist., (Case No. 01-96-00204-
CV, Decided December 18, 1997), 1997 Tex.
App. LEXIS 6685
- Exhibit 17 Hales & Warner Log for August 5, 1999
- Exhibit 18 Excerpts from Deposition of Clifford
Hales
- Exhibit 19 Excerpts from Deposition of Michael Lewis
- Exhibit 20 Restatement (Second) of Torts §414 (1965).

INDEX OF EXHIBITS

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- Exhibit 20 Restatement (Second) of Torts § 414

Exhibit 1

1 A Project manager.
 2 Q And what does a project manager do for the LDS
 3 Church?
 4 A Oversees construction projects.
 5 Q Construction projects of what nature?
 6 A New buildings, remodels, parking lots and HVAC
 7 work.
 8 Q Do you manage projects other than construction
 9 or renovation or expansion of religious sites? In other
 10 words, is it only churches or is it other things?
 11 A No.
 12 Q And how long have you been -- was it project
 13 manager?
 14 A Yes.
 15 Q How long have you been a project manager?
 16 A About eight years.
 17 Q Is there more than one project manager at the
 18 LDS Church?
 19 A Yes.
 20 Q Can you describe for me the structure of your
 21 employer? In other words, there's you, and do you
 22 manage other people and report to other people?
 23 A I report to a regional project manager, and
 24 he, in turn, reports to the DTA or director of temporal
 25 affairs, who, in turn, reports to the presiding

1 bishopric.
 2 Q And are all of those people located in the
 3 same building?
 4 A No.
 5 Q Where is your office?
 6 A American Fork.
 7 Q And where is the regional manager's office?
 8 A Currently, in our office.
 9 Q And then he reported to a DTA.
 10 A Yes.
 11 Q His office would be where?
 12 A Salt Lake.
 13 Q Okay. Are there employees equal to you, other
 14 project managers, in your office?
 15 A Yes.
 16 Q What do they do?
 17 A The same thing.
 18 Q In the same area?
 19 A Yes.
 20 Q And what, if any, training or qualifications
 21 do you have, or education do you have, that allows you
 22 to do your job?
 23 A Are you talking about college education?
 24 Q Well, what do you need to have to be a project
 25 manager for the LDS Church?

1 A Construction background.
 2 Q And could you be more specific about
 3 "construction background"?
 4 A Myself?
 5 Q Yes, sir. Why don't we start with your
 6 education and work experience.
 7 A I spent 15 years as a brick mason, six years
 8 in manufacturing and producing blocks and building
 9 retaining walls.
 10 Q For one or more --
 11 A Other entities.
 12 Q And what, if any, education do you have?
 13 A Two years of college. General ed.
 14 Q And what was your first position with the LDS
 15 Church?
 16 A I was called a PM supervisor, preventative
 17 maintenance supervisor.
 18 Q And where did you go from PM supervisor?
 19 A I was then hired as an area field rep, which
 20 that title then changed to project manager.
 21 Q And you've been a project manager for eight
 22 years?
 23 A Yes.
 24 Q What exactly does a project manager do?
 25 A We hire the architect and engineers on the

1 projects.
 2 Q How do you know you have a project? Do you
 3 decide what projects will be built or does someone tell
 4 you, We want to do something?
 5 A No, that comes out of Salt Lake.
 6 Q Well, let's talk about this project at which
 7 Jason Smith lost his life.
 8 What is the name of that project? The
 9 Highland project, can I call it that?
 10 A Highland 4 and 20.
 11 Q How did the Highland 4 and 20 project come to
 12 exist?
 13 A There's a department called planning, and they
 14 decide who should get a building. And once that
 15 happens, then they issue a work order to us, and then I
 16 go out and hire the architect to design the building.
 17 Q How do you know whether to make the building
 18 as big as this room or as big as this entire building?
 19 A The Church has a standard plan.
 20 Q They build the same building everywhere they
 21 go?
 22 A It's cookie cutter, yes.
 23 Q Regardless of the size of the congregation
 24 that they're going to serve?
 25 A Yes.

1 A You can just tell, looking at it, observing.
 2 Q I was reviewing Exhibit 23, and there's an
 3 indication in there that the owner would establish the
 4 property lines and bench marks for grading.

5 Do you know what I'm talking about?

6 A Yes.

7 Q What does that mean?

8 A The surveyor comes out and says, Here's the
 9 bench line for this project, which establishes the
 0 height or elevation of the building, and then he'll
 1 establish where the corners of the building are at.

2 Q And then the general contractor fills in the
 3 rest?

4 A Yes.

5 Q And there's also a provision in the contract
 6 about furnishing information and services required for
 7 the orderly progress of work.

8 If you need to review it, it's paragraph
 9 2.1 B. What does that mean? It's Exhibit 23, 2.1 B.

0 A Sometimes we'll have delays, for example, in
 1 the building permit. Sometimes we have things that we
 2 order, meaning the Church, for example, the pews and the
 3 carpet we order, and those are items that we have to
 4 order and make sure they get there on time.

5 Q Okay. Did you ever stop Hales & Warner from

1 Q And look at the work that had been done?
 2 Inspect it? What exactly did you do?

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

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

6 A Yes.

7 Q For what purpose?

8 A Make sure it was installed correctly.

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

11 A No.

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

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

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

19 A Yes.

20 Q Did you make any change orders?

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

23 Q What sort of change orders did you make?

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

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

4 A No.

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

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

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

0 Q Okay. What exactly did you do? You drove out
 1 there; right?

2 A We would hold monthly meetings.

3 Q Where?

4 A On the site.

5 Q Where?

6 A In the construction trailer.

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

8 A We would review the schedule, mostly payment
 9 requests, any subcontractor problems or change orders,
 0 things of that nature.

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

2 A We would go out and look at the work that had
 3 been done.

4 Q You would walk around the site?

5 A Yes.

1 remember how many we had there.

2 Q Earlier on, we were talking about Mr. Evans,
 3 the architect. Did his involvement in the Highland 4
 4 and 20 project end after he made the designs and plans?

5 A No.

6 Q What sort of involvement did he have?

7 A He has what we call "contract administration"
 8 from that point on.

9 Q And what is "contract administration"?

10 A It's to basically make sure that that building
 11 is built as per plans and specs.

12 Q Did he report to you?

13 A Yes.

14 Q How often did he report to you?

15 A We would -- every month we would talk about
 16 things, and he would send a report every week.

17 Q To?

18 A To me.

19 Q And the report was in writing, was it not?

20 A Yes. It's a job site report.

21 Q Is that what it says at the top of it, job
 22 site report?

23 A I believe that's sort of -- every architect
 24 does it differently, but it is a weekly report; maybe
 25 his visit to the site.

1 A No.
 2 Q Were there any standards that you imposed on
 3 Hales & Warner in the selection of their subcontractors?
 4 A No.
 5 Q Were there any subcontractors that Hales &
 6 Warner tried to use that you told them they couldn't?
 7 A Not that I recall.
 8 Q Did you have to hire any subcontractors to
 9 complete any portion of the work at Highland 4 and 20?
 10 A No.
 11 Q Had you known that the subcontractors were
 12 using untrained laborers, would you have had an opinion
 13 or desire about that?
 14 A Probably not.
 15 Q Were you familiar with any safety rules or
 16 regulations at the Highland 4 and 20 project?
 17 A You mean like their safety meetings and stuff
 18 like that?
 19 Q That's a good start, yes.
 20 A I knew they had some. I don't know the
 21 frequency.
 22 Q Do you know who was in charge of conducting
 23 the safety meeting?
 24 A Maurice.
 25 Q Of course, you never attended one of these

1 A We usually like to review it.
 2 Q Why?
 3 A To see if there's anybody on there we don't
 4 want to have to deal with.
 5 Q Did you see anybody on the subcontractor list
 6 that you didn't want to have to deal with?
 7 A Not that I recall.
 8 Q Did you make any inquiry or investigation
 9 regarding any of the subcontractors on the contractor
 10 list?
 11 A Not that I recall on that one.
 12 Q Did all of them meet your standards with
 13 regard to minimum limits and length of time in business,
 14 and ability to meet this timing schedule and the quality
 15 of their work? Did they meet all of those standards?
 16 A That's up to the general contractor.
 17 Q You trusted the general contractor to make an
 18 appropriate selection?
 19 A Yes.
 20 Q And in this case, that was Hales & Warner.
 21 A Yes.
 22 Q When you would visit the site, did you tell
 23 Hales & Warner or anybody else that you were coming?
 24 A No.
 25 Q Did you go at the same time every month?

1 safety meetings.
 2 A No.
 3 Q How do you know they had them?
 4 A They just told me they did.
 5 Q Do you know whether Hales & Warner was using
 6 subcontractors?
 7 A Yes.
 8 Q Were they using subcontractors?
 9 A Yes.
 10 Q How do you know?
 11 A Because they don't have that many guys that
 12 they employ to do all of that work.
 13 Q Couldn't they just hire a bunch of people to
 14 do it all on a non-permanent basis?
 15 A I guess they could if they wanted. They'd be
 16 insane, but . . .
 17 Q I'm wondering how you knew they were using
 18 subcontractors?
 19 A Just because they gave us a subcontractor
 20 list.
 21 Q Did they? And did you review the list?
 22 A Yes.
 23 Q And how often did you receive the list?
 24 A Just at the bid opening.
 25 Q Why did they give you a subcontractor list?

1 A No.
 2 Q How often did you go?
 3 A Just depended on my schedule.
 4 Q Looking back, approximately how much did you
 5 visit the site?
 6 A Probably every two or three weeks.
 7 Q And when you got there, did anyone show you
 8 around or did you show yourself around?
 9 A No, Maurice would go with me.
 10 Q How would you know that he would be there and
 11 be available?
 12 A Because he was always there.
 13 Q How did you know he would be available?
 14 A He just made himself available.
 15 Q Did you determine whether or not the
 16 subcontractors on the subcontractor list were licensed
 17 or permitted to do whatever it was they were doing?
 18 A No.
 19 Q Now, for example, with installing the
 20 electrical work or system, how do you know it's being
 21 done by an electrician as opposed to somebody who thinks
 22 they know how to do wiring?
 23 A It's up to the general contractor.
 24 Q You would agree with me, would you not, that
 25 you'd want a competent professional to install the

Exhibit 2

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AGREEMENT

This Agreement made and entered into this 7th day of May in the year Nineteen Hundred and Ninety-nine by and between the CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, A Utah Corporation Sole, hereinafter called "OWNER" and HALES & WARNER CONSTRUCTION, INC. hereinafter called "CONTRACTOR".

WITNESSETH:

WHEREAS: Owner intends to have certain work performed as outlined below, and

WHEREAS: Contractor is able and willing to perform such work.

NOW THEREFORE: Owner and Contractor for the considerations hereinafter provided agree as follows:

ARTICLE I. SCOPE OF WORK

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; HIGHLAND 4, 20 WARDS as prepared by BUTLER & EVANS ARCHITECTS, L.L.C. hereinafter referred to as "ARCHITECT".

ARTICLE II. THE CONTRACT DOCUMENTS

The General Conditions of the Contract, Supplementary Conditions, the Manual entitled HIGHLAND 4, 20 WARDS numbered Divisions 01 through 13, 15, 16, dated January 1999, Addenda No. 1, 2, 3, and the Drawings dated January 1999 entitled HIGHLAND 4, 20 WARDS and numbered G1.0 - G1.6, SD1.1, SD1.2, L1.1 - L1.4, A1.1 - A1.6, A2.1, A2.2, A3.1 - A3.7, A4.1 - A4.3, A5.1 - A5.4, A6.1 - A6.6, A7.1 - A7.3, A8.1, F1.1, F2.1, F2.2, F3.1, F3.2, S1.0 - S1.4, S2.1 - S2.8, S3.1, S3.2, P1.1, P1.2, P2.1, P3.1, M1.1, M2.1, M3.1, M4.1, M4.2, M5.1, ME1.1, ME2.1 - ME2.4, E1.1 - E1.3, E2.1, E2.2, E3.1, E4.1, E4.2, AV1.1, AV1.2 together with this Agreement form the Contract and are as fully a part thereof as if attached hereto or repeated herein.

ARTICLE III. THE CONTRACT SUM

Owner shall pay and contractor shall accept as full payment of this Contract the sum of ONE MILLION SIX HUNDRED THIRTY THREE THOUSAND NINE HUNDRED AND NO/100 DOLLARS (\$1,633,900.00), subject to additions and deductions provided in the Contract.

ARTICLE IV. TIME OF COMMENCEMENT AND COMPLETION

Work under this Contract shall commence upon written notice to proceed from Owner, and be completed and ready for Owner's final inspection within 300 calendar days from the date of such notice. Time is of the essence.

ARTICLE V. INSPECTION

The fact that any particular work has been inspected shall not be considered a waiver of the requirements of strict compliance with the Contract Documents.

ARTICLE VI. CONTRACTOR NOT AGENT OF OWNER

It is expressly agreed that Contractor is not the agent or employee of Owner, but that he is an independent Contractor.

ARTICLE VII. PROGRESS PAYMENTS, FINAL ACCEPTANCE AND FINAL PAYMENT

Payments shall be made in accordance with the applicable Sections of the Contract Documents.

ARTICLE VIII. ASSIGNS

Neither party to the Contract shall assign the Contract or sublet it as a whole without the written consent of the other. Contractor shall not assign any monies due or to become due to him hereunder nor shall he pledge or attempt to pledge the credit of Owner or bind the Owner to any third party.

ARTICLE IX. ACCEPTANCE

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 at Contractor's risk until accepted by Owner in writing.

ARTICLE X. DEFAULT AND ATTORNEY'S FEES

Should any dispute arise between the parties hereto, with regard to the performance of their respective obligations under the Contract Documents, which dispute cannot be settled between the parties and litigation is commenced, then the losing party in the litigation agrees to pay all costs and attorney's fees of the prevailing party.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, the day and year first above written, binding themselves, their heirs, successors, executors, administrators and representatives to the full performance of the contract.

REVIEWED

ARCHITECTURAL AND ENGINEERING
DIVISION OF THE DEPARTMENT OF
PHYSICAL FACILITIES FIELD
OPERATION SUPPORT SECTION

By _____
Member, Executive Staff

ACCEPTED

OWNER:

CORPORATION OF THE PRESIDING BISHOP
OF THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS,
A Utah Corporation Sole

By Georges A. Bonnet
Georges A. Bonnet, Authorized Agent

CONTRACTOR:

HALES & WARNER CONSTRUCTION, INC.
1460 NORTH MAIN, UNIT 1
SPANISH FORK, UT 84660

By Cliff Hales
Cliff Hales - president
Name and Title

License Number 86-246426-5501

Exhibit 3

CONDITIONS

Of The

CONTRACT

GENERAL CONDITIONS (FIXED SUM)

ARCHITECTURAL AND ENGINEERING SERVICES DIVISION
TEMPLE CONSTRUCTION DEPARTMENT
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

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SECTION 1 - GENERAL PROVISIONS

1.1 DEFINITIONS

- A. Agreement: The Agreement is the document entitled "Agreement Between Owner and Contractor" executed by the Owner and the Contractor for performance of the Work.
- B. Architect: The Architect is the entity identified as such in the Agreement.
- C. Change In The Work: A Change in the Work is:
1. A modification to the requirements of the Contract Documents or a delay in Substantial Completion resulting from an instruction from the Owner or Architect to the Contractor;
 2. A modification to the requirements of the Contract Documents or a delay in Substantial Completion resulting from an event or circumstance other than an instruction from the Owner or Architect to the Contractor.
- D. Contract: The Contract Documents form the Contract.
- E. Contract Documents: The Contract Documents consist of the documents identified as such in the Agreement.
- F. Contractor: The Contractor is the entity identified as such in the Agreement.
- G. Contract Sum: The Contract Sum is the total amount stated in the Agreement as amended by Modifications payable by the Owner to the Contractor for performance of the Work.
- H. Contract Time: The Contract Time is the period of time stated in the Agreement as amended by Modifications for Substantial Completion of the Work.
- I. Day: The term "day" means calendar day unless otherwise specifically defined.
- J. Drawings: The Drawings consist of the documents
- Contract in the form of a:
1. Change Order;
 2. Construction Change Directive; or
 3. Field Change.
- L. Owner: The Owner is the entity identified as such in the Agreement.
- M. Project: The Project is the total construction designed by the Architect of which the Work performed under the Contract Documents may be the whole or a part.
- N. Product Data: Product Data consists of standard illustrations, schedules, performance charts, instructions, brochures, diagrams, and other information furnished by the Contractor to illustrate details regarding materials or equipment to be used in the Work, or the manner of installation, operation, or maintenance of such materials or equipment.
- O. Project Manual: The Project Manual is the volume assembled for the Work which includes the bidding requirements, sample forms, the Conditions of the Contract, the Specifications, and other information.
- P. Samples And Mock-ups: Samples and Mock-ups are physical examples which illustrate materials, equipment, or workmanship and establish standards by which the Work will be judged.
- Q. Shop Drawings: Shop Drawings are drawings, diagrams, illustrations, schedules, performance charts, fabrication and installation drawings, setting diagrams, patterns, templates, and other data which are specially prepared by the Contractor or any Subcontractor, manufacturer, supplier, or distributor. Shop drawings illustrate some portion of the Work and confirm dimensions and conformance to the Contract Documents.
- R. Specifications: The Specifications consist of the documents identified as such in the Agreement.
- S. Subcontractor: A Subcontractor is any entity supplying labor, materials, or equipment for the Work under separate contract with the Contractor or any other Subcontractor.

for the Work from the local governmental authority having jurisdiction over the Work and the Work is sufficiently complete that Owner can use the Work for its intended purpose. The date of Substantial Completion is the substantial completion date certified by the Architect in accordance with the Contract Documents.

U. Work: The Work includes all labor, materials, equipment and construction required by the Contract Documents.

V. Written Notice: Written notice is notice in writing given from one party to the other. Written Notice shall be effective:

1. On the date of personal delivery to the other party;
2. On the date sent by facsimile transmission to the other party provided receipt of the facsimile is verified by telephone or an electronic confirmation report by the party sending the facsimile transmission;
3. Three days after the date of mailing by first class mail postage prepaid to the other party's last known business address; or
4. On the date of receipt by the other party as stated on the return receipt if sent by registered or certified mail, or by courier.

1.2 EXECUTION, CORRELATION, AND INTENT

- A. By executing the Agreement, the Contractor represents that it has visited the site, familiarized itself with the local conditions under which the Work is to be performed, and correlated its own observations with the requirements of the Contract Documents.
- B. The intent of the Contract Documents is to include all labor, materials, equipment, and other items necessary for the proper execution and completion of the Work. The Contract Documents are complementary and what is required by any one shall be as binding as if required by all. Performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended result.
- C. The organization of the Contract Documents is not intended to control the Contractor in dividing the Work among Subcontractors or to establish the extent of the Work to be performed by any trade.
- D. Words used in the Contract Documents which have well known technical or trade meanings are used therein in accordance with such recognized meanings.
- E. In the interest of brevity, the Contract Documents may omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

1.3 OWNERSHIP AND USE OF CONTRACT DOCUMENTS

The Drawings, the Project Manuals, and copies thereof are the property of the Owner. The Contractor shall not use these documents on any other project. The Contractor may retain one copy of the Drawings and the Project Manual as a Contract record set and shall dispose of all remaining copies following final completion of the Work.

SECTION 2 - OWNER

2.1 INFORMATION AND

B. The Owner will furnish to the Contractor any information or services it is required to furnish under the Contract Documents with reasonable promptness to avoid delay in the orderly progress of the Work.

C. The Owner will furnish to the Contractor up to thirty-six (36) copies of the Drawings, the Project Manual, and the Addenda.

2.2 OWNER'S RIGHT TO INSPECT THE WORK

The Owner and its representatives shall have the right to inspect any portion of the Work wherever located at any time.

2.3 OWNER'S RIGHT TO STOP THE WORK

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 the Contract Documents in a timely manner, the Owner may order the Contractor in writing to stop the Work, or any portion thereof, until the cause for such order has been eliminated.

SECTION 3 - CONTRACTOR

3.1 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

- A. The Contractor shall carefully compare the Contract Documents with each other and with other information relating to the Project prior to commencing the Work and during performance of the Work and shall immediately report to the Architect errors, inconsistencies, and omissions discovered.
- B. Should the Contractor or any of its Subcontractors become aware of any question regarding the meaning or intent of any part of the Contract Documents prior to commencing that portion of the Work about which there is a question, the Contractor shall request an interpretation or clarification from the Architect before proceeding. The Contractor proceeds at its own risk if it proceeds with the Work without first making such a request and receiving an interpretation or clarification from the Architect. If neither the Contractor nor the affected Subcontractors become aware of the question until after work on the relevant portion of the Work has commenced, then the following precedence shall govern for purposes of determining whether resolution of the question constitutes a Change in the Work:
 1. The Agreement takes precedence over all other documents.
 2. The Supplementary Conditions take precedence over the General Conditions.
 3. The General Conditions and Supplementary Conditions take precedence over the Drawings and the Specifications.
 4. An Addendum or Modification takes precedence over the document(s) modified by the Addendum or Modification.
 5. The Specifications take precedence over the Drawings.
 6. Within the Drawings, larger scale drawings take precedence over smaller scale drawings, figured dimensions over scaled dimensions, and noted materials over graphic indications.

C. It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with requirements of governing public authorities. However, if the Contractor determines that the Contract Documents are not in accordance with those requirements, the Contractor shall

laws, regulations, and ordinances have been effected. The Contractor shall be fully responsible for any work knowingly performed contrary to such laws, regulations, and ordinances and shall fully indemnify the Owner against loss and bear all costs and penalties arising therefrom.

- D. The Contractor shall take field measurements and verify field conditions and shall compare such field measurements and conditions and other information known to the Contractor with the Contract Documents before ordering any materials or commencing construction activities. The Contractor shall immediately report errors, inconsistencies, and omissions which it discovers to the Architect. If the Contractor orders materials or commences construction activities before taking field measurements and verifying field conditions, the Contractor shall not be entitled to any compensation for additional costs to the Contractor resulting from field measurements or conditions different from those anticipated by the Contractor which would have been avoided had the Contractor taken field measurements and verified field conditions prior to ordering the materials or commencing construction activities.
- E. If site conditions indicated in the Contract Documents differ materially from those the Contractor encounters in performance of the Work, the Contractor shall immediately notify the Architect in writing of such differing site conditions.

3.2 SUPERVISION OF CONSTRUCTION PROCEDURES

- A. The Contractor shall supervise and direct the Work using its best skill and attention. The Contractor shall be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work.
- B. The Contractor shall be responsible for:
 - 1. The proper observance of property lines and set back requirements as shown in the Contract Documents; and
 - 2. The location and layout of the Work as shown in the Contract Documents with respect to the position of the Work on the property and the elevation of the Work in relation to grade.
- C. The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors, and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor or any Subcontractor.
- D. The Contractor shall not be relieved of its obligation to perform the Work in accordance with the Contract Documents either by the activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections, or approvals required or performed by persons other than the Contractor.
- E. The Contractor shall be responsible for inspection of portions of the Work already performed under the Contract to determine that such portions are in proper condition to receive subsequent portions of the Work.

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.
- B. The Contractor shall maintain the Work in good order among those performing the Work.

- C. The Contractor is fully responsible for the Project and materials and work connected therewith until the Owner accepted the work in writing. The Contractor shall replace or repair at its own expense any materials or work damaged or stolen, regardless of whether it has received payment for such work or materials from the Owner.

- D. The Contractor shall remedy all damage or loss to property caused in whole or in part by the Contractor, its Subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

3.4 WARRANTY

The Contractor warrants to the Owner that the materials and equipment furnished under the Contract will be specified quality and new unless otherwise required by the Contract Documents, that the Work will be free from defects, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitution not properly approved and authorized, may be considered defective. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of the materials and equipment used in performing the Work.

3.5 TAXES

- A. The Contractor shall pay all sales, use, consumer, payroll, workers compensation, unemployment, old age pension surtax, and similar taxes assessed in connection with the performance of the work.
- B. The Owner will pay all taxes and assessments on the real property comprising the Project site.

3.6 PERMITS, FEES, AND NOTICES

- A. The Owner will obtain and pay for all permanent easements necessary for completion of the Work.
- B. The Owner will pay the cost of permits, fees, and improvement bonds required by local agencies necessary for the proper execution and completion of the Work. The Owner will arrange for issuance of permits and the Contractor shall be responsible for picking up the permits from the local agencies.
- C. The Contractor shall obtain and pay the cost of licenses necessary for the proper execution and completion of the Work.
- D. The Contractor shall secure any certificates of inspection and of occupancy that may be required by authorities having jurisdiction over the Work. The Contractor shall deliver these certificates to the Architect prior to execution of the Certificate of Substantial Completion.
- E. The Contractor shall comply with and give any notices required by the laws, ordinances, rules, regulations, and lawful orders of any public authorities bearing on performance of the Work.

3.7 CONTRACTOR'S ON-SITE REPRESENTATIVE

The Contractor shall employ a competent representative to supervise the performance of the Work. This representative shall be in attendance at the Project site during the performance of the Work. This representative shall represent the Contractor for all purposes, including communication with the Owner. All communications will be confirmed in writing.

3.8 CONTRACTOR'S CONSTRUCTION SCHEDULES

- A. The Contractor shall prepare and submit for the Owner's and the Architect's information the Contractor's construction schedule for the Work. The schedule shall cover the time limits stated in the Contract Documents, shall be revised at specified intervals, shall relate to all of the work, and shall provide for the expeditious and practicable execution of the Work.
- B. The Contractor shall prepare and keep current a submittal schedule which is coordinated with the Contractor's construction schedule and which allows the Architect specified times to review submittals.

3.9 DOCUMENTS AND SUBMITTALS AT THE SITE

The Contractor shall keep at the Project site for use by the Owner, the Architect, or their representatives, a record copy of the Project Manual, the Drawings, all Addenda, and all Modifications. These documents shall be maintained in good order and currently marked to record changes and selections made during construction. In addition, the Contractor shall keep at the Project site one copy of all Product Data, Shop Drawings, Samples, and similar submittals required by the Contract Documents.

3.10 PRODUCT DATA, SHOP DRAWINGS, AND SAMPLES

- A. Product Data, Shop Drawings, Samples, and similar submittals are not Contract Documents and do not alter the requirements of the Contract Documents unless incorporated into the Contract Documents by a Modification.

The Contractor shall review, approve, and submit to the Architect Product Data, Shop Drawings, Samples, and similar submittals in accordance with the Contract Documents. Submittals not required by the Contract Documents may be returned without action. By approving Product Data, Shop Drawings, Samples, and similar submittals, the Contractor represents that it has determined and verified field measurements, field construction criteria, materials, catalog numbers, and similar data, and that it has checked and coordinated each submittal with the requirements of the Work and of the Contract Documents or will make such determination, verification, check, and coordination prior to commencing the relevant portion of the Work.

- C. The Contractor shall not perform any portions of the Work requiring submittals until the respective submittal has been reviewed and accepted by the Architect.
- D. The Contractor shall not be relieved of responsibility for deviations from the requirements of the Contract Documents by the Architect's acceptance of submittals unless the Contractor has specifically informed the Architect in writing of such deviations at the time of submission and the Architect has incorporated the deviation into the Contract Documents by a Modification. The Contractor shall not be relieved of responsibility for errors or omissions in submittals by the Architect's acceptance of the submittal.

3.11 CUTTING AND PATCHING

The Contractor shall be responsible for any cutting, fitting, and patching that may be required to complete the Work and make its parts fit together properly.

3.12 ACCESS TO WORK

The Contractor shall provide the Owner and the Architect

3.13 ROYALTIES AND PATENTS

The Contractor shall pay all royalties and license fees required by the Work or by the Contractor's chosen method of performing the Work. The Contractor shall defend and hold the Owner harmless from all suits or claims for infringement of any patent or license rights or any loss on account thereof.

3.14 INDEMNIFICATION

- A. The Contractor shall indemnify and hold harmless the Owner, the Architect, their consultants, and the agents and employees of any of the foregoing from and against any and all claims, damages, liability, demands, costs, judgments, awards, settlements, causes of action, losses and expenses, including but not limited to attorneys fees, arising out of or resulting from performance of the Work, attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible or real property, including loss of use resulting therefrom, but only to the extent caused in whole or in part by the negligent acts or omissions of the Contractor, any Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. In the event that any such claim, damage, loss, or expense is caused in part by a party indemnified hereunder, that party shall bear the cost of such claim, damage, loss, or expense to the extent it was the cause thereof. In the event that the claimant asserts a claim for recovery against any party indemnified hereunder, the party indemnified hereunder may tender the defense of such claim to the Contractor. If the Contractor rejects such tender of defense and it is later determined that the party indemnified hereunder did not cause any part of the claim, damage, loss, or expense, the Contractor shall reimburse the party indemnified hereunder for costs and expenses incurred by that party in defending against the claim. The Contractor shall not be liable hereunder to indemnify any party for damages resulting from the sole negligence of that party.
- B. In addition to the foregoing, the Contractor shall be liable to defend the Owner in any lawsuit filed by any Subcontractor relating to the Project. Where liens have been filed against the Owner's property, the Contractor and/or its bonding company which has issued bonds for the Project, shall obtain lien releases and record them in the appropriate county and/or local jurisdiction and provide the Owner with a title free and clear from any liens of Subcontractors. In the event that the Contractor and its bonding company are unable to obtain a lien release, the Owner in its absolute discretion may require the Contractor to provide a bond around the lien or a bond to discharge the lien at the Contractor's sole expense.
- C. In addition to the foregoing, the Contractor shall indemnify and hold the Owner harmless from any claim of any other contractor resulting from the performance, nonperformance or delay in performance of the Work by the Contractor.
- D. No subcontract shall relieve the Contractor of any of its liability or obligations to the Owner under the Contract Documents. The Contractor agrees that it is fully responsible to the Owner for acts or omissions of Subcontractors and of persons either directly or indirectly employed by them.
- E. In claims against any person or entity indemnified under this Article 3.14 by an employee of the Contractor or any Subcontractor or anyone employed directly or indirectly by them or anyone for whose acts they are liable, the indemni-

Subcontractor under worker's compensation acts, disability benefit acts, or other employee benefit acts.

SECTION 4 - ADMINISTRATION OF THE CONTRACT

4.1 ARCHITECT

In case of the termination of the employment of the Architect, the Owner shall appoint in writing an Architect against whom the Contractor makes no reasonable objection, whose status under the Contract Documents shall be that of the former Architect in all respects.

4.2 ARCHITECT'S ADMINISTRATION OF THE CONTRACT

- A. The Architect shall be the Owner's representative during the construction period. He shall have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.
- 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 onsite inspections. 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. The fact that the Architect has failed to observe a defect or deficiency in the Work shall not relieve the Contractor of its duty to perform the Work in accordance with the Contract Documents.
- C. Communications between the Contractor and the Owner relating to the Work shall be through the Architect. Communications between the Owner or the Contractor with the Architect's consultants relating to the Work shall be through the Architect. Communications between the Owner or the Architect and the Subcontractors relating to the Work shall be through the Contractor. Communications between the Contractor and any separate contractor shall be through the Architect, except as otherwise specified in the Contract Documents.
- D. The Architect will review the Contractor's Payment Requests and determine the amounts due the Contractor in accordance with Section 9.
- E. The Owner and/or the Architect shall have the right to condemn and require removal of the following at the Contractor's expense:
 1. Any portion of the Work which does not meet the requirements of the Contract Documents.
 2. Any portion of the Work damaged or rendered unsuitable during installation or resulting from failure to exercise proper protection.
- F. The Architect shall have authority to stop the Work, with concurrence of the Owner, whenever such stoppage may be necessary in its reasonable opinion to insure the proper performance of the Work.
- G. The Architect will review the Contractor's submittals such as Product Data, Shop Drawings, Samples, and Mock-ups and shall accept or take other appropriate action regarding the submittals. 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 instructions for installation

review of submittals shall not relieve the Contractor of its obligations under the Contract Documents. The Architect's review of submittals shall not constitute acceptance of safety precautions or construction means, methods, techniques, sequences or procedures. The Architect's acceptance of a specific item shall not indicate acceptance of an assembly of which the item is a component.

- H. The Architect has authority to order Construction Change Directives and Field Changes in accordance with Section 7.
- I. The Architect will conduct inspections to determine the dates of Substantial Completion and final completion, will receive and review written guarantees and related documents required by the Contract and assembled by the Contractor, and will review and approve or reject the Contractor's final payment request.
- J. The Architect shall be the interpreter of the performance and requirements of the Contract Documents. The Architect's interpretations shall be in writing or in the form of drawings.
- K. The Architect's decisions in matters relating to artistic effect will be final if consistent with the Contract Documents.

SECTION 5 - SUBCONTRACTORS

5.1 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

- A. The Contractor shall enter into contracts with Subcontractors to perform all portions of the Work that the Contractor does not customarily perform with its own employees.
- 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 objection.
- 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 Architect.

5.2 SUBCONTRACTUAL RELATIONS

- A. The Contractor's responsibility for 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 subcontracts. Any warranties required for such work shall be obtained by the Contractor in favor of the Owner and delivered to the Architect. It is expressly understood and agreed that there is no contractual relationship between the Owner and any Subcontractor, and under no circumstances shall the Owner be responsible for the non-performance or financial failure of any Subcontractor or any effects therefrom.
- B. The Contractor agrees to pay the Subcontractors promptly upon receipt of payment from the Owner for that portion of the funds received which represents the Subcontractor's portion of the Work completed to the Contractor's satisfaction for which payment was made by the Owner.

- C. The Contractor shall require each Subcontractor to:
1. Be licensed by the state in which the Project is located where such licensing is required by the governing authority;
 2. Be bound by the terms of the Contract Documents as far as they are applicable to the Subcontractor's work;
 3. Assume toward the Contractor the same obligations the Contractor has assumed toward the Owner, including the prompt payment of its employees, subcontractors, and materialmen;
 4. Submit its applications for payment to the Contractor in time to permit the Contractor to make timely application to the Owner;
 5. Execute claim or lien releases or lien waivers for payments made by the Contractor; and
 6. Make all claims for extra work done or for extensions of time to the Contractor in the same manner as the Contractor is required to make such claims to the Owner.

SECTION 6 - CONSTRUCTION BY OWNER OR SEPARATE CONTRACTORS

6.1 OWNER'S RIGHT TO PERFORM WORK OR AWARD SEPARATE CONTRACTS

- A. The Owner reserves the right to perform work itself or to award other contracts in connection with other portions of the Project.
- B. When separate contracts are awarded for different portions of the Project, "the Contractor" in the Contract Documents in each case shall mean the contractor who signs each separate contract.

6.2 MUTUAL RESPONSIBILITY

- A. The Contractor shall afford other contractors reasonable opportunity to place and store their materials and equipment on site and to perform their work and shall properly connect and coordinate its Work with theirs where applicable.
- B. If any part of the Contractor's Work depends upon the work of any other separate contractor for proper performance or results, the Contractor shall inspect and promptly report to the Architect any apparent discrepancies or defects in such work that render it unsuitable for such proper performance and results. Failure of the Contractor to so inspect and report shall constitute an acceptance of the work of the other contractor as fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.
- C. The Contractor shall promptly remedy damage caused by the Contractor or any Subcontractor to the completed or partially completed work of other contractors or to the property of the Owner or other contractors.

6.3 OWNER'S RIGHT TO CLEAN UP

If a dispute arises among the Contractor and separate contractors as to the responsibility under their separate contracts for maintaining the Project free from waste materials and rubbish, the Owner may clean up the Project and allocate the cost among those responsible as the Owner and the Architect determine to be just.

SECTION 7 - CHANGES IN THE WORK

7.1 CHANGES IN THE WORK RESULTING FROM AN INSTRUCTION

- A. If the Owner or the Architect gives the Contractor an instruction which modifies the requirements of the Contract Documents or delays Substantial Completion of the Work, the Contractor may be entitled to an adjustment in the Contract Sum and/or the Contract Time. If compliance with the instruction affects the cost to the Contractor to perform the Work, the Contract Sum shall be adjusted to reflect such increase or decrease in cost subject to the conditions set forth in Article 7.1, Paragraphs B through F. If compliance with the instruction delays Substantial Completion, the Contract Time shall be extended for a period of time commensurate with such delay subject to the conditions set forth in Article 7.3, Paragraph A and the Contractor shall be paid liquidated damages for the delay as set forth in Article 7.3, Paragraph B.
- B. If the Contractor receives an instruction from the Owner or the Architect which the Contractor considers a Change in the Work, the Contractor before complying with the instruction shall notify the Architect in writing that the Contractor considers such instruction to constitute a Change in the Work. The Contractor agrees that if it complies with the instruction without first giving such written notice to the Architect, the Contractor is not entitled to any adjustment in the Contract Sum or the Contract Time as a result of the instruction and waives any claim therefor.
- C. If the Contractor claims that it is entitled to an adjustment in the Contract Sum (except for costs related to a time extension) as a result of an instruction by the Owner or the Architect, the Contractor shall furnish a proposal for a Change Order containing a price breakdown itemized as required by the Owner. The breakdown shall be in sufficient detail to allow the Owner to determine any increase or decrease in direct costs (materials, labor, equipment, insurance, bonds, and subcontract costs) as a result of compliance with the instruction. Any amount claimed for subcontracts shall be supported by a similar price breakdown and shall itemize the Subcontractors' profit and overhead charges. Profit and overhead shall be subject to the following limitations.
 1. The Subcontractors' profit and overhead shall not exceed twelve (12) percent of its direct costs.
 2. The Contractor's profit and overhead on work performed by its own crews shall not exceed twelve (12) percent of its direct costs.
 3. The Contractor's profit and overhead mark up on work performed by its Subcontractors shall not exceed five (5) percent of the Subcontractor's charges for such work.
 4. On credit changes, profit and overhead on the originally estimated work will not be credited back to the Owner.
- D. If the Contractor claims that it is entitled to an adjustment in the Contract Time as a result of an instruction from the Owner or the Architect, the Contractor shall include in its proposal justification to support the Contractor's claim that compliance with the instruction will delay Substantial Completion.
- E. The Contractor's proposal for a modification, together with the price breakdown and time extension justification, shall be furnished within ten (10) days of the date the Architect gives written notice requesting the proposal.
- F. If the Contractor is required to perform work which it claims constitutes a Change in the Work but which the Owner and the Architect do not agree constitutes a Change in the Work, the Contractor may submit its claim for additional Contract Sum and/or Contract Time, or both as a dispute pursuant to Article 13 within thirty (30) days of completion of the work.

that the change does not entitle it to additional compensation or time extensions and waives any claim therefor.

7.2 CHANGE IN THE WORK RESULTING FROM AN EVENT OR CIRCUMSTANCE

- A. If an event or circumstance, other than an instruction from the Owner or the Architect affects the cost to the Contractor of performing the Work or delays Substantial Completion of the Work, the Contractor may be entitled to an adjustment in the Contract Sum and/or the Contract Time. If the circumstance or event affects the cost to the Contractor to perform the Work and is caused by a wilful or negligent act or omission of the Owner or the Architect, the Contract Sum shall be adjusted to reflect such increase or decrease in cost subject to the conditions set forth in Article 7.2, Paragraphs B through F. If the event or circumstance delays Substantial Completion and is described in Article 7.3, Paragraph A, the Contract Time shall be extended for a period of time commensurate with such delay subject to the conditions set forth in such article. If the circumstance or event delays Substantial Completion of the Work and is caused by a wilful or negligent act or omission of the Owner or the Architect, then the Contractor shall be compensated for costs incident to the delay in accordance with Article 7.3, Paragraph B. The Contractor shall not be entitled to any adjustment to the Contract Sum or other damages from the Owner as a result of any event or circumstance unless the event or circumstance results from a wilful or negligent act or omission of the Owner or the Architect.
- B. If a Change in the Work results from any event or circumstance caused by the wilful or negligent act or omission of the Owner or the Architect, the Contractor shall give the Owner written notice of such event or circumstance within twenty-four hours after commencement of the event or circumstance so that the Owner can take such action as is necessary to mitigate the effect of the event or circumstance. The Contractor shall not be entitled to any adjustment in either the Contract Time or the Contract Sum based on any damages or delays resulting from such event or circumstance during a period more than twenty-four hours prior to the Contractor giving such written notice to the Owner.
- C. The Contractor shall submit any claims for an adjustment in the Contract Time and/or the Contract Sum resulting from a Change in the Work (other than a change resulting from compliance with an instruction from the Owner or Architect) within the time limits set forth below. In the event that the Contractor fails to submit its claim within the limits set forth above, then the Contractor agrees it shall not be entitled to any adjustment in the Contract Time or the Contract Sum or to any other damages from the Owner due to the circumstance or event and waives any claim therefor.
1. Claims for an adjustment in the Contract Time due to inclement weather shall be made by the tenth (10th) of the month following the month in which the delay occurred.
 2. Claims for an adjustment in the Contract Time and/or the Contract Sum due to any other circumstance or event shall be submitted within seven (7) days after the occurrence of the circumstance or event.
- D. If the Contractor claims that it is entitled to an adjustment in the Contract Sum (except for costs related to a time extension) because of an event or circumstance resulting from the wilful or negligent act or omission of the Owner or the Architect (other than an instruction), the Contractor shall furnish a price breakdown as described in Article 7.5, Paragraph B.

in the Contract Time as a result of an event or circumstance, the Contractor include with its claim copies of logs, letters, shipping orders, delivery tickets, P schedules, and other supporting information necessary to justify the Contractor's claim that the event or circumstance delayed Substantial Completion. If the Contractor is entitled to a time extension as a result of an event or circumstance caused by the wilful or negligent act or omission of the Owner or the Architect, the Contractor shall be compensated for all costs related to the delay in accordance with Article 7.3, Paragraph B.

- F. Within thirty (30) days after receipt of the Contractor's claim, the Architect shall either approve or deny the claim. If the Architect approves the claim, the adjustment in the Contract Time and/or Contract Sum shall be reflected in a Change Order pursuant to Article 7.5 or a Construction Change Directive pursuant to Article 7.6. If the Architect denies the Contractor's claim, the Contractor may submit its claim as a dispute pursuant to Section 13 within thirty (30) days of receipt of the Architect's denial of the claim. If the Contractor fails to submit its claim for resolution pursuant to Section 13 within the thirty (30) day time period, then the Contractor agrees it is not entitled to an adjustment in the Contract Time and/or Contract Sum and any other damages as a result of the event or circumstance from the Owner and waives any claim therefor.

7.3 EXTENSIONS OF TIME

- A. If Substantial Completion of the Project is delayed because of any of the following causes, then the Contract Time shall be extended by Change Order for a period of time equal to such delay.
1. Labor strikes or lock-outs;
 2. Inclement weather;
 3. Unusual delay in transportation;
 4. Unforeseen governmental requests or requirements;
 5. A Change in the Work pursuant to Article 7.1; or
 6. Any other event or circumstance caused by the wilful or negligent act or omission of the Owner or the Architect.
- B. If any delay referred to in Article 7.3, Paragraph A, subparagraphs 4, 5 or 6 is caused by the wilful or negligent act or omission of the Owner or the Architect, the Contractor shall be paid liquidated damages in the amount per day set forth in the Supplementary Conditions to compensate the Contractor for all damages resulting from the delay, including but not limited to general conditions costs, additional job site costs, additional home office overhead costs, disruption costs, acceleration costs, increase in labor costs, increase in subcontract costs, increase in materials costs, and any other costs incident to the delay. The Contractor shall be entitled to no other compensation relating to the delay.

7.4 DOCUMENTATION OF CHANGES IN THE WORK

If the Owner, the Architect and the Contractor reach agreement regarding the adjustment in Contract Sum, if any, and the adjustment in the Contract Time, if any, resulting from a Change in the Work, then the parties shall execute a Change Order pursuant to Article 7.5. If the Owner, the Architect and the Contractor cannot reach agreement regarding the adjustment in Contract Sum or the adjustment in Contract Time resulting from a Change in the Work, then the Owner and the Architect shall issue a Construction Change Directive pursuant to Article 7.6.

7.5 CHANGE ORDERS

1. The occurrence of a Change;
2. The amount of the adjustment in the Contract Sum, if any, as a result of the Change; and
3. The extent of the adjustment in the Contract Time, if any, as a result of the Change.

- B. The Contractor's signature upon a Change Order is the Contractor's acknowledgment that it is not entitled to any additional adjustment in the Contract Time or the Contract Sum or any other damages or compensation as a result of the Change in the Work other than that provided for in the Change Order, irrespective of whether a subsequent claim for additional compensation or time extensions relating to the Change in the Work is described as a change in the requirements of the Contract Documents, a delay, a disruption of the Work, an acceleration of the Work, an impact on the efficiency of performance of the Work, an equitable adjustment, or other claim and irrespective of whether the impact of the Change in the Work is considered singly or in conjunction with the impact of other Changes in the Work.

7.6 CONSTRUCTION CHANGE DIRECTIVES

- A. A Construction Change Directive is a written order, prepared by the Architect and signed by the Owner, stating a proposed basis for adjustment, if any, in the Contract Sum, the Contract Time, or both resulting from a Change in the Work. A Construction Change Directive shall be used to order a Change in the Work if the terms of a Change Order cannot be agreed upon prior to performance of a Change in the work described in Article 7.1 or after the occurrence of an event or circumstance described in Article 7.2.
- B. Upon receipt of a Construction Change Directive, the Contractor shall immediately perform the changed work with due diligence.
- C. Pending final resolution of any adjustment in the Contract Sum or Contract Time relating to a Construction Change Directive, the amounts proposed by the Owner in the Construction Change Directive may be included in the Contractor's Payment Requests once the work relating thereto is completed. Amounts due the Owner as a result of a Construction Change Directive shall be the actual net savings to the Contractor from the Change in the Work as confirmed by the Architect. If both additions and credits are involved in a single Change in the Work, overhead and profit shall be figured on the basis of net increase, if any, related to that Change in the Work.
- D. If after the changed work is completed the Owner, the Architect, and the Contractor reach agreement on adjustments in the Contract Sum, Contract Time, or both, such agreement shall be reflected in an appropriate Change Order.
- E. If the parties do not reach agreement regarding an adjustment to the Contract Sum, Contract Time, or both relating to the Construction Change Directive within thirty (30) days of the completion of the changed work, then the Contractor may submit its claim for an adjustment pursuant to Section 13 within thirty (30) days of the completion of the changed work. In the event that the Contractor fails to submit its claim for resolution pursuant to Section 13 within thirty (30) days of completion of the changed work, then the Contractor shall be deemed to acknowledge that it is not entitled to additional compensation or time extensions resulting from the Change in the Work except as set forth in the Construction Change Directive and waives any claim therefor.

- A. The Architect is authorized to order minor changes during the course of the Work which will not involve extra cost or time and which are consistent with the general intent of the Contract Documents. Further, the Architect is authorized to order on-the-spot minor Changes in the Work of a value of \$1,000 or less and resulting in no time extension in order to avoid delaying the Work. The price of such Field Change will be mutually agreed upon between the Architect and the Contractor before the Contractor proceeds with the change and shall be recorded on a Field Change form.

- B. The Contractor will proceed with the changed work forthwith. The Field Change will subsequently be reduced to a Change Order.

7.8 WAIVER OF CLAIMS

The Contractor shall not be entitled to any adjustment in the contract Sum or the Contract Time or for any damages of any kind whatsoever resulting from an instruction from the Owner or the Architect, any event or circumstance, or any act or omission of the Owner or Architect and the Contractor expressly waives any and all claims therefor, except as set forth in Articles 7.1, through 7.3.

SECTION 8 - TIME

8.1 TIME IS OF THE ESSENCE

All time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work. The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

8.2 COMMENCEMENT OF THE WORK

The Contractor shall not commence work on the Project site until the date set forth in the written Notice To Proceed. However, the Contractor may enter into subcontracts and secure material for the Project after receipt of the Agreement with the Owner's authorized signature. The Owner will issue the Notice To Proceed within forty-five (45) days after the Owner receives acceptable bonds and evidence of insurance pursuant to Section 11 unless the Owner earlier terminates the Agreement pursuant to Section 14.

8.3 DELAY IN COMPLETION OF THE WORK

- A. For each day after the expiration of the Contract Time that the Work is not substantially complete, the Contractor shall pay the Owner the amount set forth in the Supplementary Conditions as liquidated damages for the Owner's loss of use of the Project and the added administrative expense to the Owner to administer the Project during the period of delay. In addition, the Contractor shall reimburse the Owner for any additional Architect's fees and legal fees incurred by the Owner as a result of the delay. The Owner may deduct any liquidated damages or reimbursable expenses from the money due or to become due to the Contractor. If the amount of liquidated damages and reimbursable expenses exceeds any amounts due to the Contractor, the Contractor shall pay the difference to the Owner within ten (10) days after receipt of a written request from the Owner for payment.

- B. At the time the Architect certifies the Project is substantially completed, the Architect shall identify the remaining items to be completed for final completion of the Project and shall confer with the Contractor a reasonable time for completion of those items. The items to be completed shall be:

Contractor exceeds the time allowed for completion of the items set forth in the Certificate of Substantial Completion, the Contractor shall pay to the Owner as liquidated damages for additional administrative expenses the amount set forth in the Supplementary Conditions. In addition, the Contractor shall reimburse the Owner for any additional Architect's fees and legal fees incurred by the Owner as a result of the delay.

SECTION 9 - PAYMENTS AND COMPLETION

9.1 SCHEDULE OF VALUES

The Contractor shall submit to the Architect a schedule of values which allocates the Contract Sum to various portions of the Work. The schedule of values shall be supported by such data to substantiate its accuracy as required by the Architect. This schedule, when accepted by the Architect, shall be used as a basis for reviewing the Contractor's payment requests.

9.2 PAYMENT REQUESTS

A. Once each month, the Contractor shall submit to the Architect for its approval a payment request for the estimated value of the Work completed, materials stored on the site, and for materials stored offsite as approved by the Owner as of the date of the payment request as specified in Division 01.

1. The estimate shall be in accordance with the schedule of values submitted by the Contractor.
2. Such payment requests may include requests for payment for Change Orders and for the Changes in the Work which have been authorized by Construction Change Directives, but not yet included in Change Orders.
3. Such payment requests may not include requests for payment of amounts the Contractor does not intend to pay to a Subcontractor because of a dispute or other reason.

B. The Contractor warrants and guarantees that upon the receipt of payment for work, materials, and equipment covered by each payment request, whether incorporated in the Project or not, title to such work, materials, and equipment shall pass to the Owner free and clear of all liens, claims, security interests, or encumbrances. The Contractor further warrants that no work, material, or equipment covered by a payment request has been acquired by the Contractor or by any other person performing the Work or furnishing material and equipment for the Work, subject to an agreement under which an interest therein or an encumbrance thereon is retained by the seller or otherwise imposed by the Contractor or such other person.

9.3 PAYMENT REQUEST APPROVAL

A. The Architect will, within seven (7) days after receipt of the Contractor's payment request, forward to the Owner the payment request approved for such amount as the Architect determines is properly due, and notify the Contractor and the Owner in writing of the Architect's reasons for withholding certification of any part of the payment request.

B. The approval of the payment request will constitute a representation by the Architect to the Owner based upon the Architect's observations at the site and the data comprising the payment request, that the Work has progressed to the point indicated and that, to the best of the Architect's knowledge, the Work is in accordance with the Contract Documents.

upon Substantial Completion, to results of subsequent inspections, to minor deviations from the Contract Documents correctable prior to completion, and to qualifications expressed by the Architect. However, the Architect's approval of the payment request shall not constitute a representation that the Architect has:

1. Conducted exhaustive or continuous on-site inspections to check the quantity or quality of the Work;
2. Reviewed construction means, methods, techniques, sequences, or procedures;
3. Reviewed copies of requisitions received from Subcontractors or other data requested by the Owner to substantiate the Contractor's right to payment;
4. Made examination to ascertain how or for what purpose the Contractor has used money previously paid out of account of the Contract Sum.

9.4 DECISIONS TO WITHHOLD APPROVAL AND PAYMENT

A. The Architect may disapprove a payment request in whole or in part to the extent reasonably necessary to protect the Owner if, in the opinion of the Architect, the representation to the Owner required by Article 9.3, Paragraph B can be accurately made. If the Architect is unable to certify payment in the amount of the payment request, the Architect will notify the Contractor and the Owner provided in Article 9.3, Paragraph A. If the Contractor and the Architect cannot agree on a revised amount, the Architect will promptly approve a payment request for the amount for which the Architect is able to make such representations to the Owner. The Architect may also decide not to certify payment or, because of subsequently discovered evidence or subsequent observations, may nullify the whole or a part of a payment request previously approved, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss because of:

1. Defective Work not remedied;
2. Third-party claims filed or reasonable evidence indicating probable filing of such claims;
3. Failure of the Contractor to make payments properly to Subcontractors for labor, material or, equipment;
4. Reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
5. Damage to the Owner or another contractor for which the Contractor is responsible;
6. Reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover the cost of completing the Work and actual or liquidated damages for the anticipated delay; or
7. The Contractor's persistent failure to carry out the Work in accordance with the Contract Documents.

B. The Owner reserves the right to withhold payments to the Contractor, subsequent to the Architect's approval of any payment request, in order to protect the Owner from loss due to any condition described in Article 9.4, Paragraph A, Subparagraphs 1 through 7. Upon satisfactory removal of any such grounds for withholding, payments so withheld will be made.

9.5 PROGRESS PAYMENTS

A. Subject to the Owner's right to withhold payment set forth in Article 9.4, Paragraph B, the Owner shall pay to the Contractor ninety (90) percent of the amount certified by the Architect, less previous payment thereon within fifteen (15) days after receipt of the payment request from the Architect. However, at any time after fifty (50) percent of the Work has been completed, the Owner may withhold payment of the remaining amount until the Work is substantially completed.

- B. Upon receipt of any payment from the Owner, the Contractor shall pay to each Subcontractor the amount paid to the Contractor on account of such Subcontractor's portion of the Work.
- C. The Contractor shall maintain a copy of each payment request at the Project site for review by the Subcontractors.
- D. No payment made under the Contract, either in whole or in part, shall be construed to be an acceptance of defective or improper materials or workmanship.

3.6 FINAL PAYMENT

- A. The Owner shall make full and final payment of the Contract Sum within thirty (30) days of the completion of all of the following requirements:
 1. The Architect has declared to the Owner in writing that the Work is complete;
 2. The Architect has received all final lien waivers and/or releases of lien from all Subcontractors;
 3. The Architect has received the Affidavit of Contractor and Consent of Surety on the Owner's prescribed form fully executed by the Contractor and its surety; and
 4. The Owner has accepted the Work in writing.
- B. Acceptance of final payment by the Contractor or any Subcontractor shall constitute a waiver of claims by that payee except those previously made in writing pursuant to Sections 7, 8, or 9 and identified by the Contractor on the Affidavit of Contractor and Consent of Surety as being unsettled at the time of the final payment request.

SECTION 10 - PROTECTION OF PERSONS AND PROPERTY

10.1 SAFETY PRECAUTIONS AND PROGRAMS

The Contractor shall be responsible to the Owner for initiating and supervising all safety programs in connection with the performance of the Work.

10.2 SAFETY OF PERSONS AND PROPERTY

- A. The Contractor shall take reasonable precautions to prevent damage, injury, or loss to:
 1. All persons on the site;
 2. The Work and materials and equipment to be incorporated into the Work; and
 3. Other property at the site or adjacent to it.
- B. The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations, and other lawful requirements of public authorities bearing on the safety or protection of persons and property.
- C. The Contractor shall designate a responsible member of its organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated in writing by the Contractor to the Owner and the Architect.

10.3 EMERGENCIES

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 the Owner, act at its own discretion to safeguard persons or property. The Contractor shall immediately notify the Architect of such emergency action, and shall submit a full written report to the Architect within five (5) days.

SECTION 11 - INSURANCE AND BONDS

11.1 CONTRACTOR'S LIABILITY INSURANCE

- A. The Contractor shall obtain the following insurance and provide evidence thereof as described below prior to commencement of the Work or within ten (10) days after signing the Agreement, whichever is earlier:
 1. Workers Compensation and Employers Liability Insurance with limits and coverages as required by the law of the state in which the Project is located.
 2. Commercial General Liability Insurance - ISO Form CG 00 01 (10/93) or equivalent Occurrence Policy, with:
 - a. Limits of not less than:
 - 1) \$2,000,000 General Aggregate;
 - 2) \$2,000,000 Products - Comp/OPS Aggregate;
 - 3) \$1,000,000 Personal and Advertising Injury;
 - 4) \$1,000,000 Each Occurrence;
 - 5) \$50,000 Fire Damage (any one fire); and
 - 6) \$5,000 Medical Expense (any one person).
 - b. Endorsements attached thereto including the following or their equivalent:
 - 1) ISO Form CG 25 03 (10/93), Amendment Of Limits of Insurance (Designated Project or Premises), describing the subject Contract and specifying limits as shown above.
 - 2) ISO Form CG 20 10 (10/93), Additional Insured -- Owners, Lessees, Or Contractors (Form B), naming the Owner as an additional insured and containing the following statement: "This Endorsement Also Constitutes Primary Coverage In The Event Of Any Occurrence, Claim, Or Suit".
 - c. Automobile Liability Insurance, with:
 - 1) A minimum limit of \$1,000,000 Combined Single Limit per accident; and
 - 2) Coverage applying to "Any Auto."
 3. All-Risk Builders Risk Insurance Policy - ISO Form CP 00 20 (10/91), Builders' Risk Coverage (or equivalent) and ISO Form CP 10 30 (10/91), Causes of Loss-Special, including Additional Coverage-Collapse and Additional Coverage-Extensions (or equivalent) with Limits of Insurance not less than the Contract Sum. An installation floater may be used, if approved in writing by Owner.
 - a. Policy shall cover materials stored at temporary storage locations and materials in transit.
 - b. Policy shall not cover Flood or Earthquake. Flood and Earthquake coverage will be provided by the Owner.
 - c. Include the Owner and all Subcontractors as Insureds with the Contractor on the policy.
- B. The Contractor shall provide evidence of such insurance to the Owner as follows:
 1. Deliver to the Owner a Certificate of Insurance, on ACORD 25-S (3/93) Form, or equivalent:
 - a. Listing the Owner as a Certificate Holder and Additional Insured on general liability and any excess liability policies;
 - b. Listing the endorsements set forth above. (Note: If forms other than ISO forms are used, copies of the non-ISO forms shall be attached to this certificate);
 - c. Identifying the Project;
 - d. Containing a cancellation clause of the certificate amended to read: "Should any of the above described policies be cancelled before the natural expiration date thereof, the issuing company will give the Certificate Holder written notice to the certificate holder named to the left";

insurance shall be rated "Class VIII" or better, in the A.M. Best Company Key Rating Guide-Property-Casualty, current edition); and

- f. Bearing the name, address and telephone number of the "Producer" and an original signature of the authorized representative of the Producer. (Facsimile or mechanically reproduced signatures will not be accepted.)

2. Upon request, provide copy of All-Risk Builder's Risk Insurance Policy for Owner's approval.

- C. The Contractor shall maintain such insurance in effect from the commencement of the Work until the expiration of the time period covered by the warranty specified in Article 11.2, paragraph B. and the completion of any repairs covered by said bonds.
- D. The Owner reserves the right to reject any insurance company, policy, endorsement, or certificate of insurance with or without cause.
- E. The cost of insurance as required above shall be the obligation of the Contractor.

11.2 PERFORMANCE BOND AND LABOR AND MATERIAL PAYMENT BOND

- A. Prior to commencing the Work or within ten days after signing the Agreement, whichever is earlier, the Contractor shall furnish to the Owner a performance bond and a labor and material payment bond each in an amount equal to one hundred (100) percent of the Contract Sum as security for all obligations arising under the Contract Documents. Such bonds shall:
 1. Be written on Form AIA Document A312.
 2. Be issued by a surety company or companies licensed in the state in which the Project is located and holding valid certificates of authority under Sections 9304 to 9308, Title 31, of the United States Code as acceptable sureties or reinsurance companies on federal bonds.
 3. Have a penal sum obligation not exceeding the authorization shown in the current revision of Circular #570 as issued by the United States Treasury Department, i.e. the "Treasury List".
 4. Be accompanied by a certified copy of the Power of Attorney stating the authority of the Attorney-in-fact executing the bonds on behalf of the Surety.
- B. The Owner reserves the right to reject any surety company, performance bond, or labor and material payment bond with or without cause.
- C. The cost of such bonds as required above shall be the obligation of the Contractor.

SECTION 12 - UNCOVERING AND CORRECTION OF WORK

12.1 UNCOVERING OF WORK

The Contractor shall notify the Architect at least 24 hours in advance of performing work which would cover up work or otherwise make it difficult to perform inspections required by the Specifications or by applicable governing authorities. Should any such work be covered without proper notification having been given to the Architect, the Contractor shall uncover that work for inspection at its own expense.

12.2 CORRECTION WORK

- A. The Contractor shall promptly correct any portion of the Work which is rejected by the Architect or which fails to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed, or completed. The Contractor shall bear the costs of correcting such rejected Work, including additional testing and inspection costs, compensation for the Architect's services, and any other expenses made necessary thereby.
- B. The Contractor shall remedy any defects due to faulty materials, equipment, or workmanship which appear within a period of one year from the date of Substantial Completion or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Contract Documents. The Contractor shall pay all costs of correcting faulty work, including additional Architect's fees when incurred.
- C. Nothing in the Contract Documents shall be construed to establish a period of limitation within which the Owner may enforce the obligation of the Contractor to comply with the Contract Documents. The one year period specified above has no relationship to the time within which compliance with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations.

12.3 ACCEPTANCE OF NONCONFORMING WORK

- A. If the Owner prefers to accept work not in conformance with the Contract Documents, the Owner may do so instead of requiring removal and correction of the nonconforming Work. In that event, the Contract Sum will be reduced by an amount agreed upon by the parties which reflects the difference in value to the Owner between the Work as specified and the nonconforming work. Such adjustment may consider increased maintenance costs, early replacement costs, increased inefficiency of use, etc., and shall be effective whether or not final payment has been made. Such adjustment shall be reflected in a Change Order pursuant to Article 7.5.
- B. Temporary or trial usage by the Owner or the Architect of mechanical devices, machinery, apparatus, equipment, or other work or materials supplied under this Contract prior to written acceptance by the Architect, shall not constitute the Owner's acceptance.

SECTION 13 - RESOLUTION OF DISPUTES

- A. In the event any claim asserted under Section 7 or any dispute regarding any other provision of the Contract Documents cannot be resolved by agreement between the Owner and the Contractor, either party may submit the claim as a dispute to the Owner's Director of Facilities Management Department (the "Director") who will review the matter and render a written decision resolving the dispute. A copy of the Director's written decision will be provided to the parties. The decision of the Director will be final and conclusive of the dispute unless within thirty (30) days after the Contractor receives the Director's written decision, the Contractor mails or otherwise delivers to the Director a written notice of appeal addressed to the Presiding Bishopric, Attention: Counselor for Physical Facilities. If a notice of appeal is filed, the Presiding Bishopric shall review the matter and render its written decision regarding the matter and deliver a copy thereof to the Contractor. The decision of the Presiding Bishopric shall be final and conclusive of the dispute unless within thirty (30) days after the Contractor

Contractor commences legal action for adjudication of the dispute. Submission of the dispute to the Director and the Presiding Bishopric as outlined above is a condition precedent to the right to commence legal action to adjudicate any dispute. In the event that the Contractor commences legal action to adjudicate any dispute without first submitting the dispute to the Director and the Presiding Bishopric, the Owner shall be entitled to obtain an order dismissing the litigation without prejudice and awarding the Owner any costs and attorneys fees incurred by the Owner in obtaining the dismissal. In the event that the Contractor commences legal action to adjudicate a dispute, the decisions of the Director and the Presiding Bishop shall be deemed to be settlement proposals to the Contractor which the Contractor rejected and are admissible as evidence only to extent that settlement negotiations are admissible, but not admissible as evidence of liability. However, the initial action or inaction by the Owner giving rise to the dispute as well as the Owner's initial response to any claim by the Contractor are not settlement proposals and shall be admissible subject to the customary objections provided by law.

- B. Pending final resolution of a dispute hereunder, the Contractor shall proceed diligently with the performance of the Contract and in accordance with the Architect's decision.

SECTION 14 - TERMINATION OR SUSPENSION OF THE CONTRACT

14.1 TERMINATION BY THE CONTRACTOR

In the event the Owner materially breaches any term of the Contract Documents, the Contractor may give written notice of the breach to the Owner. If the Owner fails to cure the breach within ten (10) days of the written notice, the Contractor may terminate this Contract by giving written notice to the Owner and recover from the Owner the percentage of the Contract Sum represented by the Work completed as of the date of termination together with any loss other than unearned profits it has sustained with respect to materials and equipment as a result of the termination prior to completion of the Work. The Contractor shall not be entitled to any other compensation or damages as a result of the termination.

14.2 TERMINATION BY THE OWNER FOR CAUSE

Should the Contractor fail to provide the Owner with the bonds and certificate of insurance required by Section 11 within the time specified in Article 11.1 and Article 11.2, make a general assignment for the benefit of its creditors, fail to apply enough properly skilled workmen or specified materials to properly prosecute the Work in accordance with the approved construction schedule, or otherwise materially breaches any provision of the Contract, then the Owner may, without any prejudice to any other right or remedy give the Contractor written notice of Owner's complaint. If the Contractor fails to satisfy the Owner's complaint within ten (10) days, the Owner may terminate the Contract by giving written notice to the Contractor and take possession of the premises and all material, tools, and appliances thereon, and finish the Work by whatever method the Owner deems expedient. In such case, the Contractor shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Sum exceeds the expense of finishing the Work, including compensation for additional administrative, architectural, and legal services, the Contractor shall be liable to the Contractor. If such expense shall exceed the unpaid

14.3 TERMINATION BY THE OWNER FOR CONVENIENCE

The Owner may, without cause and in its absolute discretion, terminate the Contract at any time. In the event of such termination, the Contractor shall be entitled to recover from the Owner the percentage of the Contract Sum represented by the Work completed as of the date of termination together with any loss it has sustained other than unearned profits with respect to materials, equipment, and tools as a result of the termination prior to completion of the Work. The Contractor shall not be entitled to any other compensation as a result of the termination.

SECTION 15 - MISCELLANEOUS PROVISIONS

15.1 GOVERNING LAW

The Contract shall be governed by the law of the State where the Project is located.

15.2 NO WAIVER

No action or failure to act by the Owner, the Architect, or the Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

15.3 AUTHORSHIP

The Owner and the Contractor agree that the Contract Documents shall be deemed to be the product of both the Owner and the Contractor and shall not be construed against either the Owner or the Contractor because of authorship.

15.4 TESTS AND INSPECTIONS

- A. The Owner and the Architect have the right to have tests made when they deem it necessary. Tests conducted by the Owner or the Architect shall be paid for by the Owner. Should a test reveal a failure of the Work to meet Contract Document requirements, the cost of the test as well as subsequent tests related to the failure necessary to determine compliance with the Contract Documents will be paid for by the Owner, with the cost thereof deducted from the Contract Sum by Change Order.
- B. Where necessary, tests shall be made in accordance with recognized standards by a competent, independent testing laboratory. Materials found defective or not in conformity with Contract Document requirements shall be promptly replaced or repaired at the expense of the Contractor.
- C. The Owner and the Architect have the right to obtain samples of materials to be used in the Work and to test samples for determining whether they meet Contract Document requirements. Samples required for testing shall be furnished by the Contractor and selected as directed by the Architect. Samples may be required from the sample's source, point of manufacture, point of delivery, or point of installation at the Architect's discretion. Samples not required as a submittal in a specification section shall be paid for by the Owner. Should tests reveal a failure of the sample to meet the Contract Document requirements, the Contractor shall provide other samples which comply with the requirements of the Contract Documents.

SUPPLEMENTARY CONDITIONS

ITEM 1 - LIQUIDATED DAMAGE AMOUNTS:

1. The amount of liquidated damages to be paid to the Contractor for delays under General Conditions Article 7.3, Paragraph B is \$325 per day.
2. The amount of liquidated damages to be deducted by Owner from final payment for delays in Substantial Completion of the Work under General Conditions Article 8.3, Paragraph A is \$225 per day.
3. The amount of liquidated damages to be deducted by Owner from final payment for delays in completing work itemized on the Substantial Completion Certificate under General Conditions Article 8.3, Paragraph B is \$75 per day.

ITEM 2 - PERMITS

1. Delete General Conditions Article 3.6, Paragraph B and replace with the following:
 - B. The Contractor will pay the cost of permits, fees, and improvement bonds required by local agencies necessary for the proper execution and completion of the Work. Prior to bid opening the Owner will arrange for issuance of permits to the selected Contractor. The Contractor shall be responsible for picking up the permits from the local agencies.

ITEM 3 - LIABILITY INSURANCE

1. For Projects involving removal of asbestos-containing roof materials, add the following to Article Section 11.1, Paragraph A, 2 -
 - d. Contractor's general liability insurance shall not have an asbestos exclusion clause.

ITEM 4 - UTAH STATE NOTICE OF COMMENCEMENT FILING:

1. In compliance with Section 38-1-27 Utah Code Annotated, Contractor shall file with County Clerk of county in which Project is located a Notice of Commencement. Notice shall be filed within 30 days of date of Notice to Proceed. Notice of Commencement shall include, but not be limited to, following -
 - a. Name and address of Owner.
 - b. Name and address of Contractor.
 - c. Name and address of surety providing payment bond for Project.
 - d. Project name
 - e. Legal description of Project.
2. The parties to the Contract agree that any breach or failure to comply with this Section by the Contractor shall constitute a breach of Contract and the Contractor shall be liable in any direct, indirect, or consequential damages to the Owner flowing from said breach.

END OF DOCUMENT

Exhibit 4

1 A Bid limit.
 2 Q I'm sorry?
 3 A Bid limit, their bid limit was higher.
 4 Q Mindful of the bid limit, you could basically
 5 perform all sorts of general contracting services.
 6 A Yes.
 7 Q Did you have any involvement in the
 8 Highland 4 and 20 project?
 9 A To a point, yes.
 10 Q Okay. And let me ask you this. Do you know
 11 what the Highland project is?
 12 A Yes.
 13 Q What is the Highland project?
 14 A It's an LDS chapel.
 15 Q And the Highland 4 and 20 project, that's a
 16 sufficiently specific reference to that project for you
 17 to know what I'm talking about?
 18 A Yes.
 19 Q What was your involvement in the Highland 4
 20 and 20 project? And when I say "your," I mean BRC's.
 21 A I was the framing contractor on the job. I
 22 bid the work and acquired the bid for that work.
 23 Q You say you bid the work?
 24 A Yes.
 25 Q And what does that mean, "bid the work"?

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

1 Egbert to do the work?
 2 A I called him up and asked him if he'd be
 3 interested in doing this job.
 4 Q Who is Ken Egbert?
 5 A A contractor.
 6 Q Is he an employee of yours?
 7 A No.
 8 Q Is he a friend of yours?
 9 A He's an acquaintance.
 10 Q Is he a business associate?
 11 A Yes.
 12 Q And what did Mr. Egbert say about doing some
 13 framing for you?
 14 A He said he would be interested in doing it.
 15 Q I was looking at Exhibit 32. There's more
 16 than framing; am I correct?
 17 A Yes.
 18 Q Did you ask Mr. Egbert to help you out with
 19 all aspects of the work described on Exhibit 32 or just
 20 the framing? What did you ask Mr. Egbert to do?
 21 A Just the framing on it. I told him I would
 22 still supply the material and he could do the framing on
 23 it.
 24 Q And what is "framing"?
 25 A Putting the frame structure together, the

1 boards.
 2 Q The boards?
 3 A The structure of it.
 4 Q And the structure -- you've got to understand
 5 I don't know as much about the construction business as
 6 you do.
 7 A Build the walls, put the roof on.
 8 Q That's something I can understand. You wanted
 9 Mr. Egbert to build the walls?
 10 A Yes.
 11 Q And stand them up?
 12 A Yes.
 13 Q What about the roof?
 14 A Do the roof, too.
 15 Q And you were going to supply him all the wood
 16 and nails that he needed to build these walls?
 17 A He supplied the nails.
 18 Q Okay. And what about the men who were going
 19 to do all of this work?
 20 A His employees.
 21 Q What, if any, involvement did you have in the
 22 selection of those men?
 23 A None.
 24 Q Did you tell him how many men you needed?
 25 A I told him he would need 12 to 14 men.

1 Q And did he provide 12 to 14 men?
 2 A Not all the time.
 3 Q And what, if anything, did you do about that?
 4 A I sent some men down there -- my men down
 5 there, under his direction and payroll, to supplement
 6 his workers.
 7 Q And they were to do what, these men?
 8 A Help him with the framing.
 9 Q Did you have an agreement with Ken Egbert?
 10 A Yes.
 11 Q What was your agreement?
 12 A That he would do it for a certain price.
 13 Q What was the certain price?
 14 A I think it was about \$72,000.
 15 Q And did you have this agreement in writing?
 16 A No.
 17 Q How was the agreement made?
 18 A Verbal.
 19 Q Did you shake hands on it?
 20 A Yes.
 21 MR. DAVENPORT: I'm going to ask you to speak
 22 up a little bit. There's some type of motor over there.
 23 Just speak up a little bit.
 24 Q (BY MR. BADARUDDIN) So you said you shook
 25 hands on it; correct?

1 A Yes.
 2 Q So you were in person?
 3 A Pardon?
 4 Q The discussion occurred standing face-to-face,
 5 in person?
 6 A Yes.
 7 Q Not on the telephone?
 8 A Originally on the telephone. Then I gave him
 9 some plans and we went over it and agreed and shook
 10 hands on it.
 11 Q What plans did you go over?
 12 A Plans for the building down there.
 13 Q And where did those plans come from?
 14 A From Hales & Warner.
 15 Q And do you know if they were stamped by an
 16 architect or anything like that, the plans?
 17 A They were the architectural plans for the
 18 building.
 19 Q And whether they were stamped or not, those
 20 contained the specifications for your framing work?
 21 A There was a specifications book that goes with
 22 them.
 23 Q And you reviewed that book?
 24 A Yes.
 25 Q At least as it related to the framing portion

1 of the business.
 2 A Yes.
 3 Q I mean project, but okay.
 4 So do you remember when the framing started?
 5 A Day-wise, I don't remember.
 6 Q Do you remember whether anyone contacted you
 7 and said, Mr. Reynolds, let's get started framing?
 8 A Hales & Warner contacted me and I told them
 9 that I couldn't do it, but I had this other --
 10 Mr. Egbert that was going to do it. And they weren't
 11 sure they wanted him to do it. And they got back with
 12 me and said that that would be fine. And so I sent him
 13 down and met with the superintendent, and he worked with
 14 their schedule.
 15 Q Who was the superintendent, if you recall?
 16 A I don't remember.
 17 Q Did you meet with them before any framing
 18 began?
 19 A I met with him on the preconstruction meeting
 20 before anything on the project started.
 21 Q Did you meet with him subsequent to the
 22 preconstruction meeting but prior to beginning framing?
 23 A The only time I met with them was the
 24 preconstruction meeting.
 25 Q Okay. Had you ever done any work for the

1 LDS Church?
 2 A Yes.
 3 Q Do you know whether or not you were favored or
 4 approved or disapproved as a subcontractor by the
 5 LDS Church?
 6 A Not exactly.
 7 Q But how many occasions did you do work for the
 8 LDS Church?
 9 A I framed about 10 buildings. I was
 10 superintendent on six or seven other buildings in
 11 Hawaii.
 12 Q Did they ever complain about your work?
 13 A No.
 14 Q At least not to you?
 15 A Right.
 16 Q And do you know Paul Evans?
 17 A No.
 18 Q Do you know Dennis Butler?
 19 A No.
 20 Q Are you familiar with the architectural firm
 21 of Butler & Evans Architects, LLC?
 22 A I've heard of it.
 23 Q Do you know whether or not you've done any
 24 work that may have been under their supervision?
 25 A Not that I'm aware of right now.

1 some more men down there?
 2 A I felt that there needed to be more men down
 3 there.
 4 Q Whether they were provided by you or Egbert?
 5 A Yes.
 6 Q Well, did you subsequently provide a written
 7 framing schedule outlining manpower and target dates?
 8 A No, I did not. I told Ken to.
 9 Q Do you know whether he did?
 10 A I don't know.
 11 Q Okay. Did you ever call Cliff Hales to
 12 discuss this letter of August 11 with him?
 13 A I don't know.
 14 Q Did you ever talk to Ken Egbert about his
 15 hiring criteria?
 16 A No.
 17 Q Do you know what his hiring criteria was?
 18 A No.
 19 Q Do you know if Ken Egbert had experienced men
 20 on his crew?
 21 A No.
 22 Q Do you know how many men Ken Egbert had on his
 23 crew?
 24 A No.
 25 Q And when I say "crew," I don't even know if

1 A All I know is according to this and what I
 2 talked with Ken about.
 3 Q But you don't think that the job was right on
 4 schedule and Mr. Hales was just being unreasonable?
 5 A No.
 6 Q And then it talks about your construction
 7 subcontract, and I don't have any questions about that.
 8 What, if anything, did you do after you
 9 received this letter?
 10 A I called Ken Egbert.
 11 Q And told him?
 12 A That he needed more men on the job.
 13 Q Did you do anything else?
 14 A I think about this time I told him I would
 15 send some men down off of my crew, and on his payroll,
 16 and he could use them however he saw fit.
 17 Q And these men of yours, were they experienced
 18 or inexperienced, or did it vary?
 19 A They were experienced on churches.
 20 Q And on framing?
 21 A Framing churches.
 22 Q How many men did you send?
 23 A I don't remember. I think there was four or
 24 five.
 25 Q Okay. Let me ask you about what I'm going to

1 Mr. Egbert had a crew or if he hired people as needed.
 2 Do you know if Ken Egbert had employees on
 3 staff or did he hire people according to the job he
 4 might have to do?
 5 A I don't know.
 6 Q Let me ask you about what I'm going to have
 7 marked as Exhibit 35.
 8 (Exhibit No. 35 is marked for identification.)
 9 Q (BY MR. BADARUDDIN) If you could take a look
 10 at what's been marked as Exhibit 35, a copy of exactly
 11 what you were reading; is that correct?
 12 A Yes.
 13 Q And, again, there's some allegations in the
 14 letter that I'd like to ask you about.
 15 The second sentence says, "You still have not
 16 had 12 men on the job as promised, and the job is
 17 getting further behind."
 18 Do you know how many men were on the job?
 19 A I talked to Ken a couple of times about how
 20 many men he had on the job, and he told me he would get
 21 the men to do the job, and he evidently didn't.
 22 Q Did you tell him he needed more men?
 23 A Yes.
 24 Q And do you know whether the job was, in fact,
 25 getting behind?

1 have marked as Exhibit 36.
 2 (Exhibit No. 36 is marked for identification.)
 3 Q (BY MR. BADARUDDIN) Have you had an
 4 opportunity to review Exhibit 36?
 5 A Yes.
 6 Q And what is Exhibit 36?
 7 A It -- basically it's a back charge to me of
 8 \$12,825 for delay of the project.
 9 Q And this letter is much later than Exhibit 35,
 10 is it not? It's dated March 30, 2000.
 11 A Yes.
 12 Q I guess the project would be about finished by
 13 then, would it not?
 14 A Yes.
 15 Q And what does all that mean, "back charge"?
 16 A It means they charged me for the extra time it
 17 took to build the building.
 18 Q And essentially, are they saying that you
 19 caused a delay in the project and that you have to pay
 20 this amount of money as they've calculated?
 21 A That's what they say.
 22 Q Did you respond to this letter; do you know?
 23 A Yes, I did.
 24 Q And let me show you Exhibit 37.
 25 (Exhibit No. 37 is marked for identification.)

1 Q (BY MR. BADARUDDIN) What is Exhibit 37?
 2 A It's my response to their back charge.
 3 Q And it's dated April 3, 2000.
 4 A Yes.
 5 Q I wanted to ask you about some of the
 6 allegations in the letter. Did you write this letter?
 7 A Yes.
 8 Q In the first sentence, it says, "Before the
 9 framing on the project was started, I called you and
 10 told you I was having difficulty and could not frame
 11 your project."
 12 That's something we already discussed; is that
 13 right?
 14 A Yes.
 15 Q And then you mention, "I told you that another
 16 framer was available and could frame the building."
 17 I don't remember asking you about that. Is
 18 that what you told Mr. Hales or Mr. Warner?
 19 A Mr. Hales.
 20 Q You recommended another framer? I don't
 21 understand. Can you tell me what you meant by that, "I
 22 told you that another framer was available"?
 23 A That's when I asked Ken Egbert to do the job.
 24 Q You're referring to Egbert.
 25 A Right.

1 Q Did you, in fact, mention to Mr. Hales or
 2 Mr. Warner that Ken Egbert would not be able to meet the
 3 time frame for the framing? And I'm in the third
 4 sentence now.
 5 A I don't remember. I must have.
 6 Q And do you know whether Hales & Warner were
 7 looking for other framers but couldn't find any?
 8 A Yes.
 9 Q Yes, you know they were looking for them?
 10 A Yes.
 11 Q And yes, you know they couldn't find any?
 12 A Yes.
 13 Q How do you know that?
 14 A Cliff told me.
 15 Q You called him Cliff. Is he a friend of
 16 yours?
 17 A Mr. Hales.
 18 Q You can call him Cliff if you like. I'm just
 19 wondering -- you also mentioned "Dear Clifford." I'm
 20 wondering if y'all are friends or if it's just a
 21 familiar term.
 22 A Just a term.
 23 Q I'd like to ask you about the last sentence of
 24 the first paragraph. "I even got myself in hot water on
 25 another job in order to send some of my men there to

1 supplement the work force there and try and get your
 2 project framed."
 3 What are you talking about there, getting in
 4 hot water?
 5 A I was in trouble on another job. It slowed me
 6 down on another project I was on.
 7 Q So that you could help him?
 8 A Yes.
 9 Q Do you know what sort of time frame we're
 10 talking about there where you were in hot water and
 11 you're sending your men to help him with his job?
 12 A What do you mean?
 13 Q Like a date, a month, a year?
 14 A How long my men were down there, or what?
 15 Q Let me say this. You know who Jason Smith is?
 16 A No.
 17 Q Did you know whether or not Mr. Egbert had a
 18 man on his crew that died?
 19 A I knew that. Mr. Hales called me and told me
 20 that when it happened.
 21 Q And his name, for your information, was Jason
 22 Smith.
 23 A Right.
 24 Q Do you know what day he died?
 25 A No.

1 Q It was August 13 of 1999.
 2 Do you know whether you were sending men to
 3 Hales & Warner's Highland 4 and 20 project before and
 4 after August 13 of 1999?
 5 A It was after that.
 6 Q Let me ask you about the second paragraph of
 7 Exhibit 37. It says, "From the very beginning, your
 8 superintendent interfered with the framing process."
 9 Who is the superintendent?
 10 A I don't know.
 11 Q Well, do you remember what he was doing, how
 12 he was interfering with the framing process?
 13 A Ken called me and told me that they wouldn't
 14 let him frame some of the walls the way he wanted to
 15 frame them, told him it wasn't effective framing the way
 16 they wanted them framed, and they wouldn't let him frame
 17 them in that manner. And I tried to help him out by
 18 calling down there and talking to -- I don't remember if
 19 I called Cliff Hales or who I called.
 20 Q Do you know how Egbert wanted to frame?
 21 A Yes.
 22 Q How did he want to frame?
 23 A Well, the walls we're talking about is -- he
 24 wanted to frame them -- they had a rake on them to
 25 follow the roof joist in one area, and he wanted to

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

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

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

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

9 A Slope.

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

12 A Yes.

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

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

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

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

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

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

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

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

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

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

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

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

19 A You have to meet the specified elevations.

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

22 A Yes.

23 Q What did the plans say?

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

1 Q I've got you.

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

5 What did you mean by that?

6 A I don't remember right now.

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

9 A I don't know.

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

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

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

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

1 in terms of the duration the interference lasted.

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

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

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

13 MR. MINNOCK: You can answer.

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

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

19 A I don't know.

20 MR. DAVENPORT: Same objection.

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

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

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

5 MR. DAVENPORT: Excuse me, after what?

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

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

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

19 Q Okay.

20 (Off-the-record discussion)

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

25 MR. DAVENPORT: What is it?

1 MR. BADARUDDIN: The daily from August 4,
2 1999.

3 MR. DAVENPORT: What exhibit do you refer to
4 it as?

5 MR. MINNOCK: 29.

6 Q (BY MR. BADARUDDIN) And let me ask you this.
7 Do you know what Exhibit 29 is?

8 A Yes.

9 Q What is Exhibit 29?

10 A It's a daily report.

1 Q Did you ever have an occasion to review daily
2 reports for the Highland 4 and 20 project?

3 A No.

4 Q I guess basically there's three entries. Let
5 me ask you about the bottom one that starts "Ken
6 Egbert." If you could review that. Read it, is what I
7 mean.

8 MR. MINNOCK: Do you want him to read it into
9 the record or read it himself?

10 Q (BY MR. BADARUDDIN) Just read it to yourself.

1 A Okay.

2 Q Can you tell me what that entry means to you?
3 For example, "Ken Egbert, framer, is concerned with the
4 manner in which we want the building framed, leaving
5 sheer wall studs long, to be cut after trusses are up

1 for a more accurate cut."

2 MR. DAVENPORT: Objection. You're asking him
3 to comment on someone else's entry, which he has never
4 previously seen and which he did not make himself.

5 Q (BY MR. BADARUDDIN) I'm asking you what, if
6 anything, does that mean to you?

7 MR. DAVENPORT: Same objection.

8 MR. MINNOCK: You can answer.

9 THE WITNESS: It's an entry on the sheer walls
10 like we've discussed previously.

11 Q (BY MR. BADARUDDIN) Do you remember any issue
12 with the sheer wall and leaving the studs long?

13 A We've already talked about it.

14 Q Exactly. Okay. Would that be consistent with
15 your earlier testimony about the rake and the stud walls
16 being long and that sort of thing?

17 A Yes.

18 Q Did you tell Ken Egbert he shouldn't do it
19 that way because of the extra labor cost?

20 A We discussed extra labor costs on it, extra
21 material costs. I told him that I had done it on other
22 projects and it worked out well.

23 Q Told who?

24 A Told Ken.

25 Q Okay.

1 A And I think I called the superintendent and
2 discussed it with him, and he said this is the way the
3 architect wants it. So I told Ken he had to do it this
4 way.

5 Q It says "Ken and I," but I'm wondering, did
6 you to go a church with a similar --

7 A I didn't go.

8 Q And you don't know whether they went, "they"
9 being Ken and whoever "I" is?

10 A I don't know.

11 Q And ultimately, did you tell Ken to do it one
12 way or another? There's an indication that Ken was
13 going to do it as we have requested until final decision
14 from Brent Reynolds is given. Did you give any final
15 decision to Ken Egbert?

16 A I told him that he had to do what the
17 superintendent wanted on the job.

18 Q Okay. Let me ask you about --

19 MR. MINNOCK: You asked him about 29. What
20 you've just referenced was from 30, I believe.

21 MR. BADARUDDIN: That's what I was confused
22 about.

23 Q (BY MR. BADARUDDIN) Let me ask you to look at
24 Exhibit 30.

25 I think all of my questions that I thought

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

4 A Yes.

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

10 A Yes.

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

15 A Correct.

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

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

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

25 A No. There was another issue that I know of,

1 name BRC or Brent Reynolds Construction on it, I found
2 in the file many invoices, for example, from lumber and
3 whatnot, that were invoiced to you. For example, I
4 believe one was from, if I'm not mistaken, Burton Lumber
5 and whatnot.

6 Do you remember seeing those types of
7 documents?

8 A Yes.

9 Q Do those documents relate to your procurement
10 of the materials?

11 A Yes.

12 Q Now, I also noted in the file checks written
13 out by Hales & Warner to you and sometimes with the
14 lumber or other suppliers' name on it also. But as I
15 understand it, from reviewing the file, you are the one
16 securing the materials and Hales & Warner would pay you
17 as it relates to the procurement of those materials;
18 correct?

19 A Yes.

20 Q And as it relates to the time periods over
21 which these materials were secured, I have invoices that
22 start, at the least, on July 29, 1999, from Burton
23 Lumber, another one from Construction Specialties, Inc.
24 for July 30, 1999, and they go through, at the very
25 least, October 26, 1999. I have a statement from Burton

1 that I knew of.

2 Q Okay, what was that?

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

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

7 A No.

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

13 A That's correct.

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

19 A Correct.

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

24 A That's correct.

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

1 Lumber that has your name on it.

2 Does that sound accurate?

3 A Yes.

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

10 (Off-the-record discussion)

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

14 A It looks like it, yes.

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

16 A Yes.

17 Q Is that your signature found on page 8?

18 A Yes.

19 Q You signed it as president of BRC?

20 A Yes. BRC, Inc.

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

Exhibit 5

April 3, 2000

Hales & Warner Construction Inc.
1460 North Main, Unit 1
Spanish Fork, Utah 84660

Attn: Clifford Warner

Re: Highland 4 & 20 Wards

Dear Clifford,

Before the framing on the project was started, I called you and told you I was having difficulty and could not frame your project. I told you that another framer was available and could frame the building. I told you that he had never done a chapel and would get it done for you but the time frame could not be met. You looked for other framers to do the work but could not find any. I told you that I would help him when I could and try to get it done for you. You said that you would work with us in getting the job done and we would all try to make the best of a bad situation. I told you I would get the material there and he would get started on the scheduled date. You told me to wait until after the first of the month because of billing purposes, but I said that it would not be a problem and sent material and men to do the job. I even got myself in hot water on another job in order to send some of my men there to supplement the work force there and try to get your project framed.

From the very beginning, your superintendent interfered with the framing process, telling them that they couldn't do it the way they were used to framing and caused the framer many problems, costing extra time and material. This interference continued through out the framing of the building. If it wasn't wanting something done out of sequence, it was putting other subs and/or material in the way so the framers could not do their job.

I do not feel that the 4 ½ weeks you want to charge me time on is fair considering all of the situations involved in the project. Even if you do charge for time, the \$570.00 per day that you are charging is excessive, your own contract says \$350.00 per day.

There is no way that I feel that I owe you anywhere near that amount of money.

Sincerely

Brent Reynolds Construction

Brent L. Reynolds
Pres.

37
Reynolds

Exhibit 6

1 Q From what?
 2 A From written notice to proceed.
 3 Q And when did you receive the written notice to
 4 proceed?
 5 A I don't know the date.
 6 Q Well, what would you have to look at to
 7 determine that?
 8 A They send me out a formal notice to proceed;
 9 I'd have to find that.
 10 Q Well, that's a document that pertains to the
 11 Highland project, setting time limits; isn't that
 12 correct?
 13 A Yes.
 14 Q You received it at least prior to the May 17
 15 issuing of the permit as shown in Exhibit 22; isn't that
 16 correct?
 17 A I don't know that, sir.
 18 Q You don't? Well, who sets the time schedules
 19 for a project on behalf of Hales & Warner?
 20 A I generally write the schedule.
 21 Q Where is the schedule for the Highland
 22 project?
 23 A I'm assuming it's in my office somewhere.
 24 Q When you prepare this schedule, do you break
 25 it down as to various parts of the project, sir?

1 A Yes.
 2 Q Tell me what parts of the project you would
 3 set time limits on, and using as an example this
 4 Highland project.
 5 A I would set a time limit on forming and
 6 pouring footings, a time limit to excavate for the
 7 footings, a time limit to form and pour the foundation,
 8 time to prepare the slab, a time limit to pour the slab.
 9 Basically, every portion of that work has a time affixed
 10 to it.
 11 Q Why?
 12 A It's a matter of coordination between subs.
 13 Q Why is that important?
 14 A It keeps everyone informed. They know what to
 15 expect up front. It makes jobs go smoother.
 16 Q When you say it lets everyone know what to
 17 expect up front, what do you mean?
 18 A It means that we send out a schedule, either
 19 with their contract or shortly after. They can review
 20 it and plan for those time schedules.
 21 Q For example, Exhibit 14, what is that?
 22 A It's a subcontract from Hales & Warner
 23 Construction to BRC, Incorporated.
 24 Q Is the schedule attached to it?
 25 A No, sir.

1 Q Where is the schedule that was prepared for
 2 Exhibit 14, if you know?
 3 A I don't know where it is.
 4 Q In the normal course of business, there would
 5 have been a schedule --
 6 A Yes.
 7 Q -- for Exhibit 14; correct?
 8 A Yes.
 9 Q And you would have prepared it; correct?
 10 A Most likely.
 11 Q And you would have prepared it for the reasons
 12 set forth in your testimony a few moments ago; correct?
 13 A Yes.
 14 Q And that's so that BRC would know before they
 15 signed the subcontract, what your anticipated schedule
 16 was; isn't that correct?
 17 A They have a basic idea of when they'll be
 18 there, but the schedule, yes, it does.
 19 Q And if they had problems, for example, if they
 20 made arrangements, and you, Hales & Warner, had said
 21 okay to BRC, that you were going to send them a
 22 subcontract agreement, they would have had timely notice
 23 as to when they were expected to be on the job; correct?
 24 A Yes.
 25 Q And if there had been problems, you would have

1 anticipated that they would have told you of those
 2 problems before you signed the contract; correct?
 3 A Yes.
 4 Q And the reason being is, if they weren't
 5 available, you would have got someone else in the
 6 framing business as a subcontractor; correct?
 7 A Yes.
 8 Q Somebody that you had worked with before;
 9 correct?
 10 A Preferably.
 11 Q And if for any reason you couldn't get someone
 12 that you had worked with before, whoever you got, you
 13 would have checked out their qualifications before
 14 signing the contract; correct?
 15 A Yes, sir.
 16 Q And the reason for that is so that you would
 17 have a good workmanlike job done on the site; correct?
 18 A Yes, sir.
 19 Q Because you were responsible for their work as
 20 it pertained to delivering a good finished product to
 21 your customer, the LDS Church; correct?
 22 A Yes.
 23 Q And you prided yourself in doing it that way,
 24 did you not?
 25 A Yes.

1 not going to be there, Hales & Warner can take proper
2 steps to get a qualified replacement, if necessary;
3 isn't that correct?

4 A It's generally a last resort.

5 Q I understand. But that's part of the reason
6 why you have a two-week lead time; isn't that correct?

7 A In that two-week lead time, if he would have
8 said, I absolutely cannot be there, will not fulfill the
9 contract, then, yes, we are forced into other
10 alternatives.

11 Q Yes, but you have some time to do that.

12 A Yes.

13 Q So that you can get a qualified sub to come in
14 and replace him; correct?

15 A Yes.

16 Q So then what happened when BRC was supposed to
17 be on the job, this time period after they were
18 originally set to be on the job?

19 Do you understand what I mean?

20 A No.

21 Q Let's say day one was the day required by the
22 schedule for BRC to be on the job; correct?

23 A Okay.

24 Q They weren't there on that day, were they?

25 A No.

1 Q And as far as you know, no one from Hales &
2 Warner knew who Ken Egbert Construction was; isn't that
3 correct?

4 A That's correct.

5 Q No one from Hales & Warner knew anything at
6 all about Ken Egbert Construction when they showed up on
7 the job on this hypothetical day two; isn't that
8 correct?

9 A I believe that's correct.

10 Q How many men did Ken Egbert Construction bring
11 with them on this hypothetical day two?

12 A I don't know.

13 Q It was not the number of men required by the
14 contract; isn't that correct?

15 A We didn't have a requirement on the number of
16 men in the contract.

17 Q Okay.

18 A It's not uncommon to start with three or four
19 men, get your feet under you, get layout going, get some
20 things going, so that you can bring in more men.

21 Q Yes. Yes, exactly.

22 And Ken Egbert Construction just had their
23 reduced crew for the purpose of, using your words,
24 getting their feet under them, as far as you know; isn't
25 that correct? If you know, if you don't, that's okay,

1 Q Then there was some time, a delay, that they
2 told you that they couldn't be there, but they then
3 promised to be on the job during this delay period that
4 you're not sure exactly what it was; correct?

5 A Yes.

6 Q Let's call that day two.

7 A Okay.

8 Q Now, on day two, did BRC show up?

9 A Personally?

10 Q Yes.

11 A No.

12 Q What explanation, if any, did they, BRC, give
13 Hales & Warner for not showing up after this delay? For
14 not showing up on day two?

15 A I don't recall all the circumstances that took
16 place at that time, but I believe that BRC was trying to
17 buy themselves some time to get a start on the job, and
18 then be able to supplement that job with their own men.

19 Q So what did they do?

20 A You mean to start?

21 Q Yes. On day two.

22 A They made an arrangement with Ken Egbert to
23 start that job.

24 Q Who was Ken Egbert?

25 A I don't know the man, or didn't know the man.

1 too.

2 A I don't know what his intentions were. I
3 don't know what his thinking was. It's just my
4 experience.

5 Q But there were daily logs for this project
6 prepared by Maurice Egbert; correct?

7 A Yes.

8 Q Did you review those daily logs at any time?

9 A Yes.

10 Q When was the last time you saw those daily
11 logs?

12 A It's been a while.

13 Q Yes. When was the last time, sir?

14 A I'm guessing.

15 Q Please tell me.

16 MR. DAVENPORT: Let him finish his answer.
17 Go ahead.

18 THE WITNESS: Probably 18 months ago.

19 Q (BY MR. MORIARITY) What was the purpose of
20 the daily logs?

21 A Refresh my memory.

22 Q There were other purposes, other than just
23 refreshing your memory; isn't that correct?

24 A Such as?

25 Q Well, were there any other purposes for the

1 A No, sir.
 2 MR. MORIARITY: Should we take a short break?
 3 (Recess)
 4 Q (BY MR. MORIARITY) Getting back to this
 5 hypothetical day two, when Egbert Construction showed up
 6 in place of BRC, how did you find out about that?
 7 A I don't recall.
 8 Q What did you do when you found that out?
 9 A I didn't do anything.
 10 Q Why?
 11 A I didn't feel I needed to do anything.
 12 Q Why?
 13 A As far as I knew, BRC was attempting to
 14 fulfill his contract.
 15 Q As far as you knew, BRC was attempting to
 16 fulfill the contract; is that correct?
 17 A Yes, sir.
 18 Q How were they doing that?
 19 A He had made an arrangement with Egbert. The
 20 extent of that arrangement, I didn't know the full
 21 extent.
 22 Q And as the general contractor, Hales & Warner,
 23 did anyone make any inquiry as to what was going on as
 24 it related to the framing?
 25 A I'm sure there were discussions back and

1 forth. I don't remember exactly what took place.
 2 Q Discussions between whom?
 3 A Like I said, I'm sure there were discussions.
 4 It would have had to have been between BRC and Hales &
 5 Warner.
 6 Q Yes. And what information about these
 7 discussions was given to you, Joel Warner?
 8 A I don't remember the exact content.
 9 Q It was a problem, was it not?
 10 A It was.
 11 Q And you were one of the problem solvers;
 12 correct?
 13 A That's correct.
 14 Q What, if anything, did you do to solve this
 15 problem?
 16 A I did meet with Ken Egbert on site, either the
 17 first or second day, spoke with him.
 18 Q The first or second day that he was on the
 19 project, on the site?
 20 A That's true.
 21 Q Right?
 22 A That's correct.
 23 Q Describe Ken Egbert.
 24 A He seemed like a hard working, honest
 25 individual when I met with him. First impression.

1 Q Let me ask you, what were the first
 2 impressions that you made of Ken Egbert?
 3 A That he was hard working and honest.
 4 Q Describe Ken Egbert.
 5 A Physically?
 6 Q Yes.
 7 A Probably about my height.
 8 Q How high is that?
 9 A Five eight. A little stockier.
 10 Q Any other description?
 11 A No.
 12 Q Age?
 13 A I would guess in his 30s.
 14 Q Anything else?
 15 A Not that comes to mind.
 16 Q Okay. Now, this discussion that you had with
 17 Ken Egbert, tell me about it.
 18 A It was kind of a mini preconstruction meeting.
 19 It was just reiterating plans and specs, encouraging him
 20 to get into the plans and review them.
 21 Q Had he been into the plans and reviewed them
 22 before you encouraged him to do so?
 23 A I don't remember.
 24 Q Was it your observation that he didn't seem
 25 very educated about the plans, about those specific

1 plans?
 2 A Not -- I didn't get that assumption.
 3 Q Why did you encourage him to get into the
 4 plans and review them?
 5 A These particular plans have a lot of details.
 6 It's just -- it's nothing new to him. He had done
 7 custom homes, apartment complexes. Everything I was
 8 telling him wasn't new to him.
 9 Q How do you know that?
 10 A Just a general feeling I had.
 11 Q How many commercial projects had Ken Egbert
 12 worked on prior to the Highland project?
 13 A I don't know.
 14 Q Did you ask him?
 15 A I asked him about some of his prior projects.
 16 Q Yes. And he told you that he'd worked on some
 17 custom homes and some apartments; correct?
 18 A I believe that's what he told me.
 19 Q My question is, do you know if he had worked
 20 on any commercial projects?
 21 A I don't know.
 22 Q Did you ask him anything about his crew?
 23 A I'm sure that was a topic of discussion.
 24 Q What did he tell you?
 25 A I don't remember.

1 Q Did you ask him the number of framers he
2 intended to have on the project?

3 A Like I said, I'm sure that was a topic of
4 discussion. I have these meetings all the time with
5 subcontractors, and that's the topic. I don't remember
6 the exact content of it.

7 Q Let me ask you, how many men have been killed
8 on projects that you have been involved in?

9 A Just this one.

10 Q So would you agree that this project, the
11 Highland project, was a little bit different than any
12 other project that you had been involved with since
13 1978, because of the fact that a young man had been
14 killed?

15 MR. DAVENPORT: I'll have to object to the
16 vagueness of the question. I don't understand it.

17 You can go ahead and answer it if you can.

18 THE WITNESS: Of course it was unique in that
19 regard.

20 Q (BY MR. MORIARITY) Because of it being
21 unique, do you have any better recollection of your
22 conversations with the subcontractor for whom this young
23 man that got killed had been employed?

24 A No, sir.

25 Q No reason to, in your mind; is that correct?

1 A I didn't ask him.

2 Q Was Ken Egbert Construction approved by the
3 LDS Church, your client, to be a subcontractor on the
4 Highland project?

5 A In saying "approved," you're assuming that
6 there was a list out there of approved subcontractors?

7 Q My question is very simple. Was Ken Egbert
8 approved to be a framer on the Highland project by the
9 LDS Church, your client?

10 A He was neither approved nor disapproved.

11 Q Well, did the LDS Church, your client, know
12 that Ken Egbert was doing the framing on the Highland
13 project as distinguished from BRC doing the framing?

14 A I don't know when they knew. It wasn't
15 something that we tried to hide. I'm sure the architect
16 was privy to it, who is a representative of the owner.

17 Q Well, Hales & Warner was a representative of
18 the owner in reference to the subcontractors, weren't
19 they?

20 MR. DAVENPORT: I object to the extent you're
21 asking for a legal conclusion.

22 You can go ahead and answer to the extent you
23 can. Go ahead.

24 THE WITNESS: I didn't understand your
25 question.

1 A This is a first for me, sir. I had nothing to
2 hide at the time. Of course, it was a tragedy, but I
3 didn't take any other precautions.

4 Q Thank you.

5 Now, did you ask Ken Egbert if he had a
6 contract with BRC?

7 A No, sir.

8 Q You were informed that he was a separate
9 construction company than BRC; isn't that correct?

10 A I knew that.

11 Q Yes, you knew that. How did you know that?

12 A I'm not sure.

13 Q You knew he had never worked on any LDS
14 churches before; correct?

15 A I think that's correct.

16 Q And yet you have no recollection of having
17 asked Ken Egbert if he had a contract with BRC; isn't
18 that true?

19 A Say that again.

20 Q And yet you have no recollection of having
21 asked Ken Egbert if his construction company had a
22 separate contract with BRC; isn't that true?

23 A That's correct.

24 Q Did you ask him if he had even seen
25 Exhibit 14, the subcontract with BRC?

1 Q (BY MR. MORIARITY) Yes. Hales & Warner was a
2 representative of their client, the LDS Church, in
3 relation to dealing with the subcontractors; isn't that
4 correct?

5 A No, sir.

6 Q You were not?

7 A (Witness indicating in the negative.)

8 MR. MORIARITY: Please mark the record.

9 Q (BY MR. MORIARITY) Now, you say that the
10 architect was aware that Ken Egbert Construction, rather
11 than BRC, was doing the framing; correct?

12 A I said I'm sure they were privy to it. It's
13 nothing that we tried to hide. As far as we were
14 concerned, BRC retained the contract, and, in fact,
15 supplied material for the framing for that job.

16 Q My question was, your testimony is that the
17 architect knew that Ken Egbert Construction was doing
18 the framing instead of BRC; is that true?

19 A I believe I've answered it.

20 Q Would you please answer it.

21 A I said that he was privy to it. I did not
22 personally go to him and tell him. I don't know how it
23 come about.

24 Q Is there a reason why you're hollering at me?

25 A No, I'm --

1 MR. DAVENPORT: Let me let the record reflect
2 that my client is not hollering.

3 THE WITNESS: I'm just telling you I think
4 I've answered the question.

5 Q (BY MR. MORIARITY) Did you ever have any
6 discussions of any nature whatsoever about the role of
7 Ken Egbert Construction on the Highland project?

8 A No, not that I remember.

9 Q Who was the architect?

10 A Butler & Evans.

11 Q Yes, but who was the actual person?

12 A Paul Evans.

13 Q How often would you meet with him?

14 A I wasn't on site. He met with Maurice on a
15 weekly basis.

16 Q How do you know that the architect was privy
17 to the fact that Ken Egbert was doing the framing?

18 A Just from the mere fact that Paul Evans was on
19 site on a weekly basis. I'm sure he would have looked
20 at the framing, would have talked to Ken.

21 Q You're just assuming all of those things;
22 correct?

23 A Yes, sir.

24 Q You did not observe the architect talking to
25 Ken, did you?

1 Q Yes. Now, who actually ordered the lumber
2 from the lumber supplier; do you know?

3 A All I know is, it was in BRC's name.

4 Q How do you know that?

5 A Because that's who we wrote the joint checks
6 to.

7 Q You know that the method of payment to the
8 lumber supplier was by a joint check, payable and to be
9 endorsed by BRC and Hales & Warner Construction;
10 correct?

11 A Yes, sir.

12 Q But you don't know who ordered the lumber, do
13 you?

14 A No, sir.

15 Q Did you see the bill?

16 A No, sir.

17 Q Did you check to find out who had actually
18 ordered the lumber?

19 A No, sir.

20 Q Did you check the grade of the lumber?

21 A Personally?

22 Q Hales & Warner, did they check the grade of
23 the lumber?

24 A I can't answer for Maurice. He would have
25 been the one to check it.

1 A No, sir.

2 Q You did not have conversations that you recall
3 with the architect about the role of Ken Egbert
4 Construction, did you?

5 A No.

6 Q What materials did BRC furnish to Ken Egbert
7 Construction, if you know?

8 A He didn't supply them to Ken Egbert. He
9 supplied them to the Highland project, as per his
10 contract.

11 Q What materials did he supply prior to the
12 death of Jason Smith, "he" being BRC Construction?

13 A Lumber package.

14 Q How do you know that?

15 A Because we joint checked.

16 Q Joint checked what?

17 A With BRC and the lumber supplier.

18 Q In other words, your name and his was on the
19 check? Is that what you're saying?

20 A Say that again.

21 Q What do you mean by "joint checked"?

22 A We write out a check to BRC Construction and
23 the lumber supplier. I don't recall the lumber
24 supplier. It goes to BRC Construction, he endorses it,
25 sends it to the lumber supplier.

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

3 A Yes.

4 Q How did you know that?

5 A How did I personally know?

6 Q Yes.

7 A Maurice called me.

8 Q Where did he call you at?

9 A On my cell phone.

10 Q What did he say?

11 A He told me the problem.

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

14 A Jointly, yes.

15 Q Jointly with whom?

16 A Maurice.

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

19 (Off-the-record discussion)

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

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

23 Q Was he a director?

24 A No.

25 Q He was an employee; correct?

1 MR. DAVENPORT: Let me let the record reflect
2 that my client is not hollering.
3 THE WITNESS: I'm just telling you I think
4 I've answered the question.
5 Q (BY MR. MORIARITY) Did you ever have any
6 discussions of any nature whatsoever about the role of
7 Ken Egbert Construction on the Highland project?
8 A No, not that I remember.
9 Q Who was the architect?
10 A Butler & Evans.
11 Q Yes, but who was the actual person?
12 A Paul Evans.
13 Q How often would you meet with him?
14 A I wasn't on site. He met with Maurice on a
15 weekly basis.
16 Q How do you know that the architect was privy
17 to the fact that Ken Egbert was doing the framing?
18 A Just from the mere fact that Paul Evans was on
19 site on a weekly basis. I'm sure he would have looked
20 at the framing, would have talked to Ken.
21 Q You're just assuming all of those things;
22 correct?
23 A Yes, sir.
24 Q You did not observe the architect talking to
25 Ken, did you?

1 A No, sir.
2 Q You did not have conversations that you recall
3 with the architect about the role of Ken Egbert
4 Construction, did you?
5 A No.
6 Q What materials did BRC furnish to Ken Egbert
7 Construction, if you know?
8 A He didn't supply them to Ken Egbert. He
9 supplied them to the Highland project, as per his
10 contract.
11 Q What materials did he supply prior to the
12 death of Jason Smith, "he" being BRC Construction?
13 A Lumber package.
14 Q How do you know that?
15 A Because we joint checked.
16 Q Joint checked what?
17 A With BRC and the lumber supplier.
18 Q In other words, your name and his was on the
19 check? Is that what you're saying?
20 A Say that again.
21 Q What do you mean by "joint checked"?
22 A We write out a check to BRC Construction and
23 the lumber supplier. I don't recall the lumber
24 supplier. It goes to BRC Construction, he endorses it,
25 sends it to the lumber supplier.

1 Q Yes. Now, who actually ordered the lumber
2 from the lumber supplier; do you know?
3 A All I know is, it was in BRC's name.
4 Q How do you know that?
5 A Because that's who we wrote the joint checks
6 to.
7 Q You know that the method of payment to the
8 lumber supplier was by a joint check, payable and to be
9 endorsed by BRC and Hales & Warner Construction;
10 correct?
11 A Yes, sir.
12 Q But you don't know who ordered the lumber, do
13 you?
14 A No, sir.
15 Q Did you see the bill?
16 A No, sir.
17 Q Did you check to find out who had actually
18 ordered the lumber?
19 A No, sir.
20 Q Did you check the grade of the lumber?
21 A Personally?
22 Q Hales & Warner, did they check the grade of
23 the lumber?
24 A I can't answer for Maurice. He would have
25 been the one to check it.

1 Q Now, the first wall that Ken Egbert
2 Construction built was too tall, wasn't it?
3 A Yes.
4 Q How did you know that?
5 A How did I personally know?
6 Q Yes.
7 A Maurice called me.
8 Q Where did he call you at?
9 A On my cell phone.
10 Q What did he say?
11 A He told me the problem.
12 Q This is another problem that the problem
13 solver would take care of; correct?
14 A Jointly, yes.
15 Q Jointly with whom?
16 A Maurice.
17 MR. DAVENPORT: Can we go off the record for a
18 minute.
19 (Off-the-record discussion)
20 Q (BY MR. MORIARITY) Was Maurice Egbert an
21 officer of Hales & Warner's partnership?
22 A It's a corporation and, no, he was not.
23 Q Was he a director?
24 A No.
25 Q He was an employee; correct?

1 A Yes.

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

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

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

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

12 Q So what did you then do?

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

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

19 A I believe so.

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

25 A That was my understanding.

1 Q Such as?

2 A Those walls are designed as a sheer wall with
3 sheeting from bottom plate to top plate.

4 Q And who installed the sheeting?

5 A I don't believe it was installed at that time.

6 Q No, sir, but whose job was it to install the
7 sheeting?

8 A The framers'.

9 Q What do you mean by it was designed to be a
10 sheer wall?

11 A It's a structural wall.

12 Q Yes.

13 A That prevents it from moving horizontally,
14 diagonally.

15 Q Now, how long after Ken Egbert Construction
16 had been on the Highland project was it that this
17 problem with the wall being one inch higher took place?
18 (Off-the-record discussion)

19 Q (BY MR. MORIARITY) I'm sorry, go ahead and
20 answer.

21 A I don't know the exact time frame. It would
22 have been shortly after he started.

23 Q Yes. What reaction, if any, did you have to
24 the fact that Ken Egbert Construction, now doing the
25 framing on the Highland project, disregarded the plans

1 Q Yes. And, the reason was twofold. They could
2 use precut studs and it was faster; correct?

3 A It would have been faster.

4 Q Why did you mull it over in your mind?

5 A Because I wanted to see what, if any, ill
6 effects that it would have on the project.

7 Q The fact is, if it would have been faster and
8 didn't have any ill effects on the project, you probably
9 would have approved it; correct?

10 A On own volition, probably not. I would
11 have conferred with the architect.

12 Q Did you confer with the architect on that
13 problem?

14 A No, sir.

15 Q Because you recognized that no matter how much
16 faster it may have been, having a wall an inch higher
17 than what the plans called for would affect the whole
18 project; correct?

19 A I don't know to what extent, but it would have
20 affected the project.

21 Q Yes. You can't have walls that are planned to
2 be "X" number of feet be an inch taller and everything
3 else in the project fit in; correct?

4 A It wouldn't have been that big of a calamity,
5 but there were some different ramifications.

1 and specs and was building at least the first wall, not
2 to specs, but rather to precut stud specifications?

3 A It was as per BRC Construction, so I didn't
4 have any negativity towards Egbert, nor BRC.

5 Q Did you call and talk to anyone at BRC and ask
6 them why they were telling Egbert to do something
7 different than was in the plans?

8 A Brent called me.

9 Q What did he say?

10 A He pled his case, why he wanted to use them.

11 Q So Brent Reynolds from BRC called you and
12 tried to make a case for using the precut studs.

13 A Yes, sir.

14 Q And part of his case, a big part of his case,
15 was that it was going to be faster; isn't that correct?

16 A No. The biggest part of his case is that he
17 said he had done it on previous church jobs.

18 Q Had he done it with approval on the previous
19 church jobs?

20 A I don't know.

21 Q Well, did you ask him?

22 A I don't know if he asked for approval. That's
23 what I gathered, because he didn't ask us for approval.

24 Q Okay. So Ken Egbert didn't ask for approval
25 to build the wall one inch higher, did he?

1 to the site?

2 A No.

3 Q Where was Mr. Hales?

4 A He was off that day.

5 Q You called him from the office and told him
6 about it; correct?

7 A I don't know. He was involved in a wedding.
8 I don't know when I told him.

9 Q You made a deliberate decision in your own
10 mind that it wasn't necessary for you to go to the site;
11 correct?

12 A Yes.

13 Q Did you speak with any of the investigating
14 officers?

15 A No, I did not.

16 Q Did you speak with anyone from OSHA?

17 A I did not.

18 Q There wasn't anything that would have
19 prevented you from going to the site, was there?

20 A No, sir.

21 Q Did you call the Church, your client, and tell
22 them that there had been a fatality on the site?

23 A I don't know when that took place.

24 Q Well, did you talk to them about it?

25 A I did not.

1 them to provide proper supervision if that had not been
2 a problem?

3 A We didn't want just bodies. When you increase
4 crew size, you expect a certain amount of them to be
5 experienced.

6 Q Yes. Providing bodies may, in fact, lead to
7 dead bodies; correct?

8 A Well, I don't know.

9 Q It did, in fact, didn't it?

10 MR. DAVENPORT: Objection. You're asking him
11 to make --

12 THE WITNESS: Yes. You're asking me --

13 Q (BY MR. MORIARITY) You don't know?

14 A You're asking me to state that that's the
15 cause, and I don't know that.

16 Q Based upon Exhibit 16, what Hales & Warner
17 wanted were experienced framers on the job to get the
18 job done in a timely manner; correct?

19 A Yes, I think we said supervision, adequate
20 supervision.

21 Q Yes. And you wanted experienced framers;
22 correct?

23 A Yes.

24 Q Now, there were three individuals involved in
25 the raising of the wall that fell and killed Jason

1 Q Do you know if anyone did from Hales & Warner?

2 A I don't know.

3 Q Now, Exhibit 16, refers to a seven-week
4 framing schedule.

5 A Yes.

6 Q Correct?

7 A Yes.

8 Q From what we know, the framers had been on the
9 job for approximately two weeks; correct?

10 A Yes.

11 Q And we know that they were late getting there
12 by approximately a week or sometime in that general
13 area; correct?

14 A Yes.

15 Q And it says here, You need to immediately
16 increase the number of framers and provide proper
17 supervision.

18 What does "proper supervision" mean?

19 A Experienced men.

20 Q Had there been a problem with there not being
21 proper supervision that led, at least in part, to the
22 writing of Exhibit 16 on August 11, 1999?

23 A I don't remember any discussions that they
24 were improperly supervised.

25 Q Well, why would Hales & Warner write and tell

1 Smith. Are you aware of that?

2 A Just through these proceedings.

3 Q "These proceedings" being the depositions here
4 Friday and today?

5 A Yeah. That's when I've known for sure that
6 there were three men.

7 Q Prior to that, did you have any knowledge as
8 to how many men were being involved in the attempted
9 raising of the wall that killed Jason Smith?

10 MR. DAVENPORT: I'm just going to instruct you
11 not to speculate. You can testify on your personal
12 knowledge, but if this is just something that someone
13 has told you --

14 MR. MORIARITY: I would really be interested
15 in the Hornbook citation to the objection you just made
16 as it being a legal objection. Is there one?

17 MR. DAVENPORT: I'm not here to answer your
18 questions. I just want him to understand that he's
19 supposed to testify on his personal knowledge, not to
20 speculate.

21 MR. MORIARITY: Please read the question.

22 (Record read)

23 THE WITNESS: Yes, I knew.

24 Q (BY MR. MORIARITY) You knew there were three;
25 correct?

1 A Yes.
 2 Q Did you know what their qualifications or
 3 experience was?
 4 A No.
 5 Q Now, let me ask you a question. As a general
 6 contractor, do you check the permits of the
 7 subcontractors, does Hales & Warner check the permits of
 8 the subcontractors?
 9 A Permits? I'm confused.
 10 Q The license, the permits.
 11 A Contractor's license?
 12 Q Yes.
 13 A We ask for a number.
 14 Q That's all?
 15 A That's all.
 16 Q And the number would permit you to call up the
 17 Department of Commerce and get a copy of their permit,
 18 their license, if you so desired; correct?
 19 A Yes.
 20 Q Now, when you buy supplies, you issue checks
 21 with the subcontractor's signature and Hales & Warner's
 22 signature being required for it to be cashed; correct?
 23 A When we buy supplies?
 24 Q Supplies for the job. Materials.
 25 A We don't buy supplies through our subs. I

1 A Yes.
 2 Q Do you check or does anyone on behalf of
 3 Hales & Warner check green cards?
 4 A For subcontractors?
 5 Q Yes.
 6 A No, sir.
 7 Q You know what a green card is?
 8 A I have an idea.
 9 Q What?
 10 A It's a documentation that says people are in
 11 this country legally.
 12 Q Yes. What steps, if any, are taken to check
 13 to find out if the people working on the site are, in
 14 fact, in this country legally?
 15 A I don't know.
 16 Q Now, we were talking about criteria regarding
 17 the raising of walls. Do you remember that?
 18 A Yes.
 19 Q What criteria, if any, is there regarding
 20 having unobstructed paths for the raising of the wall?
 21 A When we have preconstruction meetings with our
 22 subcontractors, we emphasize the need for a clean site.
 23 Q Okay. And why is the clean site so important?
 24 A One, you would say that's the overall
 25 appearance of the site.

1 don't know -- I'm confused on that matter.
 2 Q Well, let's take, for example, what we talked
 3 about earlier, the materials for the framing.
 4 A Correct.
 5 Q When you were paying the supplier, you pay it
 6 with a check signed by the subcontractor and by Hales &
 7 Warner; correct?
 8 A No. The check is made out to the
 9 subcontractor and the materials supplier.
 10 Q So it requires signature by the material
 11 supplier.
 12 A Well, we send it to the person we have a
 13 contract with. He, then -- I'm not sure, I'm assuming
 14 he endorses it and sends it on.
 15 Q How about your payroll? How is that handled?
 16 A The payroll?
 17 Q Do you do a similar situation?
 18 A It's a direct check to our employees.
 19 Q Well, how about the payroll of, for example,
 20 BRC? What safeguards, if any, do you take to make sure
 21 that you're not going to have a labor lien?
 22 A We don't take any safeguards, per se.
 23 Q The reason that you issue the check to the
 24 supplier in the manner you just described is to prevent
 25 any material men's liens; isn't that correct?

1 Q Is that the only reason, appearance?
 2 A Safety issues.
 3 Q Yes. How is a clean site a safety issue?
 4 A From many standpoints. We don't want -- spent
 5 boards with nails in it could cause injury. We don't
 6 want a lot of clutter on the site.
 7 Q Why not?
 8 A You can twist an ankle, you can trip.
 9 Q Why don't you want to trip?
 10 A I guess you could hurt yourself.
 11 Q Yes. Getting back to the criteria to safely
 12 raise a wall, should the individuals who are raising the
 13 wall have a clean path for raising the wall?
 14 A Yes.
 15 Q Why?
 16 A To prevent tripping.
 17 Q Now, as I understand it, Hales & Warner
 18 emphasizes at these preconstruction meetings with the
 19 subs how important a clean site is; correct?
 20 A We emphasize we want a clean site.
 21 Q Yes. Was he, Brent Reynolds, at the
 22 preconstruction meeting?
 23 A He was at the initial preconstruction meeting.
 24 Q Well, was that the prebidding or was that the
 25 preconstruction?

Exhibit 7

1 A Not to my knowledge.

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

4 A No.

5 Q How far was it behind schedule?

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

7 Q Why was it behind schedule?

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

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

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

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

22 A Actually, with that situation, with the wall,
23 BRC had actually instructed them to build it that way to
24 save time in cutting studs. And the plan had called for

25 the shorter wall, and we had requested that they follow

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1 the plans.

2 Q Who is BRC?

3 A Brent Reynolds Construction.

4 Q What role did they play in this project?

5 A They were the contracted framers.

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

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

12 Q How did you find that out?

13 A In speaking with Ken Egbert.

14 Q How did you first meet Ken Egbert?

15 A The day he came on the job site.

16 Q What day was that?

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

20 Q I want to make sure I'm understanding.

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

23 A I had called him on the phone to let him know
24 where the project was on schedule.
25 Q Called who?

1 if you heard the -- base your testimony on what you
2 heard.

3 THE WITNESS: I talked to Ken Egbert. Ken
4 Egbert told me that he was told by somebody in Brent
5 Reynolds' company to make the wall that high.

6 Q (BY MR. MORIARITY) And the height, was it
7 higher or shorter?

8 A One inch higher than what the plans called
9 for.

10 Q The reason it was one inch higher was to save
11 studs and not have to cut them; correct?

12 A Yes. The height that they would make them
13 would be a standard height of a stud.

14 Q And so they could then just buy standard
15 studs, put them in, get the job done faster; correct?

16 A That would be my assumption.

17 Q How did you find out that the walls were one
18 inch higher?

19 A I measured them.

20 Q And when you measured them and found that out,
21 what, if anything, did you do?

22 A I talked to Ken.

23 Q And what did Ken tell you?

24 A I don't recall if he went back to Brent and
25 talked to him or not, but the next day the wall was

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1 fixed.

2 Q But was it during the course of that
3 conversation or conversations with Ken that he told you
4 that the reason the walls were as high as they were is
5 because someone from BRC had told them to do it that
6 way?

7 A I would assume it would be in that
8 conversation.

9 Q And did you show him the plans?

10 A Yes.

11 Q And point out the fact that no matter what BRC
12 or anybody else said, the walls were to be this height,
13 and it had to be torn down and made that height, which
14 was one inch shorter; correct?

15 A It is in their contract to follow the plans
16 and specs of the job.

17 Q In whose contract?

18 A Brent Reynolds'.

19 Q And what did Mr. Egbert say to you when you
20 told him that?

21 A He was hesitant, and I think he went and

22 called Brent, because he came back to me and we visited
23 again over the problem.

24 Q And what was said during that second visit, or
25 that visit, whatever number it was.

1 A They corrected the problem.

2 Q Yes, sir, I understand, but I'm talking about
3 at the time when you made the conclusion in your mind
4 that Ken Egbert was frustrated.

5 A No.

6 Q Okay. Did Ken Egbert ask you to speak to
7 Brent Reynolds or anyone at that company?

8 A No.

9 Q Did he ask that the architect be called in so
10 he could show him the work?

11 A No.

12 Q But the bottom line is that Egbert
13 Construction had constructed a wall and they had to redo
14 the entire wall and make it one inch shorter; correct?

15 A That is correct.

16 Q And that was based upon your direction;
17 correct?

18 A Yes.

19 Q How long did it take for them to dismantle
20 that wall; do you know?

21 A I believe they had it finished the next day.

22 Q But they, "they" being Egbert Construction,
23 were approximately two weeks behind the schedule;

24 correct?

25 A Not at that time.

1 Q Sometime shortly thereafter, were they?

2 A Sometime into the framing.

3 Q Yes. How long into the framing were they two
4 weeks behind schedule?

5 A I'd say approximately the time of the death.
6 That's as close as I could say.

7 Q What was causing them to be two weeks behind
8 schedule?

9 MR. DAVENPORT: Again, if you know, you can
10 tell them, but if you don't, I don't want you
11 speculating.

12 THE WITNESS: I don't know.

13 Q (BY MR. MORIARITY) Based on your
14 observations, what was causing them to be two weeks
15 behind schedule?

16 A There were several other items that they had
17 to redo.

18 Q Such as?

19 A I don't recall what they are.

20 Q But items that you told them they had to redo?

21 A But items that I had showed them on the plan
22 that we needed to rectify.

23 Q Such as?

24 A I don't recall.

25 Q But there were several items that you made

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1 them redo?

2 A There were several items.

3 Q Anything else?

4 A Not enough manpower.

5 Q Yes. Tell me about that.

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

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

13 THE WITNESS: I had discussed this with Ken.

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

16 A Yes.

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

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

21 Q Well, isn't it one of your roles as the

22 superintendent to make sure that the work is done in a
23 workmanlike manner?

24 A Could you repeat that, please?

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

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1 project superintendent to make sure that the work of the
2 subcontractors is done in a workmanlike manner?

3 A I am to see that the work is done in a quality
4 manner. Is that what you're asking?

5 Q No, I'm asking in a workmanlike manner.

6 Workmanlike manner is a term of art in the construction
7 trade, is it not?

8 A Workman?

9 Q Yes. Workmanlike manner.

10 A Never heard that presented to me.

11 Q Never did, okay.

12 So do you know if it was your job to make sure
13 that the work done by the subcontractor and their
14 employees was done in a workmanlike manner? Do you know
15 that?

16 MR. DAVENPORT: I'm going to object to the
17 extent that you're asking for some kind of a legal
18 conclusion. You can word it as you understand it.

19 Q (BY MR. MORIARITY) Just answer my question as

20 I asked it.

21 A I don't understand what you mean by
22 "workmanlike manner."

23 Q You don't?

24 A Are you talking quality of work? Are you
25 talking craftsmanship?

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1 Q Has anyone ever talked to you, anyone from
2 Hales & Warner, as to what workmanlike manner means?

3 A No.

4 Q Never heard it before today; correct?

5 A Never heard of the term.

6 Q Never seen it in writing before today?

7 A Never seen it in writing.

8 Q Never seen it in that big, thick book that you
9 have at home?

10 A Never seen it in that big book.

11 Q Never seen it in the three construction books
12 that you've read?

13 A No.

14 Q Okay. Then what did you see your role as the
15 project superintendent to be in reference to make sure
16 that the subs were doing quality construction?

17 A I look over the plans and see to it that they

18 are following the plans. I read through their section
19 of the specs in the spec book and see to it that they
20 are following the spec book. If they are doing that,
21 and using the correct lumber, correct nailing, the
22 quality of workmanship will be there.

23 Q Well, if a subcontractor came in with three or
24 four 13-year-old boys that were doing all of the things
25 that you just said, would you permit that as the project

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1 superintendent?

2 A If I knew their age, I would not permit it.

3 Q Why not?

4 A They're underage for working.

5 Q I see. Now, you had been a framer. You
6 testified to that earlier here today, had you not?

7 A I've had some experience in framing, yes.

8 Q And you said to be an experienced framer, you
9 should have at least a year's experience, or words to
10 that effect, did you not?

11 A Yes. One year's experience is what I felt was
12 minimum.

13 Q How many of the framers that Egbert
14 Construction was using on the Highland project had a
15 year or more experience, if you know, as framers?

16 A I do not know.

17 Q What you did know is that Egbert Construction
18 was falling behind the required time schedule; correct?

19 A Yes.

20 Q And you were discussing this with Mr. Egbert;
21 correct?

22 A Yes.

23 Q Did you discuss it with anyone else?

24 A I discussed it with Joel and Cliff.

25 Q And when did you discuss it with Mr. Hales and

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1 Mr. Warner?

2 A Exact time, I do not know, but when I felt
3 that they were falling behind, I approached Joel or
4 Cliff.

5 Q And what did you do?

6 A And told them we needed to get a letter to
7 Brent Reynolds or to Ken Egbert and see if we couldn't
8 rectify that problem.

9 Q Did you make the decision as to who the letter
10 should go to?

11 A No.

12 Q Did you have just one conversation with
13 Mr. Hales and Mr. Warner or did you have a series of

14 conversations on the subject matter of Egbert
15 Construction falling behind?
16 A I would say more than one.
17 Q Yes. How many more than one?
18 A I do not know.
19 Q Approximately?
20 A It would probably be a conversation -- a topic
21 of conversation almost every time we talked.
22 Q For what period of time?
23 A Probably -- probably throughout the job.
24 Q Yes. How would you, as project
25 superintendent, communicate with your bosses, Mr. Hales

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1 and Mr. Warner?
2 A I would talk to them on the phone.
3 Q It was all verbal?
4 A Or -- yes -- or if Joel would come to the
5 site, I would talk to him there in person.
6 Q But all of the communication was verbal.
7 A Correct. That is correct.
8 Q And from the very first when Egbert
9 Construction came on site, you had some problems or
10 reservations about them, didn't you?
11 MR. DAVENPORT: I'm going to object. That

12 mischaracterizes the prior testimony.

13 Q (BY MR. MORIARITY) Go ahead and answer.

14 MR. DAVENPORT: You can go ahead and answer.

15 THE WITNESS: From the very start of when they
16 came on the job site, I had -- I did not have
17 reservations.

18 Q (BY MR. MORIARITY) Okay.

19 A When Ken and I first talked, I felt like it
20 was a new company. I had never worked with them before.
21 You know, proceed as you would any other new
22 subcontractor, watching their work.

23 Q And when they're new, do you watch them a
24 little bit closer than you watch somebody that you had
25 worked with year after year?

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1 A Yes.

2 Q Did Mr. Ken Egbert tell you, Mr. Maurice
3 Egbert, that he had had previous experience working on
4 LDS churches?

5 A No.

6 Q Did he tell you that he hadn't?

7 A I don't recall.

8 Q Did you know how much experience, if any,
9 Egbert Construction had working previously on LDS

10 churches?

11 A On LDS churches, I do not know how much
12 experience he had.

13 Q Okay. When was it that you first had a
14 communication, verbal communication, with either of your
15 supervisors as it related to Egbert Construction and the
16 framing? How soon after Egbert came on the job did you
17 first have that communication?

18 A It would probably be when they built the wall
19 wrong.

20 Q Their first wall?

21 A Their first wall.

22 Q And time-wise, how soon was that prior to the
23 time that the young Smith boy was killed?

24 A There again, it's probably a month, month and
25 a half. I can't remember the exact dates when they

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1 arrived on site.

2 Q And during this month, month and a half, did
3 you say that in almost every conversation you had with
4 Mr. Hales and Mr. Warner, either when they were on site
5 or by phone, that Egbert Construction was one of the
6 subject matters of the communication?

7 A I'm sorry, repeat that.

8 Q Yes. Did you testify a few moments ago that
9 in all of your communications, after you first started
10 seeing these problems with Egbert Construction, that
11 they were the subject matter, at least in part, of all
12 of your communications with Mr. Hales and Mr. Warner?

13 A I'd say that's a fair -- yes.

14 Q And did Mr. Hales or Mr. Warner ever come down
15 to the job site there at Highland and discuss these
16 problems that you were discussing with them about Egbert
17 Construction?

18 A Did they come and discuss it with me?

19 Q Personally, yes, sir.

20 A Yes.

21 Q How often?

22 A I don't recall.

23 Q Several occasions?

24 A I'm sure.

25 Q And was it both Mr. Hales and Mr. Warner or

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1 was it just Mr. Hales or Mr. Warner that came on site
2 and discussed these problems with you?

3 A More than likely it would be Joel most of the
4 time.

5 Q And Joel's last name?

6 A Joel Warner.

7 Q Thank you very much.

8 And did Joel Warner give you some advice as to
9 how to deal with Egbert Construction and the problems
10 that you were discussing with him?

11 A He told me to keep watching, check their work,
12 like we do on every job.

13 Q Anything else?

14 A I do not recall.

15 Q Did you trust Egbert Construction?

16 MR. DAVENPORT: Object to the vagueness of
17 the question, but if you can understand how to answer
18 it, go ahead.

19 THE WITNESS: I felt with my overseeing of
20 the -- following the plans and specs, that I could trust
21 them, because they did correct all the problems that I
22 found.

23 Q (BY MR. MORIARITY) But corrected it after
24 exhibiting some frustration; correct?

25 A On the first one, yes.

1 MR. DAVENPORT: Well, that's not personal
2 knowledge, but your knowledge is through Ken.

3 THE WITNESS: Okay, what Ken told me.

4 Q (BY MR. MORIARITY) And when did he tell you
5 that?

6 A Shortly after the accident.

7 Q Tell me the circumstances of that
8 conversation.

9 A I don't recall. All I know is we had --

10 Q Well, you're having a conversation with the
11 guy who was the boss of Egbert Construction, or at least
12 who the construction company was named after; isn't that
13 true?

14 A Yes, I was talking to Ken Egbert.

15 Q And he advised you that this kid who had been
16 killed, who was 18 years of age, that was only his
17 second day on the job; isn't that true?

18 MR. DAVENPORT: Are you testifying that he was
19 18 years of age?

20 Q (BY MR. MORIARITY) Let me ask you, do you
21 know how old he was?

22 A I did not know. I knew he was young.

23 Q Well, remember when we were talking about a

24 bunch of 13-year-olds coming on, that you'd inquire.
25 Did you make any inquiry as to how old this kid was when

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1 he came on your project to work?

2 A I did not inquire as to his age.

3 Q Did you at any time learn of his age?

4 A I believe in the conversation with Ken -- in
5 fact, I know in the conversation with Ken, his age was
6 discussed.

7 Q And how old was he?

8 A I do not recall, but I know he was preparing
9 for a mission, so he was under 19, because he wasn't old
10 enough at the time.

11 Q And what else do you recall about that
12 conversation with Ken Egbert?

13 A Just that Ken had been told that he was
14 preparing for a mission.

15 Q Anything else?

16 A I don't recall anything else.

17 Q It was a tragedy, wasn't it?

18 A Yes, it was.

19 Q Terrible waste of a human life; correct?

20 Is that correct, sir?

21 A Are you asking for my religious views?

22 Q No, that's not a religious view.

23 A Yes, it is.

24 Q Well, what is your answer in response to my
25 question?

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1 A A religious view.

2 MR. DAVENPORT: You can go ahead and say what
3 it is. I don't care.

4 THE WITNESS: God has given him a mission.
5 Whether it be served here on earth or in heaven, it is
6 being served, and, yes, I believe that to be true.

7 Q (BY MR. MORIARITY) So you believe that this
8 was destined to happen, no matter what?

9 MR. DAVENPORT: I object. You're
10 mischaracterizing his testimony.

11 MR. MORIARITY: I'm asking.

12 THE WITNESS: I believe God has a purpose.
13 Whether there is a time, I will not testify to, but God
14 has a purpose for every individual on this earth.

15 Q (BY MR. MORIARITY) As a result of the tragic
16 death of Jason Smith, are you going to be a better
17 project supervisor?

18 A Every experience that I have, whether it's on
19 the job, through education, through life, makes me a

20 better man, a better employee, a better superintendent.

21 Q And can you answer the question that I asked
22 you?

23 A This is an experience of my life. It will
24 never be erased. These pictures I have seen before
25 without a camera.

Exhibit 8

1 MR. MARIGER: Application process to the
 2 LDS Church?
 3 MR. BADARUDDIN: Sure.
 4 THE WITNESS: No.
 5 Q (BY MR. BADARUDDIN) Did you have to provide
 6 them any referrals or something of that nature?
 7 A No.
 8 Q How did they come to choose you the very first
 9 time, if you know? When I say "you," I mean your firm.
 10 MR. MARIGER: So now are we talking about
 11 before 1997?
 12 Q (BY MR. BADARUDDIN) Well, when was the first
 13 time you did anything for the LDS Church?
 14 A My partner has worked for them since 1971.
 15 Q Okay. So are you aware of the circumstances
 16 under which your partner was able to start working with
 17 the LDS Church?
 18 A No.
 19 Q When were you born?
 20 A 1969.
 21 Q Okay. He didn't fill you in, I guess.
 22 Well, let's talk about the Highland 4 and 20
 23 project. How did you come to be the project -- is it
 24 project architect?
 25 A Yes.

1 Q How did you come to be the project architect
 2 on the Highland 4 and 20 project?
 3 A Our firm had projects in a geographical area
 4 that spread from Idaho to Nephi, and within our
 5 organization of the office, we, my partner and I,
 6 decided that it didn't make sense for us to be crossing
 7 paths all the time, so I tried to take the majority of
 8 the projects in the south area.
 9 Q Okay. Did Mr. Schick call y'all and say --
 10 y'all is a word that we use where I'm from -- did
 11 Mr. Schick call your firm and say, Well, we've got a
 12 project that we'd like your help with?
 13 A I think he called my partner and said that.
 14 Q And you didn't bid it or anything, they just
 15 chose you?
 16 A Correct.
 17 Q And were you paid a retainer? Was there a
 18 contract or did you just send them bills and they paid
 19 them? What was the payment arrangement?
 20 A We have a contract.
 21 Q Did you? Okay. And the contract, was that
 22 for a set rate or an hourly, or how did that work?
 23 A A fixed fee.
 24 Q Well, what were your duties and obligations to
 25 the LDS Church with regard to the Highland 4 and 20

1 project?
 2 A That could be a long list of things. Would
 3 you like them all?
 4 Q If you can list them, yes.
 5 MR. MARIGER: Do you have the contract?
 6 MR. BADARUDDIN: I do, but I got this this
 7 morning, and I haven't been able to go through this
 8 thoroughly.
 9 MR. MARIGER: It seems to me that the contract
 10 would be the best evidence of that. You're asking him
 11 all of his duties? Is that what I understand the
 12 question to be?
 13 MR. BADARUDDIN: Well, I'm not asking him his
 14 legal duties. Let me rephrase that.
 15 Q (BY MR. BADARUDDIN) What did you do for the
 16 LDS Church on the Highland 4 and 20 project? Let me
 17 start you off.
 18 Did you have to design or draft the plans for
 19 the structure?
 20 A No.
 21 Q Where did they come from?
 22 A The church has a standard set of plans that
 23 they use for their buildings.
 24 Q What's the name of the building? Is it a
 25 chapel, a sanctuary?

1 A They refer to it as the Heritage plan.
 2 Q So they sent you drawings, drafts?
 3 A They sent us CAD files in a hard copy. This
 4 project -- there are five styles that the local church
 5 leaders choose from, and this was called the New England
 6 Style.
 7 Q Okay.
 8 A So they sent those plans to us as hard copy,
 9 and also on CAD.
 10 Q Okay. And CAD is a software of some sort?
 11 A Yes.
 12 Q And all you had to do was put your stamp on
 13 them?
 14 A No.
 15 Q What did you have to do to these plans to make
 16 it so they could build the thing?
 17 A The site had to be designed and the drawings
 18 created for the site grading and utilities. Then the
 19 standard plans, we review those to determine, in our
 20 minds, if code has been met.
 21 Q Code being?
 22 A Uniform Building Code at the time.
 23 Q The State of Utah imposes certain restrictions
 24 or requirements on buildings.
 25 A Correct.

1 go back to y'all.
 2 Q (BY MR. BADARUDDIN) Is there a circumstance
 3 where you and the LDS representative jointly decide to
 4 instruct the general contractor not to use a particular
 5 subcontractor?
 6 A Yes.
 7 Q Okay. And under those circumstances, does the
 8 general contractor accept your instruction or reject it?
 9 A In past cases, they've accepted it.
 10 Q Have you ever told a general contractor in an
 11 LDS project, Use this subcontractor, for whatever
 12 purpose?
 13 A No.
 14 Q And has the LDS Church, to your knowledge,
 15 ever provided you with a list of, let's say, approved or
 16 preferred subcontractors?
 17 A No.
 18 Q Do you have an idea in your head from working
 19 with the LDS Church as to what subcontractors they
 20 prefer or approve?
 21 A I think that everybody that works on LDS
 22 projects, whether they're architects or general
 23 contractors or the project managers, know that some
 24 contractors perform better than others.
 25 Q And that's from your experience in the

1 construction field or from your experience with the
 2 LDS Church?
 3 A Can you rephrase that?
 4 Q Well, you've done quite a bit of construction;
 5 correct?
 6 A Yes.
 7 Q And you've had some good subcontractors and
 8 some bad ones.
 9 A Yes.
 10 Q And while maybe you can't list them off the
 11 top of your head, the good ones and the bad ones, if you
 12 were looking at a list of subcontractors for a
 13 particular project, you would recall whether or not any
 14 of the really bad ones were on that list; is that fair
 15 to say?
 16 A If I had an association or past experience
 17 with a bad subcontractor, I would typically remember,
 18 but there may be one that's bad that I have had no
 19 experience with that would not be apparent to me.
 20 Q So your criteria for judging a subcontractor
 21 as, let's say, bad or substandard or unacceptable would
 22 basically be your prior experience with that
 23 subcontractor was not very good?
 24 A Correct. And that could be based on more than
 25 just quality. It could have to do with schedule, who

1 their foreman might be, a number of different things.
 2 MR. WALLACE: I heard you say "schedule," and
 3 I couldn't hear after that.
 4 MR. MARIGER: Who their foreman might be.
 5 Q (BY MR. BADARUDDIN) So it's not like the
 6 representative from the LDS Church ever said to you,
 7 Paul, here are a couple of people I like, here are a
 8 couple of people I don't?
 9 A No.
 10 Q It's just your prior experience in various
 11 construction projects?
 12 A Yes.
 13 Q All right. Well, let me get back to the
 14 Highland 4 and 20 project.
 15 There were the master plans and the -- was it
 16 the New England style of -- what was the name of the
 17 structure?
 18 A New England Style Heritage.
 19 Q Who decided how big it was going to be? If we
 20 were to go out and measure the perimeter, who decided
 21 those measurements?
 22 A I don't know.
 23 Q Was it your firm?
 24 A No.
 25 Q What about, let's say, for example, the width

1 of the doorways and the height of the doorways. Some
 2 churches, especially in Rome -- in fact, in this
 3 building, the doors go way up. Other times, like in
 4 your house, they're going to be a good bit shorter. Who
 5 determined the size of the doorways?
 6 A I don't know.
 7 Q That wasn't your firm?
 8 A No.
 9 Q And what about the size of the walls and the
 10 ceiling height, who determined all of that?
 11 A I don't know.
 12 Q It wasn't your firm?
 13 A No.
 14 Q Now, what exactly did your firm do?
 15 MR. MARIGER: I'm going to object. He gave a
 16 very long list of what they did with the Church's
 17 standard designs and drawings. If you want him to
 18 repeat all of that . . .
 19 Q (BY MR. BADARUDDIN) I don't want you to
 20 repeat it. If I understand correctly, and I wanted to
 21 make sure I did, the church basically designed the
 22 New England Style Heritage.
 23 A Correct.
 24 Q You just make sure their design conforms with
 25 the requirements of law, and I guess physics, because we

1 A Correct.

2 Q And there's no 34, is there?

3 A Not that I'm aware of.

4 Q 33 would be your last weekly report for the
5 Highland 4 and 20 project?

6 A I believe so.

7 Q Did I say 34? I meant 33. I don't know what
8 I said, but the last numbered report is 33. And that
9 would be your last weekly report for the Highland 4 and
10 20 project; correct?

11 A When you say "your," you're speaking of
12 Butler & Evans?

13 Q Yes.

14 A Correct.

15 Q And of course, report number one would be your
16 first report for the Highland 4 and 20 project.

17 A Weekly construction field report.

18 Q Okay. Who designed this form that you used
19 for the weekly reports?

20 A Someone within my office.

21 Q The purpose of this form is, I guess, to have
22 a form to give all the information to your client in an
23 easy, readable manner? Well, let me ask you this.

24 What is the purpose of the form?

25 A To give the project manager a list of what is

1 current status of the project. What sort of information
2 would you put in that category?

3 A What is currently occurring at the project,
4 where they are in the progress of construction.

5 Q And then in resolved items, what sort of
6 information would you put there?

7 A Those items that came from -- if there is an
8 item that needs attention, whether it be a question or a
9 discrepancy in the plans or noncompliance with the
10 construction documents, it is listed under new items.
11 When those new items are corrected, they move to
12 resolved items. If they are not corrected the first
13 week, they move to unresolved items until they become a
14 resolved item.

15 Q So new items would only be new items once on
16 one weekly report; is that correct?

17 A Typically.

18 Q And then they would move to either resolved or
19 unresolved.

20 A Yes.

21 Q It appears also that you use codes of some
22 sort, like for example, you've got 1-1 under new items,
23 a sewer manhole.

24 Do you see where I'm reading from?

25 A Yes.

1 occurring at the project, what the progress of the
2 project is.

3 Q The project manager in this case being Dean
4 Schick?

5 A Correct.

6 Q Okay. What sort of information do you put
7 into the report?

8 A What the progress is of different components
9 of the project, items that do not comply with the
10 construction documents, questions that may be raised.

11 (Off-the-record discussion)

12 Q (BY MR. BADARUDDIN) Well, for example,
13 there's some information regarding the project manager,
14 the architect, the contractor. That's just
15 identification information?

16 A Yes.

17 Q I mean, that's not really going to help
18 anybody determine how the project is coming along.

19 A No.

20 Q But I guess the first big item there is
21 current status of the project.

22 A Yes.

23 Q I'm looking at report No. 1. It's the same on
24 every report. You can look at whatever report you want.

25 Let's talk about report 1, Exhibit 27, the

1 Q What does that mean, 1-1?

2 A Item 1 of report 1.

3 Q And so if we were to turn to any report, this
4 item would be numbered 1-1?

5 A No.

6 Q Well, if we go to report No. 16, Exhibit 27.

7 A Oh, I misunderstood your question.

8 Q Okay.

9 A It always stays as one -- an item, once it's
10 listed, so it always stays at 1-1. I thought you were
11 inferring that on all reports the first new item is
12 always 1.1, and it's not. It's the report number, dash
13 one.

14 Q All right. And that way you can follow along
15 with its progress, know how long it's been a problem; is
16 that fair to say?

17 A Correct.

18 Q So the first number would be the report
19 number. The second number would just be numbering it in
20 that report.

21 A Correct.

22 Q Now, how often would you visit the Highland 4
23 and 20 project?

24 A Weekly.

25 Q Just once a week?

1 A Unless requested to come more often.
 2 Q And did you, in fact, visit more often than
 3 once a week on the Highland 4 and 20 project?
 4 A Possibly.
 5 Q In the Highland 4 and 20 project, was there a
 6 schedule for completing the various items that are
 7 required to build the building?
 8 A Yes.
 9 Q Who designed that schedule?
 10 A Contractor.
 11 Q Did you have any input as to the timing?
 12 A No. We establish the overall total days of
 13 the contract.
 14 Q Okay. And this in case, I think it was
 15 approximately 300 days?
 16 A Possibly. That sounds appropriate.
 17 Q Well, that number would have been established
 18 by your firm?
 19 A It's established by the LDS Church.
 20 Q And then as to what element of the project is
 21 completed the first week, the second week, that would be
 22 up to the general contractor?
 23 A Correct.
 24 Q And what, if any, input would you have into
 25 that?

1 A None.
 2 Q I wanted to ask you about report No. 7 of
 3 Exhibit 27.
 4 Under "current status of the project," you
 5 indicate that the framing should start on Friday. It's
 6 the last sentence of the only paragraph in "current
 7 status of the project."
 8 A Yes.
 9 Q And why did you note that?
 10 A I was told by the superintendent when the
 11 framing would start.
 12 Q Why is it important when the framing is going
 13 to start?
 14 A Just a mark in time.
 15 Q And what is framing? What does that mean?
 16 A That is putting together the dimensional
 17 lumber, that's the bearing and non-bearing walls, the
 18 roof system. Can be a floor system in some instances.
 19 Q Okay. Well, who would determine how wide and
 20 how tall to make these walls?
 21 A Whoever designed the standard plans.
 22 Q And who designed the standard plans on the
 23 Highland 4 and 20 project?
 24 A I don't know.
 25 Q But you reviewed those plans.

1 A Yes.
 2 Q And do you know whether or not they indicated
 3 the height and width of the walls?
 4 A The plans?
 5 Q Yes.
 6 A Yes, they do.
 7 Q Do you know what height was prescribed by the
 8 plans?
 9 A It's different in different places.
 10 Q Well, on the Highland 4 and 20 project.
 11 A They're different walls of different heights.
 12 Q Okay. But you could look to the plans, is it,
 13 and determine what, if any -- what height any given wall
 14 should be?
 15 A Yes.
 16 Q And is there a name for the plans
 17 specifically, where I could go and look at these
 18 documents and see what the height is supposed to be, the
 19 walls?
 20 A A specific sheet?
 21 Q Well, if I wanted to know how tall the wall
 22 should be in a particular place at the Highland 4 and 20
 23 project, what document would I look at?
 24 A The Highland 4 and 20, I don't know what
 25 they're labeled, but it's the project name building

1 plans.
 2 Q Okay. Well, let me ask you about report No. 8
 3 of Exhibit 27. Under "current status," you make some
 4 description of the framing progress. It says, "The
 5 framers have started the exterior walls. They stood the
 6 north wall along the east side and the east wall along
 7 the north side, and everything appears to be in
 8 conformance with the construction documents, except as
 9 noted below."
 10 Is that what it says?
 11 A Yes.
 12 Q And the date of this observation was August 5,
 13 1999; is that correct?
 14 A Yes.
 15 Q What is noted below? It says, "Everything
 16 appears to be in conformance except as noted below."
 17 What is not in conformance?
 18 A 8.1.
 19 Q And I can read 8.1, but tell me what it means.
 20 A I don't recall specifically which two beams
 21 are being discussed. It was an item that was discussed
 22 between the superintendent and the structural engineer.
 23 Q Okay. What is a beam?
 24 A A beam is a horizontal member that holds
 25 something above it.

1 Q (BY MR. BADARUDDIN) The superintendent's name
2 being?

3 A Maurice Egbert.

4 Q What did he tell you happened?

5 A That three workers were standing a wall, and
6 that one of them went from one side of the wall to the
7 other side, and tripped and fell, and that the wall fell
8 at the same time and landed on his head.

9 Q Okay. Do you have any experience with
10 framing?

11 A Define "experience."

12 Q Have you ever built a wall?

13 A Yes.

14 Q Have you ever lifted a wall into place?

15 A Yes.

16 Q And how did you manage to lift the wall you
17 lifted into place?

18 A Tip it.

19 Q Tip it? What does that mean?

20 A It means you lay the base plate adjacent to
21 its final spot, you build the wall laying on the ground,
22 and then you tip it or raise it into the spot.

23 Q How do you raise it into the spot?

24 A It can be done a couple of ways.

25 Q Tell me the ways that you're familiar with

1 A No.

2 Q It had nothing to do or you don't know?

3 A It had nothing to do.

4 Q I had some questions about some reports.

5 Do you know whether or not Hales & Warner kept
6 a daily report of events at the Highland 4 and 20
7 project?

8 A Yes.

9 Q Did you ever review those reports?

10 A Yes.

11 Q In what capacity would you review them?

12 A They were submitted to us biweekly, so they
13 would give us a copy of them.

14 Q Okay. And what purpose did you have in mind
15 when you reviewed those reports?

16 A General progress of the project and if there
17 were problems.

18 Q So not only would you visit every week, but
19 you would review these daily reports just to see how
20 things are going; correct?

21 A Correct.

22 Q And then you could make a report to
23 Mr. Schick, or whoever might be in his position, as to
24 the progress on, in this case, the Highland 4 and 20
25 project.

1 raising a wall into the spot it goes in.

2 A You can use a crane and pick it up. You can
3 pull it with a rope. You can push it with a board from
4 one side. You can have -- depending on the size, there
5 are different ways, but small walls can be lifted just
6 with a man, a couple of men, five men.

7 Q This wall that fell on this individual, was
8 that a small wall, a medium-sized wall, a large wall?

9 A Relatively speaking, small wall for the
10 project.

11 Q Do you think three men were adequate to lift
12 it?

13 A Yes.

14 Q You don't think they needed a crane or a
15 forklift or anything of that nature?

16 A No.

17 Q Do you know how much experience these
18 individuals had?

19 A No.

20 Q Do you know how much experience one should
21 have in order to lift a wall of that size?

22 A No.

23 Q Do you know whether this wall that fell on
24 this individual had anything to do with item 8.1? When
25 I say 8.1, it's really 8-1, but the beam issue.

1 A Yes.

2 (Exhibit No. 29 is marked for identification.)

3 Q (BY MR. BADARUDDIN) If you could review
4 Exhibit 29.

5 My question is, is that the daily report for
6 August 5, 1999?

7 A No. It's August 4.

8 Q Right. August 4, 1999.

9 Do you know whether you reviewed that while
10 you were working on the Highland 4 and 20 project?

11 A I don't recall.

12 Q Well, let me ask you about the last
13 handwritten entry. It starts, "At Joel's request."

14 A Yes.

15 Q Can you read that paragraph.

16 A Sure. "At Joel's request, I have told the
17 framers we want all sheer walls and end walls to be" --
18 and I can't read that word, "with studs long, no top
19 plate, then to cut them when the trusses and TGIs are
20 available for exact heights. This is how we had done it
21 on our other jobs. In early discussions about the
22 framers" -- "about this, the framers did" -- "didn't
23 want to do it. They are proceeding as we have
24 requested."

25 Q Can you tell me what that means, if you know.

1 A On the east wall of the building, it's a tall
2 gable wall, very tall, very long. And in order to get
3 the slope of that wall to match the trusses, he's asking
4 them to let the studs extend vertically until the
5 trusses are in place and then mark the slope of that
6 wall, based on what the slope of the set trusses and
7 TGIs are.

8 Q Do you know how the framers wanted to do it?

9 A No.

10 Q But however they wanted to do it, the general
11 contractor gave them some instruction as to how they
12 must do it?

13 MR. DAVENPORT: Objection to the extent you're
14 asking him to speculate. If he was present and heard
15 these instructions, that's one thing to testify to his
16 personal knowledge. It's another thing to speculate as
17 it relates to reading someone else's writing as to what
18 occurred.

19 I'm going to object to your question because
20 it calls for speculation and lacks foundation.

21 MR. MARIGER: I'll join the objection.

22 Q (BY MR. BADARUDDIN) Subject to that
23 objection, do you know whether or not the general
24 contractor gave some instruction to the framers as to
25 how they were to proceed with this thing that's

1 they're talking about in the report.

2 MR. MARIGER: In the contractor's report.

3 THE WITNESS: In the contractor's report.

4 Q (BY MR. BADARUDDIN) And that would be
5 Exhibit 29.

6 A Yes.

7 Q So the description of your current status of
8 project in field report No. 8 indicates that the framing
9 is proceeding as indicated in Exhibit 29?

10 A I don't understand the question.

11 MR. MARIGER: That's ambiguous.

12 MR. DAVENPORT: Join.

13 Q (BY MR. BADARUDDIN) There's some framing
14 described in Exhibit 29; correct?

15 A Yes.

16 MR. MARIGER: There's a framing and a method
17 for framing in Exhibit 29, and you need to differentiate
18 between those two.

19 MR. BADARUDDIN: I'm getting there.

20 Q (BY MR. BADARUDDIN) There's framing described
21 in Exhibit 29; correct?

22 A Yes.

23 Q And there's one method described by the author
24 of Exhibit 29.

25 A Yes.

1 described on Exhibit 29?

2 MR. DAVENPORT: Are you asking for his
3 personal knowledge?

4 MR. BADARUDDIN: I'm always asking for his
5 personal knowledge.

6 MR. MARIGER: He has no personal knowledge of
7 this. His knowledge is based just upon the document you
8 just gave him.

9 MR. DAVENPORT: You're asking him to read
10 something and then you're asking him questions.

11 MR. MARIGER: Do you know for a fact that this
12 occurred?

13 THE WITNESS: No.

14 Q (BY MR. BADARUDDIN) Let me ask you about your
15 weekly report that would coincide with this date, which
16 I believe would be No. 8.

17 A Yes.

18 Q Does report No. 8 or possibly 9 reflect
19 anything relevant to what's going on on Exhibit 29 with
20 regard to the framing?

21 A Well, it is an exterior wall, so potentially
22 the first sentence refers to it.

23 Q Okay.

24 A The north wall along the east side is
25 consistent with what they're -- with the wall that

1 Q And there's an indication that the author of
2 Exhibit 29 wants the framing done according to the
3 manner described in Exhibit 29; is that fair to say?

4 A Yes.

5 Q Now, in your report No. 8 -

6 MR. DAVENPORT: Let me make sure I'm clear.
7 Which is Exhibit 29?

8 MR. BADARUDDIN: The daily report.

9 MR. DAVENPORT: I'm just going to indicate
10 that, again, I object to lack of foundation. He doesn't
11 know, have any personal knowledge as to Exhibit 29. He
12 did not prepare it, and he's already testified that he
13 doesn't know. He hasn't any personal knowledge as to
14 its content.

15 MR. BADARUDDIN: Okay.

16 Q (BY MR. BADARUDDIN) Field report No. 8, does
17 that indicate that the framing is proceeding on the
18 Highland 4 and 20 project in the manner described in
19 Exhibit 29?

20 A No.

21 Q What does it indicate?

22 A It indicates that the walls are in the right
23 location.

24 Q Okay. Does it indicate anything more?

25 A No.

1 Q All right.
 2 (Exhibit No. 30 is marked for identification.)
 3 MR. BADARUDDIN: It's August 5.
 4 I don't know, Erik, if you have all of these
 5 documents, it's the daily log for August 5.
 6 MR. DAVENPORT: I've got it. I'll refer to
 7 them.
 8 Q (BY MR. BADARUDDIN) Exhibit 30 is another
 9 daily report; correct?
 10 A Yes.
 11 Q For August 5, 1999.
 12 A Yes.
 13 Q And in your work on this Highland 4 and 20
 14 project, would you have reviewed this daily report?
 15 A I should have.
 16 Q And do you have any reason to suspect you did
 17 not?
 18 A No.
 19 Q And I want you to, if you can, read the last
 20 handwritten entry. It's the most lengthy one, starting
 21 with "Ken Egbert."
 22 A "Ken Egbert, framer, is concerned with the
 23 manner in which we want the building framed, leaving
 24 sheer wall studs long to be cut after trusses are up for
 25 a more accurate cut.

1 MR. DAVENPORT: -- comments that are not based
 2 upon his personal knowledge.
 3 MR. BADARUDDIN: I'm asking him to interpret
 4 the document. I'm asking him for what information it
 5 conveys to him.
 6 Q (BY MR. BADARUDDIN) But anyway, are there
 7 different ways that a framer could frame the walls as
 8 described in your field report No. 8 consistent with the
 9 plans?
 10 A Yes.
 11 Q And in Exhibit 30, how many different ways are
 12 described?
 13 A One.
 14 Q Isn't there some dispute as to at least two
 15 ways? The framer wants to do it one way and whoever
 16 wants to do it another way?
 17 MR. DAVENPORT: You're talking about the
 18 particular wall at issue here, referring to this sheer
 19 wall?
 20 MR. BADARUDDIN: I'm asking about Exhibit 30.
 21 Whatever wall is described there.
 22 MR. MARIGER: Objection; foundation.
 23 Q (BY MR. BADARUDDIN) Let me ask you this.
 24 Does Exhibit 30 describe a particular wall?
 25 A Describe "particular."

1 "Brent Reynolds, with whom our contract is
 2 with (framing), told Ken he shouldn't do it because of
 3 extra labor costs. At my request, Ken and Brady,
 4 (another framer who always does his church framing this
 5 way), met to discuss this method of framing. Ken and I
 6 also went up to a church with the same floor plan
 7 directly north of us to see the framing of it. Ken is
 8 proceeding as we have requested until final decision
 9 from Brent Reynolds is given."
 10 Q Can you tell me what is being discussed there?
 11 A It refers back to the same wall and the same
 12 method of erecting the east wall as in the previous
 13 daily report. It sounds as though two framers are
 14 discussing whether they should proceed in the manner in
 15 which they've been asked to by the superintendent. It
 16 sounds like they're consulting with another framer, and
 17 it appears that they went to a similar project to review
 18 how that was framed. And it ends with the fact that
 19 they're proceeding as asked until a final decision is
 20 given by the framer.
 21 Q Okay.
 22 MR. DAVENPORT: I'm going to object. You're
 23 asking him to speculate or comment on what someone else
 24 has written --
 25 MR. BADARUDDIN: I'm asking him --

1 Q Does it refer to a particular wall, meaning --
 2 MR. MARIGER: In the writing itself?
 3 Q (BY MR. BADARUDDIN) The writing itself,
 4 Exhibit 30, is it referencing a particular wall?
 5 MR. DAVENPORT: I'm going to object to the
 6 extent the writing speaks for itself. It says "sheer
 7 walls." We all can read what it says.
 8 Q (BY MR. BADARUDDIN) Exhibit 30 doesn't
 9 reference a particular wall, does it?
 10 A No.
 11 Q It talks about how to frame the building.
 12 MR. DAVENPORT: Objection. Exhibit 30 speaks
 13 for itself.
 14 THE WITNESS: Am I to answer?
 15 MR. MARIGER: Yes.
 16 THE WITNESS: Can you repeat the question?
 17 Q (BY MR. BADARUDDIN) Sure. Exhibit 30 refers
 18 to no particular wall; correct?
 19 A No.
 20 Q No, it does refer to a particular wall?
 21 A Sorry, it does not refer to a particular wall.
 22 Q All right. And your report No. 8 would be the
 23 relevant report for August 5, 1999, and before; correct?
 24 MR. MARIGER: Relevant report for what?
 25 Q (BY MR. BADARUDDIN) Well, suppose Exhibit 30

Exhibit 9



Hales & Warner Construction Inc.

1460 North Main, Unit 1, Spanish Fork, Utah 84660

(801) 798-7318 • FAX 798-7320

August 11, 1999

BRC, Inc.
328 South 725 East
Layton, UT 84037

RE: Highland 4 & 20 Wards

Brent;

You have now been framing on the Highland 4 & 20 Wards building for 2 weeks. You promised to have 12 men on the job. This has not happened. If you continue with the same number of framers, you will not meet the 7 week framing schedule. We feel you need to immediately increase the number of framers and provide proper supervision so as to meet the 7 week framing schedule.

Please provide us a written framing schedule outlining manpower and target dates such as wall framing, roof framing, completion, etc.

If you have any questions, please call.

Sincerely,
Hales & Warner Construction, Inc.

Clifford Hales
President

CH/jd

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Reynolds

Exhibit 10



Hales & Warner Construction Inc.

1460 North Main, Unit 1, Spanish Fork, Utah 84660

(801) 798-7318 • FAX 798-7320

August 25, 1999

BRC, Inc.
328 South 725 East
Layton, UT 84041

RE: Highland 4 & 20 Wards

Gentlemen:

This is a follow up to the letter dated August 11, 1999. You still have not had 12 men on the job as promised, and the job is getting further behind. Therefore, you are hereby notified that you are in breach of paragraph 2 of said construction subcontract.

Specifically, you have failed to employ sufficient competent help to complete the work in a reasonable time. You are hereby given 48 hours written notice in accordance with said paragraph to employ help to complete the work. If you fail to employ and have at the job site within 48 hours after this written notice sufficient competent help to complete the work, we, as general contractors, will engage additional help to complete the work and charge the same to your account, and charge you any penalties due to your failure to complete the work as contracted.

You should be advised that if costs of completing said work exceeds the contract price, you have agreed to reimburse the contractor for any sums over and above the contract price. If the cost of completing the work does not exceed the contract price, any excess will be paid to you. If the contractor is assessed liquidated damages by the owner for failure to complete the work on time, and if delay has been caused by you, which we maintain has been the case, you will be required to pay us the portion of the liquidated damages caused by or attributed to your failure to complete your work on time and in accordance with the working schedule.

Please comply with the above stipulations and have sufficient men on the job site (12 or more men) by August 27, 1999, and continue to have sufficient men on the job each day thereafter. If you are not on the job with a sufficient crew by August 27, 1999, you will not be notified again. Hales & Warner Construction will simply have another subcontractor at the job site on August 30, 1999.

Sincerely,

Hales & Warner Construction, Inc.

Clifford Hales
President

cc: Ken Egbert Construction

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Reynolds

Exhibit 11

LEXSEE 979 P2D 322

Trevor Thompson, Plaintiff and Appellant, v. Connie Jess, aka Connie Stroup, dba Motel 9/Rio Damian Motel, and Does 1 through 10, Defendants and Appellee.

No. 980127

SUPREME COURT OF UTAH

1999 UT 22; 979 P.2d 322; 364 Utah Adv. Rep. 64; 1999 Utah LEXIS 25

March 12, 1999, Filed

SUBSEQUENT HISTORY: [***1]

As Corrected November 1, 1999. Released for Publication June 24, 1999.

PRIOR HISTORY: Eighth District, Duchesne County. The Honorable John R. Anderson.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant workman, an employee of an independent contractor, sought review of an order of the Eighth District, Duchesne County (Utah), granting summary judgment to appellee motel owner in appellant's action for damages sustained while appellant worked on the property.

OVERVIEW: Appellee motel owner asked that a pipe be delivered to her motel property. When appellant workman, an employee of an independent contractor, arrived, appellee asked him to install the pipe. Appellant said that he did not have the preferred tools, but agreed to attempt installation. The pipe fell during installation and caused appellant's leg to be amputated. Appellant sued, claiming that appellee was negligent in her control of the situation and in failing to take special precautions. The trial court granted appellee's motion for summary judgment. On appeal, the court affirmed. Appellee had no duty under the "retained control" doctrine because she did not actively participate in the performance of the work; she did not impose means or methods of achieving the work, but merely stated her desired result: the pipe's installation. The "peculiar risk" and "inherently

dangerous work" doctrines did not provide theories of relief for appellant, as they only applied to innocent third parties injured as a result of the independent contractor's negligence.

OUTCOME: The court affirmed the grant of summary judgment; appellee was not liable under the "retained control" doctrine because she did not actively participate in the work, and the "peculiar risk" and "inherently dangerous work" doctrines were inapplicable to appellant, as he was an employee of the independent contractor.

CORE TERMS: pipe, contractor, independent contractor, retained control, precautions, install, workers' compensation, physical harm, inherently dangerous, duty of care, plywood, backhoe, stub, contracted, peculiar risk, subject to liability, subcontractor, hired, owed, duty, motel, performing, summary judgment, third parties, installed, chain, general contractor, beams, hires, agreeing

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN1] Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN2] The appellate court reviews the district court's grant of summary judgment for correctness, according no deference to the court's legal conclusions.

1999 UT 22, *, 979 P.2d 322, **;
364 Utah Adv. Rep. 64; 1999 Utah LEXIS 25, ***

Labor & Employment Law > Employer Liability > Tort Liability > Independent Contractors

[HN3] Utah adheres to the general common law rule that the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants. This general rule recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety of the manner or method of performance implemented. The most commonly accepted reason for this rule is that, where the principal employer does not control the means of accomplishing the contracted work, the contractor is the proper party to be charged with the responsibility for preventing the risk arising out of the work, and administering and distributing it.

Labor & Employment Law > Employer Liability > Tort Liability > Independent Contractors

[HN4] The retained control doctrine is a narrow theory of liability applicable in the unique circumstance where an employer of an independent contractor exercises enough control over the contracted work to give rise to a limited duty of care, but not enough to become an employer or a master of those over whom the control is asserted. The duty in such situations is one of reasonable care under the circumstances and is confined in scope to the control asserted.

Labor & Employment Law > Employer Liability > Tort Liability > Independent Contractors

[HN5] Under the retained control doctrine, one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Labor & Employment Law > Employer Liability > Tort Liability > Independent Contractors

[HN6] A principal employer is not subject to liability for injuries arising out of its contractor's work unless the employer actively participates in the performance of the work.

Labor & Employment Law > Employer Liability > Tort Liability > Independent Contractors

[HN7] Under the "active participation" standard, a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work. Such

an assertion of control occurs, for example, when the principal employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail.

Labor & Employment Law > Employer Liability > Tort Liability > Independent Contractors

[HN8] To have "actively participated" in the contracted work, a principal employer must have exercised affirmative control over the method or operative detail of that work. The degree of control necessary for the creation of a legal duty must involve either the direct management of the means and methods of the independent contractor's activities or the provision of the specific equipment that caused the injury. Although the requisite level of control over the contractor's manner or method of work does not rise to the level of creating a master-servant relationship, the principal employer must exert such control over the means utilized that the contractor cannot carry out the injury-causing aspect of the work in his or her own way. A typical instance in which such an exertion of control might occur is when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman supervises the entire job.

Labor & Employment Law > Employer Liability > Tort Liability > Independent Contractors

[HN9] Under *Restatement (Second) of Torts* § 413 (1965), one who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer fails to provide in the contract that the contractor shall take such precautions, or fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

Labor & Employment Law > Employer Liability > Tort Liability > Independent Contractors

[HN10] Under *Restatement (Second) of Torts* § 416 (1965), one who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical

harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

Labor & Employment Law > Employer Liability > Tort Liability > Independent Contractors

[HN11] Under *Restatement (Second) of Torts* § 427 (1965), one who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Labor & Employment Law > Employer Liability > Tort Liability > Independent Contractors

[HN12] The purpose of the "peculiar risk" doctrine and the "inherently dangerous work" doctrine, under *Restatement (Second) of Torts* § § 413, 416, and 427 (1965), is to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for the injuries. This purpose is not advanced when these exceptions are applied in favor of a contractor's employees who are covered by workers' compensation. Thus, the doctrines have no application when the injured person is an employee of the independent contractor undertaking the allegedly dangerous work.

COUNSEL: John Paul Kennedy, Salt Lake City, and David J. Bennion, San Jose, Cal., for plaintiff.

Stephen G. Morgan, Joseph E. Minnock, Salt Lake City, for defendant.

JUDGES: RUSSON, Justice. Chief Justice Howe, Associate Chief Justice Durham, Justice Stewart, and Justice Zimmerman concur in Justice Russon's opinion.

OPINIONBY: RUSSON

OPINION: [**323] RUSSON, Justice:

[*P1] Trevor Thompson appeals from the district court's grant of summary judgment in favor of Connie Jess, owner of four motels in Duchesne, Utah. The district court ruled, as a matter of law, that Thompson could not recover from Jess for injuries sustained while

erecting a steel pipe for use as a sign post at one of Jess's motels. We affirm.

BACKGROUND

[*P2] On or about March 9, 1995, Jess phoned AmeriKan Sanitation to arrange for the purchase and delivery of a used steel pipe. Jess requested a hollow pipe approximately 20 feet in length with an 8-inch diameter, one that would fit vertically over an [**324] existing pipe stub secured to the ground in front of one of her motels, [***2] which stub would support the larger pipe for use as a sign post. After agreeing upon a price, Jess requested that the pipe be delivered to her motel.

Two employees of AmeriKan Sanitation, Dennis Jensen and Trevor Thompson, delivered the pipe. When Jensen inquired where to place the pipe, Jess told him she wanted it installed over the existing pipe stub. Jensen responded that he had been instructed only to deliver the pipe and that he was not equipped to erect it in the best manner. Jess then asked Jensen if he would install the pipe, and he agreed to do so, believing he could improvise by hoisting the pipe with the winch truck and tools he had with him.

[*P4] At that point, Jess's involvement in erecting the pipe ceased, and she went inside the motel. Jensen, who had hoisted similar pipes more than a hundred times before, determined on his own the manner and method of lifting and installing the pipe. For leverage, Jensen set up stabilizing poles in an A-frame formation. He then attached to the pipe a "system-seven" chain and a hook using a "trucker's hitch" or "logger's hitch"--a method of fastening pipe, which Jensen had used many times prior, whereby the weight of the pipe [***3] pulls the chain tight. Jensen connected the chain to a winch cable that was strung over the A-frame and proceeded to hoist the pipe with the winch attached to his truck. Thompson stood near the back of the truck and attempted to guide the elevated pipe onto the pipe stub protruding from the ground.

[*P5] After lifting the pipe as high as this method would allow, Jensen and Thompson discovered they were approximately two inches short of being able to raise the pipe over the top of the pipe stub. They decided to lower the pipe to the ground and obtain different equipment that would lift the pipe the requisite height. In the process of lowering the pipe, however, slack developed in the chain, and the pipe slipped out, bouncing on the ground and striking Thompson in the leg. As a result of the injuries sustained from this incident, Thompson's leg was amputated below the knee.

n1

n1 Shortly after the accident, Thompson applied for and began receiving workers' compensation benefits through his employer, Amerikan Sanitation.

***4]

[*P6] The day following the accident, Jensen returned to the site with a backhoe and erected the pipe without problem using the same chain-hitch method. Both Jensen and Thompson, as well as their employer, Amerikan Sanitation, testified after the accident that had they known in advance they would be asked to raise and install the pipe, they would have arrived prepared with a backhoe or crane in the first instance. However, after agreeing to install the pipe for Jess, neither Jensen nor Thompson informed her that a backhoe or crane was necessary to do the job. Rather, as reflected by the record, Jensen simply told Jess that although he lacked the best equipment, he would nonetheless erect the pipe. Jensen devised his own technique for the task, and Thompson helped him in the attempt.

[*P7] In April 1997, Thompson filed suit against Jess, alleging that she was negligent in the control she exercised over installation of the pipe and in failing to take or require special precautions in the performance of the job. After the parties conducted discovery, Jess moved for summary judgment, arguing that (1) she did not direct or otherwise control the manner or method of installing the pipe, and therefore [***5] owed no duty of care to Thompson or Jensen to insure they raised the pipe safely, and (2) she cannot be held vicariously liable for the negligent acts of the independent contractor she hired, regardless of whether the work involved peculiar risks or was inherently dangerous, because the injuries were suffered by an employee of that independent contractor. The district court granted Jess's motion for summary judgment, ruling that under *Dayton v. Free*, 46 Utah 277, 284-85, 148 P. 408, 411 (1914), Jess owed Thompson no duty of protection or warning concerning performance of the task because she did not exercise control over the manner or method utilized to install the pipe.

[*P8] On appeal, Thompson contends that the district court erred in granting summary judgment. Thompson argues that by requesting [**325] that he and Jensen erect the pipe when they were not obligated to do so, and by directing them to install the pipe over the existing pipe stub, Jess asserted control over the work and thereby assumed a duty of care to him under the "retained control" doctrine set forth in section 414 of the Restatement. n2 Thompson also submits that, under section 413 of the Restatement, the work Jess [***6] requested posed "a peculiar unreasonable risk of physical harm to others" and that, consequently, Jess had a duty to

take appropriate safety precautions. By not taking measures to ensure the safety of the work, asserts Thompson, Jess breached her duties of care under these provisions. Thompson argues that Jess knew or should have known from erecting sign posts at her other motels that a crane or backhoe was required to install the pole safely.

n2 All Restatement references herein are to Restatement (Second) of Torts (1965).

[*P9] As an alternative theory of liability, Thompson posits that even if Jess was not directly negligent herself, she nonetheless should be held vicariously liable for the contractor's negligence--in this case, the negligence of Thompson's co-worker, Jensen--because Jess knew the work she requested involved a peculiar risk of physical harm to others. On this point, Thompson urges this court to adopt and apply in his favor sections 416 and 427 of the Restatement. Section 416 imposes vicarious [***7] liability on the principal employer for the contractor's negligence if the employer knows or should know that the work involves "a peculiar risk of physical harm to others." Section 427 imposes the same liability for work involving "a special danger to others . . . inherent in or normal to the work."

[*P10] In response, Jess counters that the trial court did not err in granting summary judgment because (1) she did not control the manner or method in which Thompson and Jensen attempted to lift and install the pole, and therefore owed them no duty of care under the "retained control" doctrine; and (2) sections 413, 416, and 427 of the Restatement provide causes of action to "others"--meaning innocent third parties--not to employees of the independent contractor hired to perform the allegedly dangerous work.

[*P11] Thus, the principal issues before us are (1) whether Jess owed Thompson a duty of care under the "retained control" doctrine, and (2) whether the "peculiar risk" and "inherently dangerous work" doctrines under sections 413, 426, and 427 of the Restatement provide causes of action in favor of employees of the contractor hired to perform the work at issue.

STANDARD OF REVIEW

[*P12] [HN1] [***8] Summary judgment is proper only when "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Doit, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 841 (Utah 1996). [HN2] We review the district court's grant of summary judgment for correctness, according no deference to the court's legal conclusions. See *id.*

ANALYSIS

[HN3] [*P13] Utah adheres to the general common law rule that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants," Restatement § 409; see *Gleason v. Salt Lake City*, 94 Utah 1, 16, 74 P.2d 1225, 1232 (1937) (noting applicability of said general rule and certain exceptions to it). This general rule recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety of the manner or method of performance implemented. See W. Prosser & W. Keaton, *The Law of Torts* 509 (5th ed. 1984). The most commonly accepted reason for this rule is that, where the principal employer does not control the means of accomplishing [***9] the contracted work, the contractor "is the proper party to be charged with the responsibility for preventing the risk [arising out of the work], and administering and distributing it." Id.

[*P14] In the case at bar, Thompson does not contend that by agreeing to install the pipe over the existing pipe stub, he and Jensen [***326] became Jess's employees. Rather, Thompson relies entirely on certain exceptions to the general rule of nonliability of an employer of an independent contractor: namely, the "retained control" doctrine, and the "peculiar risk" or "inherently dangerous work" doctrine. We address each in turn.

A. "Retained Control" Doctrine

[*P15] Thompson charges that Jess should be subject to liability because, by requesting that the pipe be erected and instructing that it be installed over the existing pipe stub, she controlled and directed the work that caused his injuries. [HN4] In so arguing, Thompson relies on the retained control doctrine, which, as set forth more fully below, is a narrow theory of liability applicable in the unique circumstance where an employer of an independent contractor exercises enough control over the contracted work to give rise to a limited duty of care, [***10] but not enough to become an employer or a master of those over whom the control is asserted. The duty in such situations is one of reasonable care under the circumstances and is confined in scope to the control asserted.

[*P16]

In 1965, the American Law Institute promulgated the retained control doctrine as section 414 of the Restatement, which states:

§ 414. Negligence in Exercising Control Retained by Employer

[HN5]

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts § 414 (1965). This doctrine has not been adopted formally in Utah, although similar principles were discussed in this court's early decision of *Dayton v. Free*, 46 Utah 277, 148 P. 408, 411-12 (Utah 1914).

[*P17] In *Dayton*, this court addressed whether a company that employed an independent contractor was liable for injuries sustained by an employee of that contractor during the blasting of an underground tunnel. See [***11] 148 P. at 411-12. Citing a number of authorities from other states, the injured employee claimed that because the company, by contract, reserved to itself certain rights pertaining to overall management of the contract work, "the relation between the company and the contractors was not that of independent, but nonindependent, contractors." 148 P. at 411. As a result, argued the injured employee, he should be allowed to recover against the company. The court disagreed, stating:

[The cited authorities] relate to instances and cases where the proprietor or employer reserved or exercised the right to superintend, direct or control the work, not only with respect to results, but also with reference to methods of procedure or means by which the result was to be accomplished, where the will and discretion of the contractor as to the time and manner of doing the work or the means and methods of accomplishing the results were subordinate and subject to that of the owner or proprietor. We do not find anything in the contract or the evidence [identified by the plaintiff] which brings this case within such a rule.

Id. The court concluded that the injury had been caused by the manner [***12] in which the work was performed rather than by the nature of the work itself. See 148 P. at 412. Because the company exercised no control over the contractor's manner of work, it owed the plaintiff no duty to warn or guard him "against dangers incident to or created by the prosecution of the work, and certainly not to guard or protect him against the negligence of those who had employed him or with whom he labored." Id.

[*P18] This court has not had opportunity to determine the precedential value of *Dayton* with respect to the retained control doctrine. Several federal courts

applying Utah law, however, have been called upon to do so. [HN6] Those courts uniformly have determined that under *Dayton*, a principal employer is not subject to liability for injuries arising out of its contractor's work unless the employer "actively participates" in the performance of the work. For instance, in *Simon v. Deery Oil*, 699 F. Supp. 257, 258 [**327] (D. Utah 1988), the court cited *Dayton* for the proposition that a principal employer "retaining an independent contractor to render services has no duty to warn or train employees of the contractor, nor must the principal protect the contractor's [***13] employees from the contractor's own negligence, unless the principal has 'actively participated' in the project." See also *Sewell v. Phillips Petroleum Co.*, 606 F.2d 274, 276 (10th Cir. 1979), cert. denied, 444 U.S. 1080, 62 L. Ed. 2d 763, 100 S. Ct. 1031 (1980); *Texaco, Inc. v. Pruitt*, 396 F.2d 237, 240 (10th Cir. 1968); *Erwin v. Kern River Gas Transmission Co.*, 1997 Tex. App. LEXIS 6685, *8 (addressing Utah law on issue). We believe the standard relied upon in these cases is correct, and we formally adopt the same. Elaboration on the contours of the standard is needed, however.

[HN7] [*P19] Under the "active participation" standard, a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work. See *Conklin v. Cohen*, 287 So. 2d 56, 60 (Fla. 1973) (holding that under "active participation" standard, principal employer must directly influence manner in which work is performed; no duty arises from "passive nonparticipation"). Such an assertion of control occurs, for example, when the principal employer directs that [***14] the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished. See, e.g., *Lewis v. N.J. Riebe Enterprises, Inc.*, 170 Ariz. 384, 825 P.2d 5, 7-8 (Ariz. 1992) (imposing liability where subcontractor's employee was injured as result of new, less safe method of work required by general contractor); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) (imposing liability where subcontractor was ordered to operate backhoe dangerously close to plaintiff).

[*P20] The comments to section 414 of the Restatement provide guidance as to the "active participation" requirement:

In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations

which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled [***15] as to his methods of work, or as to operative detail.

Restatement (Second) of Torts § 414 cmt. c. (1965) (emphasis added). [HN8] In other words, to have "actively participated" in the contracted work, a principal employer must have exercised affirmative control over the method or operative detail of that work. See *Grahn v. Tosco Corp.*, 58 Cal. App. 4th 1373, 1997 Cal. App. LEXIS 897, *37-38, rev. denied, 1998 Cal. LEXIS 494. "The degree of control necessary for the creation of a legal duty must involve either the direct management of the means and methods of the independent contractor's activities or the provision of the specific equipment that caused the injury." *Id.*

[*P21] Although the requisite level of control over the contractor's manner or method of work does not rise to the level of creating a master-servant relationship, cf. *Restatement* § 414 cmt. a, the principal employer must exert such control over the means utilized that the contractor cannot carry out the injury-causing aspect of the work in his or her own way. Cf. *id.* cmt. c. A typical instance in which such an exertion of control might occur is "when a principal contractor entrusts a part of the [***16] work to subcontractors, but himself or through a foreman superintends the entire job." *Id.* cmt. b.

[*P22] The requisite level of control over the contractor's work is well illustrated in *Lewis*, 825 P.2d at 7-8. There, the general contractor, Riebe, hired the subcontractor, Garges, to install a pitched roof constructed of beams and sheets of plywood nailed to the beams. After Garges had already put the plywood in place, Riebe's on-site superintendent told Garges the roof was improperly installed and ordered it redone, specifying the use of H-clips to secure the plywood. Pursuant to this [***328] instruction, Garges employees began removing the nails from each row of plywood, installing H-clips, and then renailling the plywood to the beams. Soon thereafter, however, Riebe's superintendent instructed the Garges employees to use a different, faster method of dislodging the plywood by banging it from underneath. Because this method resulted in plywood being dislodged faster than H-clips could be installed, numerous sheets of plywood were left lying loose on top of the beams. A Garges employee stepped on the loose plywood and fell through the roof, incurring serious injuries. See *id.*

[*P23] [***17] Thus, in *Lewis*, the general contractor interfered with the subcontractor's method of performing the work and instructed that a quicker but less safe method be implemented. A worker was injured

as a direct result of the dangerous condition created by the general contractor's method. The court concluded, on the basis of these facts, that the general contractor exercised sufficient control over the means used in performing the contracted work to subject it to retained control liability. See 825 P.2d at 14-15.

[*P24] Applying these standards to the case at hand, we conclude that Jess did not actively participate in the manner in which Thompson and Jensen attempted to lift and install the steel pipe. After agreeing to erect the pipe, Jensen, not Jess, determined the method for bringing about the desired result. Jensen decided to proceed with the equipment he had with him, and by Jensen's own design, he and Thompson set up the A-frame for use as leverage, fastened the chain to the pipe using the "trucker's hitch" or "logger's hitch" technique, and hoisted the pipe with the winch on Jensen's truck. When this method was unsuccessful, Jensen and Thompson attempted to lower the pipe to the [***18] ground and, in the course of doing so, lost control of the pipe. Thompson's injury was caused by the manner of performance, implemented by Jensen, over which Jess exercised no direction, control, or supervision. The only control Jess exerted was in directing that the pipe be installed over the pipe stub. This amounted merely to control over the desired result, which is insufficient to come within the retained control doctrine.

[*P25] Particularly revealing is the fact that Jensen returned to the site with a backhoe the day after the accident and erected the pipe without incident using the same chain-hitch method. Nothing precluded Jensen from retrieving the backhoe before attempting to hoist the pipe in the first instance. The backhoe was stored only two to three miles away at the time, and nothing suggests that Jess required Jensen to install the pipe at the moment of delivery. Jensen alone chose to attempt installation of the pipe without a backhoe.

[*P26] Thus, because Jess did not actively participate in or otherwise exercise affirmative control over the manner or method of performance utilized by Jensen and Thompson, she owed Thompson no duty of care under the retained control doctrine. [***19] n3 The trial court was correct in so ruling.

n3 We note that the term "retained control" doctrine is somewhat of a misnomer. Under the standards announced herein, a duty of care is imposed if the principal employer asserts affirmative control over or actually participates actively in the manner of performing the contracted work. "Retained," to the extent the word implies passivity or nonaction, is inapt.

The term "retained control" may have a more syntactically correct application to sophisticated parties who, by contract, stipulate which party will control the manner or method of work or the safety measures to be taken--such as in contracts between general contractors and subcontractors involved in construction projects. See *Dayton*, 148 P. at 411 (noting that under terms of contract, principal employer did not reserve right to direct or control prosecution of work or any of contractor's workers). The issue, however, of whether a duty of care may be imposed solely as a result of a such a contractual reservation is not before us.

[***20]

B. "Peculiar Risk" or "Inherently Dangerous Work" Doctrine

[*P27] Thompson also relies on sections 413, 416, and 427 of the Restatement and urges this court to adopt those sections in his favor as exceptions to the general rule that one who employs an independent contractor is not liable for injuries arising out of the contract work. These sections are similar in wording and are commonly referred to as the "peculiar risk" doctrine, see, e.g., *Privette v. Superior Court*, 5 Cal. 4th 689, [**329] 854 P.2d 721, 725 (Cal. 1993) (en banc), or the "inherently dangerous work" exception, see, e.g., *Wagner v. Continental Cas. Co.*, 143 Wis. 2d 379, 421 N.W.2d 835, 840 (Wis. 1988).

[*P28] Section 413 is premised on direct liability for a principal employer's negligence in failing to insure that special precautions are taken in the contractor's work. That section provides:

§ 413. Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor

[HN9]

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special [***21] precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

(a) fails to provide in the contract that the contractor shall take such precautions, or

(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

Restatement (Second) of Torts § 413 (1965).

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[*P29] Sections 416 and 427 impose vicarious liability on the principal employer for the contractor's negligence, even if the employer reasonably provides for precautions in the contract work. Those sections state:

§ 416. Work Dangerous in Absence of Special Precautions

[HN10]

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

§ 427. Negligence as to Danger Inherent in the Work

[HN11]

One who employs [***22] an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Restatement (Second) of Torts § § 416, 427 (1965).

[HN12] The purpose of these sections is "to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for the injuries." *Privette*, 854 P.2d at 725. *Privette* held that this purpose is not advanced when these exceptions are applied in favor of a contractor's employees who are covered by workers' compensation. See *id.* at 726-30; see also *Wagner*, 421 N.W.2d at 840-44 (detailing reasons for not adopting sections 413, 416, and 427 in favor of employees of independent contractors).

[*P30] We agree with *Privette* and *Wagner* and decline to apply section 413, 416, [***23] or 427 of the Restatement in the manner Thompson proposes. Whether based on direct negligence under section 413 or vicarious liability under sections 416 and 427, these provisions have no application when the injured person is an employee of the independent contractor undertaking the allegedly dangerous work. The majority of jurisdictions that have examined this issue have decided likewise, n4

n4 See *Morris v. City of Soldotna*, 553 P.2d 474, 481-82 (Alaska 1976); *Welker v. Kennecott Copper Co.*, 1 Ariz. App. 395, 403 P.2d 330, 337-39 (Ariz. Ct. App. 1965); *Jackson v. Petit Jean Elec. Coop.*, 270 Ark. 506, 606 S.W.2d 66, 69 (Ark. 1980); *Privette*, 854 P.2d at 726-31; *Ray v. Schneider*, 16 Conn. App. 660, 548 A.2d 461, 466 (Conn. App. Ct. 1988); *Peone v. Regulus Stud Mills*, 113 Idaho 374, 744 P.2d 102, 105-06 (Idaho 1987); *Johns v. New York Blower Co.*, 442 N.E.2d 382, 386-88 (Ind. Ct. App. 1982); *Dillard v. Strecker*, 255 Kan. 704, 877 P.2d 371, 385 (Kan. 1994); *King v. Shelby Rural Elec. Coop. Corp.*, 502 S.W.2d 659, 661-63 (Ky. 1973); *Parker v. Neighborhood Theatres*, 76 Md. App. 590, 547 A.2d 1080, 1082-83 (Md. Ct. Spec. App. 1988); *Vertentes v. Barletta Co.*, 392 Mass. 165, 466 N.E.2d 500, 502-03 (Mass. 1984); *Zueck v. Oppenheimer Gateway Properties*, 809 S.W.2d 384, 390 (Mo. 1991) (en banc); *Sierra Pacific Power Co. v. Rinehart*, 99 Nev. 557, 665 P.2d 270, 273-74 (Nev. 1983); *Donch v. Delta Inspection Services, Inc.*, 165 N.J. Super. 567, 398 A.2d 925, 927-29 (N.J. Super. Ct. App. Div. 1979); *New Mexico Electric Serv. Co. v. Montanez*, 89 N.M. 278, 551 P.2d 634, 637-38 (N.M. 1976); *Whitaker v. Norman*, 75 N.Y.2d 779, 551 N.E.2d 579, 580, 552 N.Y.S.2d 86 (N.Y. 1989); *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 449-54 (N.D. 1994); *Curless v. Lathrop Co.*, 65 Ohio App. 3d 377, 583 N.E.2d 1367, 1376-78 (Ohio Ct. App. 1989); *Cooper v. Metropolitan Government of Nashville, Davidson County*, 628 S.W.2d 30, 32-33 (Tenn. Ct. App. 1981); *Humphreys v. Texas Power & Light Co.*, 427 S.W.2d 324, 330-31 (Tex. Civ. App. 1968); *Tauscher v. Puget Sound Power & Light Co.*, 96 Wash. 2d 274, 635 P.2d 426, 428-31 (Wash. 1981) (en banc); *Wagner*, 421 N.W.2d at 839-44; *Stockwell v. Parker Drilling Co.*, 733 P.2d 1029, 1031-33 (Wyo. 1987).

[***24]

[**330] P31 Along with *Privette* and *Wagner*, *Zueck v. Oppenheimer Gateway Properties*, 809 S.W.2d 384 (Mo. 1991) (en banc), is representative of those decisions. As expounded in *Zueck*, if employees of an independent contractor are allowed to avail themselves of the peculiar risk doctrine or inherently dangerous work exception, the principal employer is placed in an untenable position: he or she must anticipate activities that are "inherently dangerous" to the contractor's employees and, if the dangers inhere to the manner in which the work is done, protect against such dangers despite the fact that the employees are best able to

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identify and address whatever hazards are involved in their own method of performance. Oftentimes, both the risks involved and the protections necessary to avoid the risks are beyond the principal employer's knowledge or capacity. Thus, to avoid the liability imposed by the peculiar risk doctrine or inherently dangerous work exception, the principal employer has an incentive to direct his or her own employees to do the work despite their lack of expertise. Such a choice would limit the principal employer's exposure to that under the Workers' Compensation [***25] Act but, at the same time, increase the risk of injury to the principal's employees and innocent third parties. Placing principal employers in such a position distorts the objectives of tort law, and for that reason, the peculiar risk doctrine or inherently dangerous work exception should not apply in favor of employees of the independent contractor performing the work. See *Zueck*, 809 S.W.2d at 387-88.

[*P32] In addition, sections 413, 416, and 427 each speak of liability for injury "to others," which implies third parties rather than employees of the independent contractor carrying out the contracted work. An early draft of the Restatement included a special note which, though ultimately not adopted, provided guidance on this point:

Special Note. The rules stated in this Chapter are, in general, not applicable to make the defendant who hires an independent contractor liable to two classes of persons.

One consists of the employees, or servants, of the defendant himself. . . .

The other class of plaintiffs not included in this Chapter consists of employees of the independent contractor. . . . One reason why such responsibility has not developed has been that the [***26] workman's recovery is now, with relatively few exceptions, regulated by workmen's compensation acts. . . . While workmen's compensation acts do not infrequently provide for third-party liability, it has not been regarded as necessary to impose such liability upon one who hires the contractor, since it is expected that the cost of the workmen's compensation insurance will be included by the contractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him.

Restatement (Second) of Torts (Tent. Draft No. 7, Apr. 16, 1962) ch. 15, special note at 17-18. The American Law Institute omitted this note due to lack of uniformity of the effect of the various state workers' compensation acts but indicated nonetheless that "certainly the prevailing point of view is that there is no liability on the part of the employer of the independent contractor." 39

A.L.I. Proc. 244, 247 (1962); see also *Monk v. Virgin Islands Water & Power Auth.*, 53 F.3d 1381, 1390-91 (3d Cir.), cert. denied, 516 U.S. 914, 116 S. Ct. 302, 133 L. Ed. 2d 207 (1995) (referring to same language of tentative draft of Restatement).

[*P33] The rationale set forth in the special note quoted above is [***27] persuasive and provides [***331] additional support for our holding that sections 413, 416, and 427 of the Restatement have no application to employees of independent contractors performing the work at issue. The phrase "to others" in these sections does not encompass such employees, but rather, innocent third parties. This is consistent with the analysis in *Dayton* and with Tenth Circuit case law applying *Dayton* to this issue. See *Eutsler v. United States*, 376 F.2d 634, 636 (10th Cir. 1967) (concluding that phrase "to others" as contained in Restatement § 413 does not include employees of independent contractors); see also *United States v. Page*, 350 F.2d 28 (10th Cir. 1965), cert. denied, 382 U.S. 979, 86 S. Ct. 552, 15 L. Ed. 2d 470 (1966) (acknowledging that general law on subject reaches same conclusion as to Restatement § 427).

[*P34] Holding otherwise would create unfair and anomalous results under Utah's workers' compensation system:

Courts and legal commentators have expressed concern that to allow an independent contractor's employees who incur work-related injuries compensable under the workers' compensation system to also seek damages under the doctrine of peculiar risk from the person who [***28] hired the contractor would give those employees an unwarranted windfall. As these authorities point out, to permit such recovery would give these employees something that is denied to other workers: the right to recover tort damages for industrial injuries caused by their employer's failure to provide a safe working environment. This, in effect, would exempt a single class of employees, those who work for independent contractors, from the statutorily mandated limits of workers' compensation.

Privette, 854 P.2d at 729. Furthermore, given that the exclusive remedy provision of the workers' compensation scheme limits the liability of independent contractors to coverage premiums, permitting an employee of the contractor to recover tort damages against the nonnegligent landowner who employed the contractor would allow for the inequitable result that a nonnegligent person's liability for an injury is greater than that of the person whose negligence actually caused the injury. n5

n5 We note that in Utah, this unfairness is exacerbated by the fact that an employee who recovers against a third party is obligated to reimburse the workers' compensation insurer for any amounts paid to or on behalf of the employee. See *Utah Code Ann. § 34A-2-106(5)* (1997). Thus, if Thompson recovered from Jess for any negligence of Jensen in raising the pipe, he would be required to reimburse AmeriKan Sanitation's insurer for benefits received. Such a reallocation would result in Jess's being exclusively liable for Thompson's injuries.

[***29]

[*P35] In the present case, there is no question that Thompson was an employee of the independent contractor, AmeriKan Sanitation, at the time of his injury. He was involved in attempting to install the pipe and, indeed, has been receiving workers' compensation benefits through AmeriKan Sanitation since the accident.

We have no reason to question the determination (already made as a prerequisite to Thompson's qualifying for such benefits) that Thompson was acting within the course of his employment when injured. See *Allen v. Industrial Comm'n*, 729 P.2d 15, 18 (Utah 1986) (noting that to qualify for workers' compensation benefits, injury must be "by accident" and must arise "in the course of employment"). Accordingly, the trial court correctly determined as a matter of law that Thompson's sole recourse is workers' compensation benefits.

CONCLUSION

[*P36] In view of the foregoing analysis, summary judgment in favor of Jess was proper.

Affirmed.

[*P38] Chief Justice Howe, Associate Chief Justice Durham, Justice Stewart, and Justice Zimmerman concur in Justice Russon's opinion.

Exhibit 12

FILED
Fourth Judicial District Court
of Utah County, State of Utah

10.8.03 k Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

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

Plaintiffs,

 ∇

HALES & WARNER CONSTRUCTION,
INC., a Utah Corporation;
CORPORATION OF THE PRESIDING
BISHOP OF THE CHURCH OF JESUS
CHRIST OF LATTER-DAY SAINTS, a
Utah Corporation,

Defendants.

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

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

Third-Party Plaintiff,

 V_{max}

BRC, INC. a.k.a. BRENT REYNOLDS
CONSTRUCTION, INC.,

Third-Party Defendant.

Civil No. 020401834

Judge Claudia Laycock

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

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

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

following order for good cause shown:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

October
DATED this 7th day of ~~September~~, 2003.

BY THE COURT:

Claudia Laycock
CLAUDIA LAYCOCK
District Court Judge



CERTIFY THAT THIS IS A TRUE COPY OF
AN ORIGINAL DOCUMENT ON FILE IN THE
FOURTH JUDICIAL DISTRICT COURT, UTAH
COUNTY, STATE OF UTAH

DATE: 10-30-03

Julie [Signature]
DEPUTY COURT CLERK



CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing document was faxed and mailed,
postage prepaid, this 15th day of September, 2003, to:

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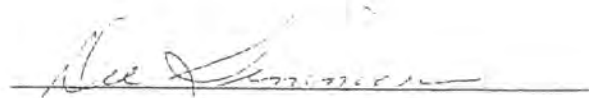


Exhibit 13

**TED SIMON, Plaintiff, v. DEERY OIL, a Washington corporation, and
KENNECOTT CORPORATION, a Delaware corporation, Defendants**

Civil No. 87-C-0653A

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION**

699 F. Supp. 257; 1988 U.S. Dist. LEXIS 13026

November 16, 1988, Decided

CORE TERMS: contractor, ponds, independent contractor, general rule, summary judgment, evaporation, construction project, matter of law, unsafe, train, actively participated, active participation, tank truck, construct, asphaltic, sealant, laborer, sealer, rubber, duty, vicariously liable, non-performance, intrinsically, superintended, owed, actively participate, right to control, failure to warn, work done, temporary

COUNSEL:

[**1] John L. Black, Esq., Salt Lake City, Utah, for Plaintiff.

H. James Clegg, Esq., Salt Lake City, Utah, for Defendant.

JUDGES:

Aldon J. Anderson, United States District Senior Judge.

OPINIONBY:

ANDERSON

OPINION:

[*257] ORDER GRANTING DEFENDANT KENNECOTT CORPORATION'S MOTION FOR SUMMARY JUDGMENT

ALDON J. ANDERSON, SENIOR UNITED STATES DISTRICT JUDGE.

INTRODUCTION

On June 24, 1987, plaintiff Ted Simon filed a complaint for personal injuries arising from a work accident occurring during the construction of evaporation ponds by Deery Oil for defendant Kennecott Corporation. Plaintiff was accidentally burned while filling a portable tank truck with hot asphaltic sealer. Plaintiff's complaint alleges three separate claims against defendant Kennecott: (1) failure to warn; (2) allowing an unsafe operation to be performed [*258] with unsafe equipment; and (3) failing to require proper training of personnel working on defendant's property. n1

n1 The original complaint contained a cause of action against Deery Oil for negligence in maintaining the equipment and failure to properly train the plaintiff. Deery moved for summary judgment on the grounds that it was the statutory employer of the plaintiff under the Utah Worker's Compensation Act, entitling it to judgment as a matter of law. Plaintiff did not oppose Deery's motion, and it was subsequently granted by this court.

[**2]

Defendant Kennecott has moved for summary judgment on the basis that it is not liable for injuries occurring to employees of independent contractors when it does not actively participate in the construction project. Kennecott asserts that plaintiff worked for Deery Oil, an independent contractor, and that Kennecott had no duty to conduct safety inspections of Deery's equipment, nor to train or warn Deery's employees with respect to such equipment. Plaintiff, on the other hand, argues that

summary judgment should not be granted because Kennecott had the right to control, and, in fact, did control Deery's construction of the evaporation ponds.

FACTUAL BACKGROUND

In April of 1987, Deery Oil and Kennecott entered into a contract wherein Deery agreed to line certain evaporation ponds for the Kennecott corporation. The contract recognized Deery as an independent contractor and called for it to supply the labor, equipment, and materials necessary to construct a rubber and asphalt lining for the evaporation ponds. The contract was a performance contract where Deery was to construct a lining in accordance with its own specifications as long as it would be able to contain copper leachate [**3] solution with a minimal amount of leakage. Therefore, Kennecott exercised no control over the construction and design of the ponds.

The construction project required a large amount of unskilled labor to apply the rubber matting and sealant that constituted the liner, and Deery contracted with SOS Temporary Services to supply this labor. The plaintiff was employed by Deery through SOS Temporary Services as a temporary laborer. Deery supervised all the work done by plaintiff and the other laborers.

On May 6, 1987 plaintiff was burned while filling a Deery-owned portable tank truck with hot asphaltic sealer. The nozzle being operated by plaintiff was connected to the tank truck by means of a flexible rubber hose. Plaintiff was injured when a clamp connecting the hose to the nozzle loosened, spraying him with the sealer.

DISCUSSION

Plaintiff claims that Kennecott is liable for the injuries resulting from the accident because it had the right to control, and, in fact, did control the construction project. Plaintiff asserts that Kennecott's failure to warn plaintiff of the inherent danger of the work and to properly train him on the equipment in question, as well as permitting an unsafe [**4] operation to be performed with unsafe equipment on its property, was the cause of plaintiff's injuries. Defendant contends that it is entitled to judgment as a matter of law because principals are not liable for injuries to employees of independent contractors unless they actively participate in the project.

In Utah, it is clear that a company 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. *Dayton v. Free*, 46 Utah 277, 148 P. 408 (1914); *United States v. Page*, 350 F.2d 28, 31 (10th Cir. 1965); *Sewell v. Phillips*

Petroleum Co., 606 F.2d 274 (10th Cir. 1979) cert. den. 444 U.S. 1080, 62 L. Ed. 2d 763, 100 S. Ct. 1031 (1980).

In *Dayton v. Free*, the Utah Supreme Court adopted the common law rule that principals are not liable to third parties for work done by independent contractors where there is no evidence "to show that the company in fact directed, controlled, or superintended the prosecution of the work, or hired or discharged employees, or directed, [**259] controlled, or superintended [**5] them in or about the work" 148 P. at 411. See also *Dowsett v. Dowsett*, 116 Utah 12, 207 P.2d 809, 811 (1949).

The rule of *Dayton* has also been used by federal courts applying Utah law. In the case of *Sewell v. Phillips Petroleum Co.*, 606 F.2d 274, the plaintiff was employed by a contractor to install underground gasoline tanks for Phillips Petroleum Company. Plaintiff was injured while working in an excavated hole. The Court of Appeals vacated a plaintiff's jury verdict and affirmed a judgment for defendant on the grounds that the jury was not instructed concerning the "active participation" requirement needed to impose liability on principals under Utah law:

Plaintiff's principal theory at trial was that defendant "retained and exercised control" over the contractor's work and was therefore liable for plaintiff's injuries. The relevant jury instruction failed to explain the necessity for "active participation" by the defendant as required by Utah law. . . . The record clearly shows a lack of evidence supporting the "retained control" theory. . . . Appellants contention has no merit because the record provides the evidence necessary for determining that defendant [**6] was not liable as a matter of law.

Id. at 275-76.

This is not to say that a principal can never be liable for injuries sustained by an employee of an independent contractor. The three recognized exceptions to this rule in Utah are: (1) where the injury was the direct result of the stipulated work; (2) where the work was intrinsically dangerous, and the injury was the consequence of the failure of the contractor to take appropriate precautions; and (3) where the injury was caused by the non-performance of a absolute (non-delegable) duty owed by the principal to the plaintiff, individually or to the class of person to which he belongs. *Dayton v. Free*, 148 P. at 411 (citing 1 Labatt's Mast. & Serv. § 41). These exceptions, in one form or another, are recognized in most jurisdictions. See e.g. *Wilson v. Good Humor*

Corp., 244 U.S. App. D.C. 298, 757 F.2d 1293, 1303 (D.C.Cir. 1985) (exception to general rule that employers are not vicariously liable for torts of their independent contractors exists when employer engages independent contractor to perform inherently dangerous work); *Vagle v. Pickands Mather & Co.*, 611 F.2d 1212, 1217 (8th Cir. 1979) cert. den. 444 U.S. 1033, 62 L. Ed. 2d 669, 100 S. Ct. 704 (1980) (Under "nondelegable [**7] duties" exception to general rule that employers are not vicariously liable for torts of their independent contractors, a principal may be liable if the work to be performed is likely to create a peculiar unreasonable risk of physical harm or if a special danger is inherent or normal to the work).

In the instant case, plaintiff argues that the fact Kennecott required a list of general safety rules to be incorporated into the contract shows that Kennecott retained tight control and, presumably, actively participated in the construction project. This requirement, however, does not rise to the level of active participation by Kennecott. Deery clearly had the right to construct the ponds as it saw fit, the only requirement being that the ponds retain the copper solution with minimal leakage. Deery supplied all the labor, equipment and materials for the project. In addition, Deery supervised and trained all of the temporary laborers. With this in mind, it cannot be seriously contended that Kennecott actively participated in the construction of the ponds.

Moreover, there is no indication that plaintiff falls within any of the exceptions to the general rule of non-liability. First, plaintiff [**8] was injured as a result of the manner the work was to be performed, by transferring asphaltic sealant from the truck to the ponds. Thus, the injury was not caused from the act of

performance, but from the manner of performance, over which Deery had control.

Second, transferring sealant from a truck is not an ultrahazardous or intrinsically dangerous activity. If the transfer is done in the proper manner with proper equipment, then the workers are in no danger of being injured.

Third, the injury was not caused by the non-performance of a duty that Kennecott [*260] owed the plaintiff. Plaintiff has made no showing that Kennecott failed to perform a duty that it owed to the plaintiff. In fact, the contract specifically places on Deery all responsibility for the supervision and construction of the ponds.

In sum, plaintiff does not fit within any of the recognized exceptions to the general rule that principals are not liable for injuries to the employees of independent contractors.

CONCLUSION

Utah law provides that companies are not liable for injuries to employees of independent contractors unless the company actively participates or controls the project to be done by the independent contractor. [**9] It has been clearly shown that Kennecott retained no control over the project to construct the evaporation ponds. Moreover, plaintiff does not fit within any of the recognized exceptions to this general rule of non-liability. Therefore, this court holds that defendant Kennecott corporation is not liable as a matter of law and grants summary judgment in its favor.

DATED this 16 day of November, 1988.

Exhibit 14

LEXSEE 606 F2D 274

**GLENN H. SEWELL, Appellant, v. PHILLIPS PETROLEUM COMPANY, a
Delaware corporation, Appellee.**

No. 77-2072

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

606 F.2d 274; 1979 U.S. App. LEXIS 12266

**March 16, 1979, Argued
August 24, 1979, Decided**

PRIOR HISTORY: [1]**

Appeal From The United States District Court For The
District Of Utah Central Division (D.C. #C 74-40)

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant independent contractor filed an action against appellee landowner seeking damages for injuries sustained while working on the landowner's premises. The United States District Court for the District Of Utah Central Division entered a verdict in favor of the independent contractor, which the court reversed and remanded. On remand, judgment was entered in favor of the landowner. The independent contractor appealed.

OVERVIEW: The independent contractor claimed that the landowner, who had contracted with the independent contractor's employer regarding the installation of gasoline tanks, was liable for the independent contractor's injuries because the landowner retained and exercised control over the work. The court reversed and remanded the initial verdict in favor of the independent contractor because the "retained control" jury instruction that was given at trial failed to explain the necessity for active participation by the landowner as required by Utah law and the evidence failed to support the independent contractor's alternative theories. On remand, the parties agreed to submit the liability issue to the trial judge on the basis of the trial record. The court held that (1) the independent contractor's arguments, which were raised previously, were not persuasive because no further evidence was produced on remand; (2) there was a lack

of evidence supporting the "retained control" theory; and (3) the alternative business invitee theory had no merit because the danger, which arose from the work performed, was readily apparent and the landowner had no duty to guard against such an obvious danger.

OUTCOME: The court affirmed the judgment in favor of the landowner.

CORE TERMS: independent contractor, duty, sloping, contractor, precautions, new trial, excavation, pit, safeguards, shoring, prior decision, gasoline, tank, prior appeal, misstatements, ordinance, earlier decision, excavated, punitive damages, cause of action, matter of law, perpendicular, non-delegable, disciplinary, injustice, drawing, cave-in, reopen, active participation, manifest injustice

LexisNexis (TM) HEADNOTES - Core Concepts:

Torts > Real Property Torts > General Premises Liability
Torts > Negligence > Duty > Duty Generally

[HN1] A landowner is under no duty to guard against an obvious danger under the business invitee theory of liability.

COUNSEL:

Samuel King, Salt Lake City, Utah, for appellant.

Ray R. Christensen of Christensen, Gardiner, Jensen & Evans and Chris Wangsgard of Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for appellee.

JUDGES:

Before SETH, Chief Judge, and DOYLE and McKAY, Circuit Judges.

OPINIONBY:

SETH

OPINION:

[*275]

We previously considered this case in *Sewell v. Phillips Petroleum Company, Inc.*, Nos. 76-1030-31 (10th Cir. March 21, 1977). We held there that the crucial "retained control" jury instruction for imputing liability to an owner for injuries caused by a negligent independent contractor was erroneous, and that the evidence clearly failed to support plaintiff's alternative theories for imposing liability on the defendant. We reversed the general verdict in favor of plaintiff and remanded for a new trial. The parties stipulated to the trial judge on remand that no issue remained to be determined and agreed to submit the liability issue to the trial judge on the basis of the trial record. They also agreed that if the trial judge found in favor of plaintiff on the [**2] liability issue, then the case would proceed to a jury for a determination of damages. Since there was no further evidence to be presented, the trial judge entered judgment for the defendant in light of our holding.

Appellant complains here that he was entitled to judgment as a matter of law, and that our previous holding relied on misstatements of the facts in the defendant's brief. He also maintains entitlement to remand on the punitive damages issue which we considered and denied in our previous holding.

We believe it unnecessary to reiterate the relevant facts because they are discussed in detail in our previous holding. The case involved a suit for damages for injuries sustained by plaintiff while working in an excavated eleven-foot hole. Plaintiff was employed by Harvey W. Eckman & Associates which had contracted with the defendant to install 10,000-gallon gasoline storage tanks at defendant's gasoline stations. Plaintiff's principal theory at trial was that defendant "retained and exercised control" over the contractor's work and was therefore liable for plaintiff's injuries. [*276] The relevant jury instruction failed to explain the necessity for "active participation" [**3] by the defendant as required by Utah law. *United States v. Page*, 350 F.2d 28 (10th Cir.); *Dayton v. Free*, 46 Utah 277, 148 P. 408. We noted further that no evidence presented at trial

indicated the defendant could be held liable under this theory or the alternative theories.

Appellant raises here the same issues discussed previously. No further evidence was produced on remand. We see no purpose in repeating the basis for our previous holding. Appellant's arguments are simply unpersuasive.

We do address, however, the contention that the previous holding relied on misstatements in the defendant's brief. The record clearly shows a lack of evidence supporting the "retained control" theory. Furthermore, on plaintiff's alternative business invitee theory, the danger arose from the work performed on the premises and was readily apparent to the plaintiff. [HN1] Defendant was under no duty to guard against such an obvious danger. *Texaco, Inc. v. Pruitt*, 396 F.2d 237 (10th Cir.). Appellant's contention has no merit because the record provides the evidence necessary for determining that defendant was not liable as a matter of law.

AFFIRMED.

CONCURBY:

McKAY

CONCUR:

McKAY, Circuit Judge, concurring [**4] in the result:

Although I believe that the dissenting opinion may correctly characterize the result which should have been reached in the prior appeal brought in this case, I believe the instant appeal is in substance only a much-belated petition for rehearing. Rightly or wrongly, the issues that divide the other panel members were decided in the earlier appeal, and the time for asking this court's reconsideration of its determination has long since expired. All purported defects in the earlier disposition would have been known to appellant during the period in which filing for rehearing would have been timely. I therefore agree with the decision to affirm.

Nonetheless, I believe a troubling subsidiary matter should be addressed. There appears to be a substantial likelihood that disciplinary proceedings are in order. If counsel for appellant is correct, counsel for appellee deliberately misstated material facts to this court in the brief he filed in the prior appeal. If counsel for appellee is correct, counsel for appellant has leveled false charges of serious professional impropriety against a member of the bar. Both charges are extremely grave. If either is true, disciplinary [**5] sanctions are in order.

We have not investigated the charges and countercharges raised in this case, nor is such an undertaking the proper responsibility of this court in the first instance. I am, however, mailing a copy of this opinion to the Commissioners of the Utah State Bar, of which both attorneys are members, for their appropriate disposition. I will also direct the clerk of this court to supply the Commissioners with copies of the relevant materials.

In a growing number of cases, adversarial rivalry has degenerated into accusations of unethical conduct. This court will not tolerate false charges of this variety. Neither will it abide the filing of dishonest statements by practitioners. We expect the highest standard of care by attorneys in correctly citing facts and cases. If necessary, when deliberate or grossly negligent miscitations occur, we will strike the briefs and leave the clients who are damaged thereby to malpractice remedies. We intend to apply an equal standard to false accusations of unethical conduct.

When misstatements of the type discussed here do occur, opposing counsel should note the errors in a responsive brief. Misconduct should not be so characterized [**6] in the briefs on appeal, lest the argument shift to focusing on the integrity of practitioners rather than the substantive issues raised in the appeal. Where the misstatements suggest the likelihood of misconduct, opposing counsel should file a charge with the appropriate bar authorities. We will ourselves be alert to whether the challenged [*277] statements suggest the propriety of disciplinary proceedings and will, as in the instant case, initiate appropriate action when the opposing attorney has not already done so.

Having outlined our views in this matter generally, we repeat that we express no view at this time concerning which attorney is correct in the instant dispute. We assume that the matter will be resolved in a more appropriate forum so that the rights of the litigants will not be further affected by this controversy.

I am authorized to state that SETH, C. J., concurs in the views expressed in this opinion on the matter of professional misconduct on the part of attorneys who practice before us.

DISSENTBY:

DOYLE

DISSENT:

WILLIAM E. DOYLE, Circuit Judge, dissenting.

I respectfully dissent.

This case was appealed on a previous occasion. It was reversed and remanded [**7] for a new trial. The panel, with the exception of Chief Judge Seth, was different on the prior appeal.

The complaint was originally filed in this case on February 8, 1974. Plaintiff was injured as a result of the cave-in of an excavation wall in a pit in which he was working. This excavation was made on behalf of Phillips Petroleum Company, the defendant herein. The depth of this was 11'6". The sides, however, were perpendicular and it is said that this is what caused it to cave.

It is not disputed that both the Uniform Building Code which was in effect in Salt Lake City and also OSHA, the United States agency, which was concerned with employee safety, required sloping and shoring. See *United States v. Dye Construction Company*, 510 F.2d 78 (10th Cir. 1975).

In this instance the pit was excavated for the purpose of installing a gasoline storage tank at a retail service station. An independent contractor performed the work. However, he did not apply for a permit. Had he done so there would have been an inspection together with orders requiring the sloping in accordance with the city ordinance and OSHA regulations.

The evidence established that the particular excavation was [**8] one of a large number in Salt Lake City by Phillips in order to store unleaded gasoline. Phillips was fully aware of the manner of excavating and was aware that it was illegal. There was evidence to show that proceeding without a permit and not sloping or shoring was the policy of Phillips. The evidence also showed that Phillips furnished the blueprint or plan for the excavation and installation of the tank. This called for a pit with perpendicular walls.

Plaintiff made the mistake of appealing the trial court's denial of punitive damages. The defendant cross-appealed the judgment on the merits. This court rejected plaintiff's appeal and adopted that of Phillips. The theory was that Phillips was shielded by the independent contractor concept.

The source of this disagreement goes back to the first appeal following the original trial of the case. The trial had been to a jury in early October 1975. On that occasion special interrogatories were submitted to the jury, and as a consequence of the jury's responses a verdict in the amount of \$ 25,000 was returned in favor of the plaintiff. In answering the interrogatories, the jury responded that the defendant Phillips Petroleum [**9] Company was the proximate cause of the injury to the degree of 100%. Judgment was entered accordingly. The appeal which is referred to above followed.

This court reversed in an opinion filed March 21, 1977. It emphasized that Mr. Eckman had been employed by Phillips under an explicit contract which provided that he was an independent contractor. He was to dig an 11'6" pit in which the gasoline tank would be placed. In general, this court's opinion followed the proposition that in order to impose liability on the defendant, considering that Eckman was an independent contractor, it would have to appear that an exception existed to nonliability for torts of an independent contractor. The court went on to find that such exception was not present.

[*278] The basis on which the verdict was rendered at the trial was that Phillips, in truth, controlled the project; that it was hazardous to fail to perform sloping and shoring in a pit this deep; that such sloping and shoring was required by the County of Salt Lake and also by OSHA, a federal agency. It was also brought out that Phillips was fully aware of the fact that these precautions which were required by law had not been [*10] taken. Indeed, Phillips prepared the drawings and specifications which called for a perpendicular pit and which did not provide for sloping or shoring. It was also shown that this particular contractor was regularly employed, had excavated a large number of these in accordance with Phillips' plans, and with the full knowledge of Phillips. These facts resulted in Phillips having independent responsibility for the injury.

The opinion of this court remanded the case for a new trial. However, the trial judge concluded that he was unable to conduct a new trial in view of the decision. The court proceeded to enter an order of dismissal of the complaint with prejudice. In that order of dismissal it was pointed out that the contract provided that the contractor was to be an independent contractor, who would provide the necessary materials and labor, get the necessary licenses and observe all laws in excavating the premises and installing the tanks. The wording of the contract also provided that the contractor was to have complete control over the work.

While plaintiff, the order continued, was working on the excavation, a cave-in occurred causing his injuries. "There had been no [*11] sloping of the sides of the excavation as local law required. The plans for the work were provided by the defendant and contained no requirement of sloping." A representative of defendant had visited the project occasionally and the company, from past experience, could expect bidders would follow the plan provided. No Phillips' representative was present when it happened.

The trial court wrote that it had first granted the defendant's motion for summary judgment on the basis that defendant was insulated from responsibility, but

upon reconsideration it became persuaded that it was a case that presented a jury question considering that the defendant company had vast experience in excavation and installation work, had an engineering department trained in this kind of work, and "in this very community had previously contracted for many such jobs and been familiar with the local law requiring sloping, notwithstanding that the company drew plans leaving out sloping, an expensive addition, and put it out to bid." The court said that since the company had gained an economic benefit from putting out a job for bid with a drawing for the work without sloping, the issue of whether this was [*12] negligence should be presented to the jury on the theory that such may be an exercise of control that would deprive the company of the protection of the contract which placed responsibility with the independent contractor. The court then went on to say:

The case was presented to the jury and plaintiff was awarded a verdict of \$ 25,000. Plaintiff appealed the court's dismissal of the claim of punitive damages and defendant cross-appealed, contending there were no issues of fact for the jury and that, as a matter of law, judgment should be entered in favor of defendant no cause of action on plaintiff's complaint. The case was argued to the Court of Appeals in November, 1976, and on March 21, 1977, the Court handed down its decision reversing the judgment and remanding the case for a new trial.

Thereafter the trial court met with counsel for the parties to hold a pretrial in preparation for a retrial. It was stipulated that all of the evidence had been presented at the first trial and that the matter should be presented to the trial court, based on the records and brief of counsel, for its decision.

The court has carefully reviewed the facts in the record, the [*13] ruling of the Circuit Court of Appeals for the Tenth Circuit, the briefs of counsel and, deeming itself fully advised, enters the following as its ruling and verdict in the matter.

[*279] IT IS HEREBY ORDERED that defendant be granted a verdict of no cause of action on plaintiff's complaint.

The court believes that under the facts and the law provided by the Circuit this is the only verdict that could be

entered. On page 3 of the opinion of the Appellate Court the Court ruled:

There is no question that Eckman was an independent contractor.

To impose liability on the defendant there must be shown an exception to the general rule of non-liability for torts of an independent contractor either through the exercise by the defendant of control over a delegable duty, or by showing a non-delegable duty.

The opinion then proceeds to demonstrate that neither of the two alternatives is present in this case. It follows, therefore, that plaintiff can establish no basis for liability.

In holding that the defendant retained no control of the work (over a delegable duty), the Court said:

There was shown no active participation [**14] in the work by defendant's inspections of the job site. The defendant never exercised control of the work and Eckman was under a contractual duty to comply with proper procedures.

(a)lthough the drawings and specifications did not specify sloping, they in themselves did not show control in the absence of some affirmative act.

The defendant, on this record, did not retain control of the work. (Emphasis added.)

Since the parties have no more evidence to present, this ruling is determinative in this alternative.

As to the possibility of its being a situation of a non-delegable duty, the Appellate Court said:

As for nondelegable duties which are described as being "inherently dangerous" . . . this Circuit has expressed "serious doubts as to whether the doctrine of non-delegable duty as here involved applies to injuries of employees of the independent contractor."

In concluding the opinion, the Court added:

In any event, the defendant owed no duty to Plaintiff. (Emphasis added.)

With the parties stipulating there is no more evidence to present, under the opinion of the Circuit there is nothing left to try.

Judgment, [**15] therefore, should be, and is, entered for defendant, no cause of action on plaintiff's complaint.

DATED this 20th day of September, 1977.

I have quoted and shown the trial court's opinion on remand in detail for the reason that it shows, in my opinion, that the trial court was somewhat startled to receive this court's opinion, and I must confess that I had similar feelings when I first heard the case on the present appeal. My first exposure to the case was the occasion of oral arguments on the second appeal.

Being of the opinion that there has been a miscarriage of justice, it is my conclusion that the judgment of the district court should be at this time reinstated in the interest of justice. Such action has been taken on past occasions.

The reason for my dissent is my conviction that the concept of independent contractor is capable of shrouding a great many sins; that it will not succeed where, as here, a statute or ordinance imposes a duty to provide specified safeguards or precautions for the safety of others. This is expressed in the *Restatement (Second), of Torts* § 424, which provides:

Precautions Required by Statute or Regulation

One who by statute or [**16] by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

[*280] So, under this principle, the owner will not be heard to say that it was the duty of the contractor to fulfill the duties imposed by statute. This is because the duty is on the owner to comply with the law and he cannot pass the buck. If he could, avoidance would be quite simple. The owner could avoid the law by entering an airtight contract with an "independent contractor."

The guiding principles are set forth in somewhat more detail and clarity in an annotation reported in 41 *Am.Jur.2d Independent Contractors* § 37 (1968), at 799-800:

Generally speaking there are many situations in which a person cannot absolve himself from liability by delegating his duties to an independent contractor. An employer has a nondelegable duty with respect to the taking of precautions during work which is dangerous in the absence of such precautions, which is inherently or intrinsically [**17] dangerous, or which from its nature is likely to render the premises dangerous to invitees, and also has a nondelegable duty with respect to the conduct of ultrahazardous work. Where a person, either by contract or by law, owes an obligation to another, he cannot escape liability for negligence in performance of such obligation by delegating the duty to an independent contractor. Thus, if a statute or ordinance requires a person to take certain precautions when work is being done, and such precautions are not taken, it is no defense that an independent contractor was employed to do the work and that the failure to take the precautions was due to the contractor's negligence. Likewise, one who, by a specific agreement, undertakes to do some particular thing, or to do it in a certain manner, cannot, by employing an independent contractor, avoid responsibility for an injury resulting from the nonperformance of any duty or duties which, under the express terms of the agreement or by implication of law, are assumed by the undertaker. An exception to the general rule of nonliability of an employer for the negligence of an independent contractor or the latter's servants exists where the [**18] employer has assumed a contractual obligation to perform the work.

At bar we have an activity which is inherently hazardous. The hazard is recognized by statute and ordinance. In addition, we have an owner who provides plans which do not attempt to adopt safeguards. In fact, it knowingly encourages the doing of the work without taking safeguards. Phillips would be liable for the failure of the contractor to follow its orders. It is certainly liable where the contractor follows its orders and thereby creates the risk.

One recent example is that which occurred in *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975). In *Pierce v. Cook & Co.*, the action was for wrongful death in an

automobile collision. The truck driver had been hauling wheat for the defendant-appellee in the case, *Cook & Co., Inc.* The trial court entered summary judgment. This was appealed and affirmed by this court. The judgment became final in 1971. The accident had actually happened in 1968. Relief was sought in the federal court based upon a change of law in the Oklahoma state court. The Oklahoma Supreme Court had overruled the prior decision which had strictly applied the independent contractor rule [**19] and had concluded that where there is a foreseeable risk of harm to others unless precautions are taken, one who is regularly engaged in a commercial enterprise as an integral part of the business is responsible for failure to exercise care in selecting a competent carrier. Failure to do so rendered him liable.

When this change of law was announced, a motion for relief was filed by the aggrieved party under Rule 60(b). Notwithstanding that this court's prior decision had become final in 1971, relief was granted following presentation of the case to this court en banc. The cause had been removed to federal court, and after the state court rule was changed, we held in an opinion by Judge Breitenstein that in this extraordinary condition, the plaintiff was the victim of an injustice, and although we did not reverse [*281] the decision of the trial court, we commended the Rule 60(b) motion to it.

While an appellate court will generally refuse to reopen a final judgment entered in a prior appeal, it will do so when substantial justice warrants. See 9 Moore's Federal Practice P 110.25(2), at 274-75 (2d ed. 1975). The law of the case doctrine bars a second review of established [**20] law unless compelling circumstances warrant the action.

The Supreme Court has long recognized that an appellate court may review its earlier decision in a case and reopen that case when circumstances warrant it. See *Messenger v. Anderson*, 225 U.S. 436, 32 S. Ct. 739, 56 L. Ed. 1152 (1912).

Bromley v. Crisp, 561 F.2d 1351, 1363 (10th Cir. 1977), Cert. denied, 435 U.S. 908, 98 S. Ct. 1458, 55 L. Ed. 2d 499 (1978), recognized that this court could depart from its own earlier decision in the identical case when circumstances warranted such departure.

Other circuits have also recognized that where circumstances warrant reopening of an earlier appellate decision in the same case, such procedure may be pursued.

The Eighth Circuit has said that the earlier judgment will not be disturbed unless clearly erroneous and manifestly unjust. See *Wrist-Rocket Mfg. Co. v.*

Saunders Archery Co., 578 F.2d 727, 730-31 (8th Cir. 1978).

The Fifth Circuit has said that a second review is permissible "if considerations of substantial justice warrant it." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 663 (5th Cir. 1974), Cert. denied, 420 U.S. 929, 95 S. Ct. 1128, 43 L. Ed. 2d 400 (1975). Clearly a prior decision [**21] is not to be reopened and reversed except upon the basis of cogent reasons and to avoid manifest injustice. See *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19-20 (5th Cir.), Cert. dismissed, 419 U.S. 987, 95 S. Ct. 246, 42 L. Ed. 2d 260 (1974).

The Sixth Circuit has refused to review a prior decision unless a new statute or intervening Supreme Court decision raises questions as to the viability of the earlier decision. *Hawkes v. Internal Revenue Service*, 507 F.2d 481, 482 n.1 (6th Cir. 1974).

In one instance the First Circuit refused to reopen a civil case, but recognized that it could be done in the case in which the previous error constituted a manifest injustice. *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1974).

In the present case the mix-up occurred because of the fact that the contract between Phillips Petroleum Company and the independent contractor purported to place all of the responsibility on the independent contractor, but when the case was tried a far different condition was revealed. It was shown that Phillips in actuality had exercised a good deal of control over the

project and that it was the author of the plans which took the less expensive [**22] way out, that of not taking steps to prevent cave-ins. Thus, where it had control of the condition and acted negligently, that is, where it could reasonably foresee that a workman was going to be injured from this practice, it should be held responsible to the workman for its own negligent conduct. That is what the trial court held and that is the correct approach to the case. It is an approach that is not at odds with Utah law.

Here we have an activity that was contrary to law, both local and federal, which plainly created a hazard and thus the trial court was plainly correct in the first case in submitting the case to the jury. The jury's verdict was well founded both in law and in fact. A plain injustice occurred as a result of the reversal. The trial court was unable to carry out the mandate which ordered a new trial because the law of the case contained in this court's decision closed the door to a new trial. There was nothing for the trial court to do except vacate the judgment based upon the jury verdict and enter judgment for Phillips, which it did.

In this case the injustice which the litigant has suffered is clear. There is not and was not any way which would allow [**23] Phillips to shift responsibility to the contractor. To allow it to do so constituted grave error which should be corrected.

The case should be reopened in the interest of justice.

Exhibit 15

LEXSEE 396 F2D 237

TEXACO, INC., Appellant, v. Jimmy N. PRUITT, Appellee

No. 9595

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

396 F.2d 237; 1968 U.S. App. LEXIS 6648

June 6, 1968

DISPOSITION: [1]**

Affirmed.

Texaco appeals from a substantial judgment on a jury verdict. We affirm.

CORE TERMS: horsehead, rod, walking beam, pump, bolt, servicing, bottom, beam, duty, polished, pumping, clamp, caught, safe place to work, guard, legal duty, cable, latent, diesel engine, elevator, carrier, derrick, surface, top, general contractor, contractor, concealed, insurance carrier, stuffing box, bumping

JUDGES:

Murrah, Chief Judge, Marvin Jones, * Judge Court of Claims, and Breitenstein, Circuit Judge.

* Sitting by designation.

OPINIONBY:

MURRAH

OPINION:

[*239] MURRAH, Chief Judge.

While Sayer's Well Servicing Company, Inc. was servicing a pump on a Utah oil well owned by defendant-appellant Texaco, Inc., plaintiff-appellee Pruitt, an employee of Sayer's, was seriously injured when a piece of the pumping equipment known as a "horsehead" fell upon him. Having collected workmen's compensation as an employee of Sayer's, Pruitt brought this action against Texaco, alleging that Texaco negligently permitted the horsehead to fall. n1 Texaco denied any negligence, asserting that Sayer's negligence caused the accident, and in any event, that Pruitt was contributorily negligent.

n1 The basis of this suit is § 35-1-62 of the Utah Workmen's Compensation Act, which provides that when an injury to an employee is caused by the wrongful act or neglect of another person not in the same employment, the injured employee may claim workmen's compensation and may also have an action for damages against the third person.

[**2]

The pumping unit involved in the accident consists of three main pieces -- a horsehead, a walking beam and a tripod. The "horsehead" is a large metal object shaped roughly like the head of its namesake. It is attached to one end of the "walking beam" -- a long horizontal metal beam similar to a girder. The center of the walking beam rests upon and is affixed to the tripod, which acts as its fulcrum. A pump jack is attached to the other end of the walking beam and, when actuated, creates a seesaw motion of the beam.

Two steel cables called "bridles" hang down from the top of the horsehead. They are attached to a "polished rod" which extends through a "stuffing box" and is attached to rods which operate the pump at the bottom of the well. Propelled by the seesaw movement of the walking beam, the rods move up and down inside tubing, through which the oil is pumped to the surface.

The evidence shows that the horsehead is about 13 feet long and weighs approximately 2000 pounds. It has a groove on its back side which fits over a two-inch "lip" on the top of the walking beam. Near the bottom of the beam both the horsehead and beam have a two-inch slot

through which a bolt is inserted. [**3] An employee of the manufacturer of the pumping unit testified that this particular unit calls for a 3/4 inch bolt. He also explained that the purpose of the bolt is twofold: (1) to keep the horsehead on the beam in case a rod breaks in the well, and (2) to hold the horsehead in place after it is centered with two adjusting screws.

Texaco maintained a production foreman and several employees in the field who made daily visits to the wells, and had the responsibility of maintaining and servicing the surface pumping units. Texaco had a contract with Sayer's and another well servicing company to service the pump at the bottom of each well.

Two or three days prior to the date of the accident, the surface pumping unit on the well in question was operating but no oil was being produced. The other servicing company (Falco) was called in to "trip the sub-surface pump", n2 but when its efforts proved unsuccessful, Sayer's was asked to "bump bottom and space the pump". To perform this operation, Sayer's shut down the pump and [**240] raised a 65 foot portable derrick directly over the well. Cables were then run from a diesel engine beside the derrick up through the top of the derrick [**4] and down to the polished rod. Three objects referred to as a block, hook and elevator were affixed to the end of the cable, and apparently were used to attach the cable to the polished rod. After the bridles were disengaged, the rods were lowered several feet further into the well so as to put pressure on the pump at the bottom. The purpose of the operation is to "seat" the pump more firmly at the bottom of the well and dislodge any foreign material that might be interfering with the pump's operation. The operator of the diesel engine was in the process of lifting the rods when the horsehead fell from the walking beam onto Pruitt, who was working at the stuffing box immediately under the horsehead.

N2 This operation involves pulling the string of rods from the well and hanging them on the derrick, pulling the pump from the bottom of the well to the surface, checking the pump and then returning it to the bottom, and replacing all of the rods.

The trial judge submitted the question of Texaco's negligence to the [**5] jury, but instructed as a matter of law that Pruitt was not contributorily negligent. The jury's verdict in favor of Pruitt was necessarily based upon a finding that Texaco's negligence caused the injury.

Texaco's initial contention is that the trial judge should have directed a verdict in its favor for want of any

evidence of actionable negligence on its part. But the sufficiency of the evidence must be adjudged in the light of the rule of law by which Texaco's legal liability is to be determined. We are brought, therefore, to a consideration of the nature of the legal duty owed by Texaco to Sayer's employees and the situations under which this duty becomes operative.

It is the general rule, applicable in Utah, that an owner of premises or the general contractor of work being performed thereon, who has neither reserved nor exercised direction or control over the particular work being performed by a contractor or subcontractor, as the case may be, owes no legal duty to provide an employee of the contractor or subcontractor "a safe place to work * * or to guard him against dangers incident to or created by the prosecution of the work, and certainly not to guard or protect him [**6] against the negligence of those who had employed him or with whom he labored." *Dayton v. Free*, 46 Utah 277, 148 P. 408, 412. See also *Titan Steel Corp. v. Walton*, 365 F.2d 542. Such an owner or general contractor is, however, under a legal duty to warn or guard against concealed or latent conditions of danger on the premises of which he has or ought to have knowledge and of which the employee has none. See *Gulf Oil Corp. v. Bivins*, 276 F.2d 753; *Titan Steel Corp. v. Walton*, *supra*. And see also *United States Steel v. Warner*, 378 F.2d 995; *Demarest v. T. C. Bateson Const. Co.*, 370 F.2d 281.

Although the pretrial order defining the triable issues left in dispute Texaco's ownership and control of the pumping equipment, the case was apparently tried and submitted to the jury on the assumption that Texaco, as the owner and operator of the well, contracted to Sayer's the performance of the work which was being done at the time of the accident. There is no evidence to indicate that any Texaco employee was present or had anything to do with Sayer's servicing operation. In any event, there is nothing in the [**7] record to indicate that the issue of control was submitted to the jury. We think it is clear that Texaco exercised no direction or control over the particular work being performed, and therefore, had only the duty of warning or guarding Sayer's employees against concealed or latent conditions of danger on the premises. The issue then must be whether Texaco allowed the horsehead to be insecurely fastened to the walking beam so as to create a latent condition of danger, or whether, as Texaco contends, the horsehead was pulled off the beam by Sayer's servicing rig.

The evidence was conflicting, and mostly speculative, as to the cause of the accident. An employee of Falco testified that the horsehead was taken off when his company serviced the well two or three days prior to the accident, and he noticed that the bolt removed was

[*241] a 5/8 inch rather than the prescribed 3/4 inch bolt. He further testified that even though the bolt was "smaller than * * * normal", he directed another employee to put it back in the horsehead because "we don't change any bolts". Two witnesses for Texaco testified that a bolt removed from the walking beam the day after the accident was a 3/4 inch [*8] bolt. A Sayer's employee testified that he recalled "seeing that the elevator caught the horsehead and raised it up." He admitted, however, that he was not "hundred per cent sure". Other witnesses testified that the elevator was above the horsehead during the "bumping" operation. The operator of the diesel engine testified that the engine's weight indicator gauge showed no sudden increase in weight while the rods were being lifted. He explained that if something on his cable had caught the horsehead, a "very fast" weight increase would have registered on the gauge.

We have repeatedly held "that a verdict may not be directed unless the evidence points all one way and is susceptible of no reasonable inferences which sustain the position of the party against whom the motion is made." *United States Steel v. Warner*, *supra*, at p. 998. See also *Christopherson v. Humphrey*, 366 F.2d 323. It is too clear for argument that the evidence here is not all one way in favor of Texaco. The case was for the jury under the applicable rule of legal duty and liability.

Texaco next complains that the trial judge prescribed an erroneous legal duty of care when he instructed [*9] the jury that Texaco had the "continuous duty * * to use reasonable care and prudence to furnish the employees of Sayer's * * with a reasonably safe place within which to perform their work." Texaco saved its record by specifically objecting to the use of the phrase "safe place to work" to describe Texaco's duty to Pruitt. The objection and the argument here is that although Texaco owed invitee Pruitt the duty to "use reasonable care", the duty to provide a safe place to work was owed by Pruitt's employer, Sayer's, not Texaco.

The phrase "safe place to work" has been loosely used to characterize both the duties of an employer incident to the prosecution of the work being done, and the altogether different duty of an owner or contractor not in control of the work being done to warn or guard against concealed or latent dangers on the premises. As we have seen, these duties are separate and distinct, and confusion results when they are articulated by the same or similar words. It is accurate to say that an employer or person in control of the premises and the work being done must provide a safe place to work, but it is inaccurate and misleading to say that an owner or general contractor [*10] not exercising direction over the particular work being performed is under such an obligation.

Although Judge Ritter did use the phrase "safe place within which to perform their work" to describe Texaco's legal obligation to the employees of Sayer's, he did not stop there but went on to explain the meaning of his words: "this duty required [Texaco] to use reasonable care to inspect the equipment, and particularly the horse's head and walking beam and other units of the pumping equipment, to repair the same when necessary, and to keep the horse's head securely fastened to the walking beam." We think his explanation sufficiently advised the jury that Texaco's legal duty was to guard against hidden dangers inherent in the premises rather than unsafe conditions incident to or created by the work being done, and enabled the jury to arrive at an intelligent verdict.

Complaint is also made of the trial judge's refusal to allow counsel for Texaco to argue to the jury that the "polished rod clamp" caught on the horsehead and pulled it from the walking beam. The polished rod clamp is a "little box contraption" attached to the polished rod. The superintendent in charge of Sayer's servicing [*11] operation testified that the clamp had been removed during the "bumping operation". [*242] Another witness, the operator of the diesel engine, testified that the clamp had been "removed in order for me to touch bottom." Pruitt, when asked what caught on the horsehead, if anything, replied: "I was presuming in my mind that the polish rod clamp caught it. * * * But I didn't see it, and I don't know."

We agree with the trial judge that the evidence was insufficient to allow Texaco "to take that clamp to the jury." It appears to be undisputed that the clamp was removed from the polished rod. Moreover, Texaco was not prevented from presenting its causal theory of the accident to the jury. It apparently was given wide latitude to argue that some other object, such as the block, hook, elevator or box (a coupling between two sections of rod), caught on the horsehead and pulled it from the walking beam.

Texaco next asserts that the trial judge erred in refusing to submit to the jury the question of contributory negligence on the part of Pruitt. It is argued that Pruitt was negligent in that: (1) he walked out on the walking beam and should have seen whether or not the horsehead was [*12] properly attached, and (2) he placed himself under the horsehead when the servicing unit was lifting the rods.

We agree with Judge Ritter that there was no evidence of contributory negligence. The walking beam was two to three feet in depth, and the slot for the bolt was located near the bottom of the beam. Certainly a man on top of the beam would be in no position to observe that a bolt underneath was not of the proper size. Nor was Pruitt negligent in placing himself under the

horsehead when the rods were being lifted. He was not at a place he should not have been; instead, he was stationed at his post of duty next to the stuffing box. Moreover, it was customary to leave the horsehead on the walking beam while performing this "bumping" type operation. The horsehead was not in motion, but had been stopped on the downstroke and a brake applied. In our opinion there was nothing to indicate that any danger would be involved in working beneath it.

Finally, Texaco contends that the trial judge erroneously refused to reduce the amount of the judgment awarded Pruitt by \$18,000-the amount of workmen's compensation benefits paid to Pruitt. The argument is that the trial judge should have [**13] held Sayer's negligent as a matter of law, or in any event, submitted that issue to the jury; and that because of its negligence, Sayer's and its insurance carrier, standing in its shoes, are precluded from recovering the amount of compensation benefits paid to Pruitt.

Section 35-1-62 of the Utah Workmen's Compensation Act, which authorizes an injured and compensated employee to bring an action against a third party wrongdoer, also provides that "if any recovery is obtained against such third person * * * the person liable for compensation payments shall be reimbursed in full for all payments made." It does not by its terms preclude a negligent employer or its insurance carrier from recovering the amount paid to the injured employee. There is, however, respectable authority denying reimbursement to such employer or carrier on the principle that "[one should not] profit from its own wrong." *Witt v. Jackson*, 57 Cal.2d 57, 17 Cal.Rptr. 369, 366 P.2d 641, 650 (1961). See also *Liberty Mutual Insurance Co. v. Adams*, 91 Idaho 151, 417 P.2d 417 (1966). Although admitting that the majority of jurisdictions have held that a third party tortfeasor cannot assert [**14] the concurrent negligence of the employer as a defense, whether the employer, the employer's carrier, or the employee has brought the action against

him, n3 Texaco argues [*243] that Witt and Adams, being California and Idaho decisions, would be highly persuasive on the Utah courts, which have not faced the problem.

n3 *Baker v. Traders & General Ins. Co.*, 199 F.2d 289; *Cyr v. F. S. Payne Co.*, 112 F. Supp. 526; *Williams Bros. Lumber Co. v. Meisel*, 85 Ga.App. 72, 68 S.E.2d 384; *Fidelity & Casualty Co. v. Cedar Valley Electric Co.*, 187 Iowa 1014, 174 N.W. 709; *City of Shreveport v. Southwestern Gas & Electric Co.*, 145 La. 680, 82 So. 785; *General Box Co. v. Missouri Utilities Co.*, 331 Mo. 845, 55 S.W.2d 442; *Utley v. Taylor & Gaskin*, 305 Mich. 561, 9 N.W.2d 842; *Graham v. City of Lincoln*, 106 Neb. 305, 183 N.W. 569; *Royal Indemnity Co. v. Southern California Petroleum Corp.*, 67 N.M. 137, 353 P.2d 358.

[**15]

Judge Ritter refused to consider or submit the issue of Sayer's negligence to the jury, holding that it had no bearing on the carrier's right to reimbursement. He reasoned that "the legislature legislated in this area with some particularity * * *. They mention that the carrier is entitled to be reimbursed, and that is unqualified. If they had meant to impute the negligence of the employer to the insurance carrier, they very easily could have said so * * *." Where the state supreme court has not ruled upon the precise question before us, we will accept the Federal trial judge's interpretation of his state law unless convinced that he is clearly wrong. See *Rooney v. Mason*, 394 F.2d 250 (10 CA May 13, 1968); *Adams v. Erickson*, 394 F.2d 171 (10 CA May 10, 1968); *Smith v. Greyhound Lines, Inc.*, 10 Cir., 382 F.2d 190. In this case we certainly cannot so say.

Affirmed.

Exhibit 16

SHANE ERWIN and ANGELA ERWIN, Appellants v. KERN RIVER GAS
TRANSMISSION COMPANY, KERN RIVER CORPORATION, and WILLIAMS
WESTERN PIPELINE COMPANY, Appellees

NO. 01-96-00204-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

1997 Tex. App. LEXIS 6685

December 18, 1997, Opinion Issued

NOTICE: [*1] PURSUANT TO THE TEXAS
RULES OF APPELLATE PROCEDURE,
UNPUBLISHED OPINIONS SHALL NOT BE CITED
AS AUTHORITY BY COUNSEL OR BY A COURT.

PRIOR HISTORY: On Appeal from the 165th District
Court, Harris County, Texas. Trial Court Cause No. 92-
23124.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, contractor's
employee and his wife, sought review of a judgment
from the 165th District Court, Harris County (Texas)
entered on a directed verdict for appellee principal
employer in appellants' claims for negligence and loss of
consortium.

OVERVIEW: Appellee principal employer was
building a 900-mile pipeline. In Utah, appellant
employee of appellee's contractor was severely injured
when equipment failed and the contractor's foreman
negligently decided to back a crane down a hill.
Appellant sued appellee for negligence, and his wife
sued for loss of consortium. Applying Utah substantive
law and Texas procedural law, the trial court directed a
verdict for appellee. On appeal, the court affirmed.
Appellee was not liable because it did not actively
participate in its contractor's work, it did not have a
nondelegable duty or an assumed duty of care to
appellant employee, and appellant wife could not
maintain her spousal consortium claim under Utah law.

Appellee did not direct, control, or superintend its
contractor's work as contemplated by the Dayton line of
cases. The court held Utah would not recognize an
employer's liability to its independent contractor's
employee injured during the course of inherently
dangerous work.

OUTCOME: The judgment for appellee in appellants'
loss of consortium and negligence claims was affirmed.
Utah law did not recognize loss of consortium for the
spouse of a person injured by a third party, and appellee
did not actively participate in its contractor's work, have
a nondelegable duty of care, or an assumed duty of care
to appellant employee.

CORE TERMS: contractor, right-of-way, crane,
inherently dangerous, pin, pipeline, duty, sideboom,
accelerated, precautions, directed verdict, reserved,
independent contractor, superintend, unsafe, active
participation, work schedule, consortium, spread, boom,
actively participated, inspector, overrule, hill, general
rule, spousal, repair, dicta, vice president, rights-of-way

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Trials > Judgment as Matter of Law
[HN1] A motion for directed verdict is proper when: (1)
a defect in the opponent's pleading makes it insufficient
to support a judgment, (2) the evidence conclusively
proves facts establishing the movant's right to judgment,
or negates the nonmovant's right to judgment, as a matter
of law, or (3) the evidence is legally insufficient to raise
a fact issue on a proposition necessary to entitle the
nonmovant to judgment.

Civil Procedure > Trials > Judgment as Matter of Law

[HN2] In reviewing a directed verdict, the court must determine whether there is any evidence of probative force to raise fact issues on the material questions presented. The court considers all the evidence in the light most favorable to the party against whom the verdict was instructed and disregard all contrary evidence and inferences, giving the losing party the benefit of all inferences raised by the evidence. If there is any conflicting evidence of probative value on any theory of recovery, the instructed verdict was improper, and the court must reverse and remand for a jury determination of that issue. The court must affirm a directed verdict, even if the trial court's rationale for granting it was erroneous, if it can be supported on another basis.

Torts > Damages > Consortium Damages

[HN3] See *Utah Code Ann. § 30-2-4* (1995).

Labor & Employment Law > Employer Liability > Tort Liability > Independent Contractors Labor & Employment Law > Employer Liability > Contract Liability > Third Party Liability

[HN4] As a general rule under Utah law, a principal employer is not liable for injuries caused by its contractor's negligence, unless the principal actively participates in the work's performance. Utah law recognizes three exceptions to this rule: (1) the injury is the direct result of the stipulated work; (2) the work to be performed is inherently dangerous, and the injury is the consequence of the contractor's failure to take appropriate precautions; or (3) the injury was caused by the non-performance of an absolute, nondelegable, duty the principal employer owed the injured party, individually or to the class of persons to which he belongs.

Torts > Negligence > Duty > Control of Third Parties

[HN5] To determine whether a principal employer actively participates in work's performance, the court examines whether the principal employer reserved the right to direct, control, or superintend the work. The court also examines whether the principal employer in fact directed or controlled the time and manner of doing the work, or the means and methods by which the results were to be accomplished. The injury must be caused by the act of performance, not merely the manner of performance over which the principal employer exercised neither direction, control, nor supervision.

Torts > Negligence > Duty > Control of Third Parties

[HN6] A contractual clause giving a principal employer the right to retain 10 percent of any amounts invoiced by

its contractor until the project's completion has been held to not justify a finding that the principal company reserved the right to direct, control, or superintend the contractor's work.

Torts > Negligence > Duty > Control of Third Parties

[HN7] Requiring a contractor to fire any of its workers whom the principal employer, in its sole discretion, deems to be unsafe, unqualified, or the like has been held, when considered in the context of the entire contract, not to be a reservation of the right to direct, control, or superintend the independent contractor's work.

Torts > Negligence > Duty > Control of Third Parties

[HN8] A clause requiring a contractor to remedy any imperfect or insufficient work, when pointed out by the principal employer's engineers, does not reserve the right to direct, control, or superintend the contractor's work.

Torts > Negligence > Duty > Control of Third Parties

[HN9] A clause allowing the principal employer to terminate a contract at will if the contractor fails or refuses to do the amount of work agreed upon, does not reserve the right to direct, control, or superintend the contractor's work.

Torts > Negligence > Duty > Control of Third Parties

[HN10] Utah law recognizes a principal will be liable for injury caused to others by its contractor when the work it hires the contractor to perform is inherently dangerous and appropriate precautions are not taken. Whether the principal is liable to its contractor's employees under this inherently dangerous exception is another matter. Jurisdictions split on whether a contractor's employees fall within the protected class under this doctrine.

Torts > Negligence > Duty > Duty Generally Business & Corporate Entities > Agency > Agents Distinguished > Independent Contractors, Masters & Servants

[HN11] When a person employs a contractor to do work lawful in itself and involving no injurious consequences to others, and damage arises to another through the negligence of a contractor or his servants, the contractor, and not the employer, is liable.

Evidence > Procedural Considerations > Rulings on Evidence

[HN12] The exclusion of evidence is committed to the trial court's sound discretion. For the exclusion of evidence to constitute reversible error, an appellant must show: (1) the trial court committed error and (2) the error was reasonably calculated to cause, and probably did cause, rendition of an improper judgment. This standard usually requires the complaining party to show that the

judgment turns on the particular evidence excluded. Accordingly, the exclusion of cumulative evidence is not reversible error. The court reviews the entire record.

JUDGES: Michael H. Schneider, Chief Justice. Justices Taft and Bass n10 also sitting.

n10 The Honorable Sam H. Bass, retired Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

OPINIONBY: Michael H. Schneider

OPINION: OPINION

This lawsuit arises from an injury that occurred during the construction of the Kern River Pipeline (the pipeline). The trial court granted appellees's motion for directed verdict after appellants (together, the Erwins) rested. We affirm.

Standard of Review

[HN1] A motion for directed verdict is proper when (1) a defect in the opponent's pleading makes it insufficient to support a judgment, (2) the evidence conclusively proves facts establishing the movant's right to judgment, or negates the nonmovant's right to judgment, as a matter of law, or (3) the evidence is legally insufficient to raise a fact issue on a proposition necessary to entitle the nonmovant to judgment. [*2] *Neller v. Kirschke*, 922 S.W.2d 182, 187 (Tex. App.--Houston [1st Dist.] 1995, writ denied).

[HN2] We must determine whether there is any evidence of probative force to raise fact issues on the material questions presented. *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994); *Jordan v. Jordan*, 938 S.W.2d 177, 178 (Tex. App.--Houston [1st Dist.] 1997, no writ). We consider all the evidence in the light most favorable to the party against whom the verdict was instructed and disregard all contrary evidence and inferences, giving the losing party the benefit of all inferences raised by the evidence. *Szczepanik*, 883 S.W.2d at 649; *Jordan*, 938 S.W.2d at 179. If there is any conflicting evidence of probative value on any theory of recovery, the instructed verdict was improper, and we must reverse and remand for a jury determination of that issue. *Szczepanik*, 883 S.W.2d at 649; *Jordan*, 938 S.W.2d at 179. We must affirm a directed verdict, even if the trial court's rationale for granting it was erroneous, if it can be supported on another basis. *Kelly v. Diocese of Corpus Christi*, 832 S.W.2d 88, 90 (Tex. App.--Corpus Christi 1992, writ dismissed [*3] w.o.j.).

Background

The construction project to build the pipeline (the project) was a joint venture of the Williams Companies and Tenneco, and was carried out under the auspices of Kern River Gas Transmission Company. Kern River Gas Transmission Company is a general partnership, in which Kern River Corporation and Williams Western Pipeline Company are partners. n1

The pipeline was to extend 900 miles, from Wyoming to California.

n1 We refer to appellees Kern River Transmission Company, Kern River Corporation, and Williams Western Pipeline Company collectively as "Kern River."

Kern River contracted with Associated Pipeline Contractors, Inc. (APC) to assist in part of the pipeline's construction. Shane Erwin was APC's employee; Angela Erwin is his wife. The entire project was divided into eight sections, called "spreads." APC worked on spread two, which contained Utah's Wasatch mountains (the Wasatch area). Shane Erwin was injured in these mountains.

Kern River wanted to have gas flowing through [*4] the entire pipeline in a year, originally setting the completion date for the Wasatch area at early October 1991. Kern River wanted to finish before winter set in, which would preclude further work in the Wasatch area until late spring of 1992. However, the Wasatch area work was delayed for various reasons. Therefore, the work schedule was accelerated to meet the completion deadline.

On the day of the accident, Pete Logan, APC's bending crew foreman, was pulling a truck, loaded with pipe, up a steep grade in the Wasatch area with a sideboom crane. A sideboom crane is not normally used for this. As Logan was driving the sideboom crane down the hill, one of its pivot pins fell out. This caused the crane's boom to cock sideways. Logan and Shane Erwin noticed the fallen pin.

This was a dangerous situation, because the crane's boom could break and fall. Therefore, Logan stopped the crane, at which point he and the workers around him (including Shane Erwin) were temporarily safe. There was not enough room to fix the crane's pin, so Logan began backing the crane down the hill. Logan was responsible for clearing the area before doing this. Shane Erwin positioned himself in what he thought [*5] was a safe place, on the opposite side of the boom. However, the boom broke free, swung around the other side of the crane, and pinned Shane Erwin's right leg to the ground. His leg had to be amputated below the knee. No one

from Kern River was present when the accident occurred.

Shane Erwin sued Kern River for negligence in causing his injuries. Angela Erwin sued Kern River for loss of consortium and her husband's services.

Directed Verdict

In point of error one, the Erwins claim the trial court erred in granting Kern River's motion for directed verdict because, under Utah law, they had proved a prima facie case of liability against Kern River under three theories. n2

These theories were that Kern River (1) negligently exercised control over the project, (2) breached a nondelegable duty of care to Shane Erwin, and (3) assumed a duty of care to him.

n2 The accident occurred in Utah. Neither party contested, on appeal or below, the application of Utah substantive law. Texas law governs procedural and evidentiary matters, however. See *Penny v. Powell*, 162 Tex. 497, 347 S.W.2d 601, 602 (Tex. 1961); *Paine v. Moore*, 464 S.W.2d 477, 479 (Tex. Civ. App.--Tyler 1971, no writ).

[*6]

A. Angela Erwin's Consortium Claims

In a footnote to its brief, Kern River argues Angela Erwin is not a proper party to this appeal, because Utah does not recognize her loss-of-consortium claims. In an oral motion for directed verdict, Kern River argued Angela Erwin could not maintain a consortium claim under Utah law. n3

Because the trial court's final judgment directed a verdict against Angela Erwin, she may appeal it.

n3 In the oral motion, Kern River argued: (1) Angela Erwin could not maintain a consortium claim; (2) there was no evidence of Kern River's negligence, or that Kern River controlled or participated in the construction; (3) there was no proximate cause between Kern River's actions and Shane Erwin's injuries; (4) APC's employee's negligence was an unforeseeable, superseding cause of the injury; (5) no evidence supported a gross negligence instruction; (6) and the "inherently dangerous" exception, which the Erwins argued would create a duty on Kern River's part, did not apply. Kern River neither

pleaded nor asserted the workers's compensation bar. See *UTAH CODE ANN.* § 35-1-42, 35-1-60 (1994). The trial court's final judgment recited the Erwins had proffered either no or insufficient evidence.

[*7]

We conclude a directed verdict was properly granted on Angela Erwin's claims. Utah law does not allow the spouse of a person injured by a third party to recover for loss of consortium. n4

[HN3]

See *UTAH CODE ANN.* § 30-2-4 (1995); *Cruz v. Wright*, 765 P.2d 869, 869, 871 (Utah 1988); *Hackford v. Utah Power & Light Co.*, 740 P.2d 1281, 1287-88; *Ellis v. Hathaway*, 27 Utah 2d 143, 493 P.2d 985, 986 (Utah 1972); *Wollam v. Kennecott Corp.*, 648 F. Supp. 160, 163 (D. Utah 1986) (applying Utah law). While the Utah Legislature this year passed a statute allowing spousal consortium claims, the statute applies only to spouses of persons injured by a third party after May 4, 1997. See *UTAH CODE ANN.* § 30-2-11 (Supp. 1997). We hold, therefore, that the trial court properly directed a verdict against Angela Erwin's spousal consortium and service claims.

n4 It appears Utah would consider a claim for loss of spousal services to be part of a spousal consortium claim. See *Hackford v. Utah Power & Light Co.*, 740 P.2d 1281, 1290 (Utah 1987) (Durham, J., dissenting, noting the definition of "consortium" includes company, society, cooperation, affection, and aid) (citing *Black's Law Dictionary* 280 (5th ed. 1979)); *Ellis v. Hathaway*, 27 Utah 2d 143, 493 P.2d 985, 985, 986 (Utah 1972) (treating wife's claims for loss of support, companionship, love, and affection as prohibited loss-of-consortium claims).

[*8]

B. Kern River's Liability

[HN4] As a general rule under Utah law, a principal employer is not liable for injuries caused by its contractor's negligence, unless the principal actively participates in the work's performance. See *Dayton v. Free*, 46 Utah 277, 148 P. 408, 411, 412 (Utah 1914); *Sewell v. Phillips Petroleum Co.*, 606 F.2d 274, 275-76 (10th Cir. 1979) (applying Utah law); *Texaco, Inc. v. Pruitt*, 396 F.2d 237, 240 (10th Cir. 1968) (applying Utah law); *Simon v. Deery Oil*, 699 F. Supp. 257, 258 (D. Utah 1988) (applying Utah law). Utah law recognizes three exceptions to this rule: (1) the injury is the direct result of the stipulated work; (2) the work to be

performed is inherently dangerous, and the injury is the consequence of the contractor's failure to take appropriate precautions; or (3) the injury was caused by the non-performance of an absolute (nondelegable) duty the principal employer owed the injured party, individually or to the class of persons to which he belongs. *Gleason v. Salt Lake City*, 94 Utah 1, 74 P.2d 1225, 1232 (Utah 1937); *Dayton*, 148 P. at 411.

1. Active Participation in Contractor's Work

The Erwins first [*9] argue Kern River actively participated in the project. [HN5] To make this determination, we examine whether Kern River reserved the right to direct, control, or superintend APC's work. *Dayton*, 148 P. at 411; accord, see *Callahan v. Salt Lake City*, 41 Utah 300, 125 P. 863, 865 (Utah 1912); cf. *Rustler Lodge v. Industrial Comm'n*, 562 P.2d 227, 228 (Utah 1977) (under workers's compensation statute); *Dowsett v. Dowsett*, 116 Utah 12, 207 P.2d 809, 811 (Utah 1949) (distinguishing independent contractor from servant). We also examine whether Kern River in fact directed or controlled the time and manner of doing APC's work, or the means and methods by which the results were to be accomplished. *Dayton*, 148 P. at 411; see *Gleason*, 74 P.2d at 1234; cf. *Kippen v. Jewkes*, 258 F.2d 869, 873 (10th Cir. 1958) (applying Utah law and quoting *Dowsett*). The injury must be caused by the act of performance, not merely the manner of performance over which Kern River exercised neither direction, control, nor supervision. See *Dayton*, 148 P. at 412; accord *Simon*, 699 F. Supp. at 259.

The Contract's Terms

The Erwins initially argue the contract reserved [*10] to Kern River the right to participate actively in the project. We disagree.

First, the Erwins point to [HN6] the contractual clause giving Kern River the right to retain ten percent of any amounts invoiced by APC until the project's completion. The Erwins argue this clause provided Kern River economic leverage over APC. In *Dayton*, however, the Utah Supreme Court held an almost identical provision did not justify a finding that the principal company reserved the right to direct, control, or superintend the contractor's work. *Dayton*, 148 P. at 410, 411.

Second, the Erwins point to paragraph 11.4, which [HN7] requires APC to fire any of its workers whom Kern River, in its sole discretion, deems to be unsafe, unqualified, or the like. The *Dayton* court found a similar clause, when considered in the context of the entire contract, not to be a reservation of the right to direct, control, or superintend the independent contractor's

work. *Dayton*, 148 P. at 410, 411. Similarly, the *Callahan* court found an almost identical clause not to reserve such rights. *Callahan*, 125 P. at 863, 865.

Third, the Erwins focus on paragraph 19.5, which allows Kern River's inspectors to stop [*11] APC's work if, among other things, it is not being performed strictly according to the contract's terms; APC's work is risking, threatening, or damaging any property; or the work is not being done safely. Such a provision has been found insufficient to make the principal liable. See *United States v. Page*, 350 F.2d 28, 30, 31 (10th Cir. 1965) (under Federal Tort Claims Act (FTCA)); *Thompson v. Timpanogos Metals*, 762 F. Supp. 927, 929 (D. Utah 1991) (FTCA). The *Dayton* court found [HN8] a clause requiring the contractor to remedy any imperfect or insufficient work, when pointed out by the principal employer's engineers, did not reserve the right to direct, control, or superintend the contractor's work. *Dayton*, 148 P. at 411; see *Eutsler v. United States*, 376 F.2d 634, 635 (10th Cir. 1967) (holding right to prescribe and impose safety regulations created no liability under FTCA); *Page*, 350 F.2d at 31 (same); *Thompson*, 762 F. Supp. at 929 (holding no liability even though principal had right to inspect, and inspectors visited site weekly and directed contractor to comply with safety requirements); cf. *Intermountain Speedways, Inc. v. Industrial Comm'n*, [*12] 101 Utah 573, 126 P.2d 22, 24 (Utah 1942); *Angel v. Industrial Comm'n*, 64 Utah 105, 228 P. 509, 512 (Utah 1924) (finding no "control" under workers's compensation law when supervision was to ensure work was being performed in workmanlike manner). If, as in *Dayton*, no such right is reserved when the contract allows the principal to dictate repairs, then no such right is reserved when the principal, as here, has the authority to stop work upon detection of safety or other problems.

Finally, the Erwins argue [HN9] a clause allowing Kern River to terminate the contract at will granted Kern River ultimate control over the project. The *Dayton* court rejected the argument that a clause allowing the principal employer to terminate the contract, if the contractor failed or refused to do the amount of work agreed upon, reserved the right to direct, control, or superintend the contractor's work. *Dayton*, 148 P. at 410, 411; cf. *Parkinson v. Industrial Comm'n*, 110 Utah 309, 172 P.2d 136, 140 (Utah 1946) (finding unilateral right to discharge not controlling factor under workers's compensation law); *Gogoff v. Industrial Comm'n*, 77 Utah 355, 296 P. 229, 231 (Utah 1931) (finding [*13] independent contractor relationship under workers's compensation law when either party could terminate with three-days's notice). In light of *Dayton*, we hold this termination clause does not reserve to Kern River those active participation rights.

We also note that paragraph 24.1 of the contract specifically stated APC was an independent contractor, and that it alone was to select the means, manner of performance, and methods for its work. *See Gogoff*, 296 P. at 230. The contract also left to APC the job of procuring and servicing materials, equipment, and labor. *See Callahan*, 125 P. at 863. Considering the contract as a whole, we find the contract did not reserve to Kern River the right to direct, control, or superintend APC's work.

Actual Control

Alternatively, the Erwins argue Kern River actually participated in the project, regardless of the contract's terms. The Erwins's theory is three-fold: (1) Kern River exercised economic pressure over APC, causing APC to rush work and compromise safety; (2) Kern River's acceleration of the work schedule set the stage for APC's unsafe work practices, which led to the accident; and (3) Kern River directly exercised [*14] control by directing the construction of the Wasatch area right-of-way, the negligent design of which the Erwins say was a cause of the accident. We set out the applicable evidence, viewed in the light most favorable to the Erwins, below.

The contract required Kern River to provide APC with a right-of-way and access to it. For various reasons, Kern River could not provide all the right-of-way and access in spread two Kern River had originally promised. Kern River and APC discussed these rights-of-way and access problems. At some point, Kern River asked APC to identify areas in spread two where additional rights-of-way were needed. APC did not always ask for additional space, and it apparently did not ask for additional space at what was later the accident site.

The Erwins rely on the testimony of Earl Harrison, APC's foreman over the project's right-of-way. Harrison and Shane Erwin testified the right-of-way bordering the accident site was too narrow and insufficiently leveled. Harrison testified Kern River's inspector and construction supervisors would not let him build the right-of-way in the manner he wanted, and that he had to build it on Kern River's accelerated time schedule. [*15]
n5

He said Kern River's construction superintendent told him the right-of-way should be built just to look like a right-of-way from a forest ranger's helicopter. Harrison also stated the same individual agreed the working conditions were dangerous, that a right-of-way was not being built, and that someone would probably get killed on the job. Other than with respect to this right-of-way, there is no evidence Kern River ever directed the specifics of APC's day-to-day activities on the project.

n5 For example, Harrison testified Kern River's superintendent told him he had to build a 12-mile right-of-way in under two weeks, or about 1,000 feet a day with each bulldozer, or Kern River would shut the job down. Harrison told Kern River's superintendent it was impossible to cut the right-of-way in that time.

Because the right-of-way was too steep and its dirt was too loose, even a 4-wheel drive truck could not drive on it. Trucks could not, therefore, climb the hill to reach equipment needing service. The record [*16] discloses that, on construction jobs like this, equipment breakdowns are foreseeable, and it is important to have trucks available to reach the equipment for repairs.

When a sideboom crane's pin comes out, the proper procedure is to lay the boom down, bring up another crane, and repair the pin. n6

However, this procedure could not be followed, because two cranes could not drive at the same time on the right-of-way. The Erwins's safety expert said having sufficient work space in the Wasatch area was critical to safety, and the right-of-way was not wide enough for safety purposes. Therefore, the expert concluded Kern River's involvement in the right-of-way's construction affected the work's safety. APC's former vice president admitted the right-of-way's terrain bore on safety.

n6 If a sideboom crane's pivot pin is not lubricated, it seizes up, putting the pin in a position where it can break and fall out. It was not uncommon for these pins to fall out, especially in terrain like that in the Wasatch area. It was undisputed that APC, not Kern River, was responsible for greasing these pins and maintaining the sideboom crane and its equipment. Prior to the accident, APC did not know these pins required lubrication.

[*17]

Kern River either requested or ordered APC to accelerate the Wasatch work schedule, and APC agreed. To meet the accelerated schedule, APC concentrated its workers and equipment in the Wasatch mountain area. Kern River knew of and condoned APC's mobilization efforts. APC decided to concentrate its resources at the location, at least in part, because it wanted to work for Kern River again. Kern River also paid APC about \$ 32 million extra for this change in schedule and work. APC faced possibly great financial loss if it did not complete the project in the time required. For example, Kern River could have fired APC, which could have put APC out of

business. APC also wanted to get along with Kern River to get repeat business.

The Erwins's safety expert testified this mobilization to the Wasatch area was in total disregard for safety. The expert also testified time pressures such as those experienced on spread two affect safety. The expert further stated the accelerated schedule deprived the Wasatch area crews of proper equipment. For example, dozers would have been available to do what Logan had been trying to do (incorrectly) with a sideboom crane had the work schedule not been accelerated. [*18] The expert thus concluded Kern River caused the accident, although he agreed Logan's negligence was also a cause.

Kern River had various supervisors and inspectors who periodically visited the project. It appears the inspectors's visits were to assure safety and workmanlike performance, as provided in the parties's contract. APC also had its own safety representative for the project. Any work problems were to be reported to APC's on-site foreman. APC's former vice president said APC did not expect Kern River to check daily on APC's equipment or to run its safety program; rather, it was APC's responsibility under the contract. APC had experience in building pipelines in the mountains. Its employees were experienced and trained in laying pipe. APC's former vice president said APC brought expertise to the project, expertise Kern River did not have.

The Erwins argue these facts show Kern River exercised economic pressure over APC, causing APC to rush work and compromise safety. Closely related is their argument that Kern River's acceleration of the work schedule set the stage for APC's unsafe work practices, which led to the accident. We examine these two theories of active participation [*19] together.

An independent contractor undoubtedly always has incentive to do that which its principal employer wants done, within the time it wants that done. Such economic pressure, which appears to exist here, is not tantamount to Kern River's directing or controlling the day-to-day manner of doing APC's work, or the means and methods by which the results were to be accomplished. *See and compare Dayton, 148 P. at 411-12.* Control of the overall schedule should not suffice. This is especially true where it is uncontested APC agreed to the accelerated schedule and the mobilization to the Wasatch area, and Kern River paid APC for this change. APC could have told Kern River it could or would not carry out its work under an accelerated schedule, but APC chose not to. While there was expert testimony the accelerated work schedule was unsafe, that it caused a shortage of equipment, and that this shortage may have led to Logan's using inappropriate equipment on the day of the accident, the record does not show Kern River

actively participated in anything other than the ultimate schedule. Indeed, under the contract and in practice, APC was responsible for providing workers and equipment [*20] regardless of the schedule.

The Erwins do not cite a case in which mere economic incentive or coercion, or the acceleration of a schedule, sufficed to show a principal's active participation. Neither have we found a Utah case so holding. In the absence of such a case, we find the general rule on active participation of *Dayton* and its progeny controlling. We hold any economic pressure Kern River may have exercised over APC, and its mere acceleration of the project's schedule, did not constitute the sort of active participation contemplated by the *Dayton* line of cases.

The Erwins also argue Kern River actively participated in the project by directing the construction of the Wasatch area right-of-way, the negligent design of which they say caused the accident. Kern River relies on the fact that, although Kern River was to provide the rights-of-way, APC agreed to have some restriction in the Wasatch area and did not request a broader one at the accident site. We find this persuasive. We also find persuasive that APC agreed to and was paid more for working under the accelerated schedule. Although APC advised Kern River of its mobilization in the Wasatch area, it was APC's responsibility [*21] to provide sufficient equipment and labor. The record further discloses Kern River's only involvement in APC's day-to-day activities (other than Kern River's safety and performance inspections) was its one-time involvement with the right-of-way.

Additionally, even if Kern River actively participated one time in the right-of-way's specifics, the injury did not directly result from this participation. *See Gleason, 74 P.2d at 1232; Dayton, 148 P. at 411.* The boom swung free after the pin holding it broke. It was undisputedly APC's responsibility to repair and maintain these pins and its other equipment. Under the contract and in practice, APC, not Kern River, furnished and supplied all tools, labor, and equipment for the work. Neither does anyone dispute that Logan should not have used a sideboom crane to do what he was doing when the crane's pin broke. No one from Kern River was present or directed the manner or means of APC's work at the time of the accident. There is no indication Kern River's inspectors knew APC was using sideboom cranes for this purpose. No one from Kern River advised Logan to use a sideboom crane, to back it down the hill after the pin fell out, or to [*22] do so without first ensuring everyone was clear. APC, not Kern River, made these daily decisions. The equipment's failure, and the negligent decision to use the crane and to back it down the hill

without clearing all workers, directly caused Shane Erwin's accident.

Accordingly, we overrule point of error one on this ground.

2. Nondelegable Duty: Inherently Dangerous Activity

Also in point of error one, the Erwins argue Kern River is liable because the project was inherently dangerous. See *Dayton*, 148 P. at 412. n7

We need not decide whether the project was inherently dangerous, because we find Shane Erwin was not within the class protected by the doctrine under Utah law.

n7 In addition to the facts set out above, the Erwins point to the undisputed testimony that the Wasatch area was the steepest, most dangerous, and roughest part of spread two. Kern River knew of the Wasatch mountains's steep and treacherous nature.

[HN10] Utah law recognizes a principal will be liable for injury caused to others [*23] by its contractor when the work it hires the contractor to perform is inherently dangerous and appropriate precautions are not taken. *Sullivan v. Utah Gas Serv. Co.*, 10 Utah 2d 359, 353 P.2d 465, 467 (Utah 1960) (in dicta, citing *RESTATEMENT (SECOND) OF TORTS* § 427 (1965)); *Gleason*, 74 P.2d at 1232; *Dayton*, 148 P. at 411. Whether the principal is liable to its contractor's employees under this "inherently dangerous" exception is another matter. Jurisdictions split on whether a contractor's employees fall within the protected class under this doctrine. See Francis M. Dougherty, Annotation, *Liability of Employer with Regard to Inherently Dangerous Work for Injuries to Employees of Independent Contractors*, 34 A.L.R. 4th 914 (1984). The Erwins claim Utah law applies the inherently dangerous exception to a contractor's employees; Kern River claims it does not.

Each party cites the *Dayton* decision and correctly notes it is the only Utah decision discussing the issue. In *Dayton*, the Utah Supreme Court addressed whether the principal employer was liable for its contractor's employee's injuries occurring during the blasting of an underground tunnel. [*24] *Id.* at 411-12. The court first cited various treatises and secondary sources for the general rule that liability attaches only where inherently dangerous work caused injury to "another" or "third persons." *Id.* at 412; see *RESTATEMENT (SECOND) OF TORTS* § 427 (1965). In dicta, the *Dayton* court elaborated as follows:

But it is said developing an underground tunnel by blasting is dangerous. Dangerous to whom? Here, only to those engaged in and about the work. So is feeding a threshing machine or working at sawmilling dangerous. An inexperienced employe, unguarded against attendant dangers and attempting such work, may possibly be injured. Who, if anyone, owes him duties of warning and protection? He who employed or directed or controlled him, or directed or controlled the threshing or sawing. Certainly not the farmer, who did no more than merely contract with the thresher to thresh his grain, or with the sawmiller to saw his timber . . .

Here, the stipulated work itself, constructing and developing the tunnel, did not involve injurious or mischievous consequences to others. And the injury to plaintiff was not caused from the act of performance, but from [*25] the manner of performance over which, as has been seen, the company neither reserved nor exercised direction, control, or supervision. We think, therefore, that the case comes within the general rule that [HN11] when a person employs a contractor to do work lawful in itself and involving no injurious consequences to others, and damage arises to another through the negligence of a contractor or his servants, the contractor, and not the employer, is liable.

Id. at 412. The *Dayton* court held that the principal had no liability because (1) the work was not inherently dangerous and (2) the manner of doing the work, over which the principal had no control, caused the accident, not the work's intrinsic nature. *Id.* at 412. However, we find the *Dayton* decision strongly indicates, by using the above-quoted language and by consistently speaking of danger "to others," the inherently dangerous exception would not extend to the contractor's employees. *Id.* at 412.

The Tenth Circuit Court of Appeals has, in dicta, interpreted *Dayton* similarly. See *Page*, 350 F.2d at 33-34. In *Page*, the district court had found the United States liable for injuries to a contractor's [*26] employee under the FTCA. *Id.* at 30. The district court had based its decision in part on its conclusion the work was inherently dangerous. *Id.* While noting Utah law did not apply, the district court had nonetheless stated it believed the government would be liable under Utah law, as expressed in *Restatement of Torts (Second)* section 427. n8

In reversing on other grounds, the *Page* court noted that *Dayton*, like the law in other jurisdictions, casted serious doubt on whether the doctrine applied to the contractor's employees. *Id.* at 33-34. The dicta in *Page* supports our interpretation of *Dayton*. See also *Sewell*, 606 F.2d at 279 (Doyle, J., dissenting) (quoting language from

unpublished opinion on first appeal that inherently dangerous exception likely does not apply to contractor's employees); *Eutsler*, 376 F.2d at 636 (finding, under federal law, no duty to contractor's employees for inherently dangerous work).

n8 Section 427 provides, "One who employs an independent contractor to do work involving 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 to such others by the contractor's failure to take reasonable precautions against such danger." *RESTATEMENT (SECOND) OF TORTS* § 427 (1965) (emphasis added).

[*27]

The Erwins rely on *Simon*, which in turn relied on *Dayton*, to conclude that an independent contractor's employee falls under the inherently dangerous doctrine. *Simon*, 699 F. Supp. at 259. The *Simon* court did not discuss the above-quoted language from *Dayton*, which we find actually undermines *Simon*'s conclusion. *Id.* Additionally, the *Simon* decision inadvertently misquoted *Dayton* by stating, "This is not to say that a principal can never be liable for injuries sustained by an employee of an independent contractor. The three recognized exceptions to this rule in Utah are" *Id.* (emphasis added). The *Dayton* court, however, had defined "this rule" as applying to "third persons" or "others." *Dayton*, 148 P. at 411, 412. The only other cases cited by *Simon* with respect to the inherently dangerous rule involved injury to a third person (*Wilson v. Good Humor Corp.*, 244 U.S. App. D.C. 298, 757 F.2d 1293, 1303 (D.C. Cir. 1985)), or held the inherently dangerous exception inapplicable to a contractor's employees (*Vagle v. Pickands Mather & Co.*, 611 F.2d 1212, 1217-19 (8th Cir. 1979)).

The *Dayton* decision indicates [*28] a contractor's employee does not fall under the protected class of Utah's inherently dangerous doctrine. While the *Simon* decision is to the contrary, we may not follow it when the Utah Supreme Court has indicated otherwise. Accordingly, we hold Utah would not recognize an employer's liability to its independent contractor's employee injured during the course of inherently dangerous work. Therefore, Kern River cannot be liable to Shane Erwin under this theory, and we overrule point of error one on this ground.

3. Assumed Duty of Care

Also under point of error one, the Erwins claim Kern River assumed a duty of care to Shane Erwin, which duty Kern River breached. They argue that Kern River expressly adopted a duty to APC's employees in an operation plan, entitled the Construction, Operation, and Maintenance Plan (COM Plan), Kern River devised for the project. The trial court excluded the COM Plan and testimony explaining it. If this document and testimony were properly excluded, the record contains no evidence to support Kern River's liability under this theory, and we must affirm point of error one. If this evidence was improperly excluded, precluding the record from [*29] containing evidence to support the Erwins's liability theory, a directed verdict would have been improper. Therefore, we first examine whether the COM Plan and the related testimony were properly excluded.

Exclusion of Evidence

In points of error two and three, the Erwins claim the trial court erred in excluding certain testimony and the COM Plan.

[HN12] The exclusion of evidence is committed to the trial court's sound discretion. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995); *Felker v. Petrolon, Inc.*, 929 S.W.2d 460, 467 (Tex. App.--Houston [1st Dist.] 1996, writ denied). For the exclusion of evidence to constitute reversible error, an appellant must show (1) the trial court committed error and (2) the error was reasonably calculated to cause, and probably did cause, rendition of an improper judgment. *McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992). This standard usually requires the complaining party to show that the judgment turns on the particular evidence excluded. *Alvarado*, 897 S.W.2d at 753-54; *Stuart v. Bayless*, 945 S.W.2d 131, 143 (Tex. App.--Houston [1st Dist.] 1996, no writ) (op. on rehearing). Accordingly, the exclusion [*30] of cumulative evidence is not reversible error. *Reina v. General Accident Fire & Life Assurance Co.*, 611 S.W.2d 415, 417 (Tex. 1981); *British Am. Ins. Co. v. Howerton*, 877 S.W.2d 347, 350 (Tex. App.--Houston [1st Dist.] 1994, writ dismissed by agr.). We review the entire record. *Alvarado*, 897 S.W.2d at 754.

COM Plan and Related Testimony

The resolution of the remainder of the Erwins's first point of error depends on whether the COM Plan and related testimony were correctly excluded. In point of error two, the Erwins argue the trial court improperly excluded the COM Plan and testimony relating to it.

Kern River had to adopt the COM Plan before federal governmental agencies would grant Kern River rights-of-way on federal land. See 43 U.S.C. § 1764(d) (1995); 36 C.F.R. § 251.54(e)(4) (1997); 43 C.F.R. § 2882.3(m) (1996). Kern River perceived the COM Plan

as a commitment or agreement with the governmental agencies granting Kern River permits. By its own terms, the COM Plan was drafted for the federal government principally to address environmental concerns.

The Erwins rely on the following COM Plan section to support their argument:

8.0 Safety [*31] Policies and Program

8.1 Purpose

The purpose of these policies and program is to provide minimum requirements that shall be followed by Kern River during construction operations. It is intended to provide for the safety and welfare of contractor employees, Kern River's personnel, and the general public.

8.2 Plan

8.2.1 Kern River shall be solely responsible for initiating, implementing, maintaining, and supervising all safety precautions and programs in connection with construction. This shall include employee safety training and prompt elimination of all unsafe physical and/or mechanical conditions. The contractors shall take any precautions necessary to ensure the safety of all proposed personnel and property.

The Erwins argue that Kern River assumed a duty to them under *Restatement of Torts (Second) section 323* by adopting section eight of the COM Plan. See *RESTATEMENT (SECOND) OF TORTS § 323* (1965).
n9

As is clear from the text and its own commentary, this section applies only to one undertaking a service to another. The Erwins claim Kern River assumed the following "services" to APC's employees, including Shane Erwin: [*32] (1) "to provide for the safety and welfare of *contractor employees*" (P 8.1) and (2) "[to] be solely responsible for initiating, implementing, maintaining, and supervising all safety precautions and programs in connection with construction" (P 8.2.1). However, the Erwins overlook paragraph 8.2.1's explanation for which "safety precautions and programs" Kern River took responsibility: "This shall include employee safety training and prompt elimination of all unsafe physical and/or mechanical conditions." The COM Plan then clearly provides that *contractors*, not Kern River, will be responsible for taking precautions to ensure the safety of all personnel, such as Shane Erwin. This was also APC's duty under article 17 of the parties's contract.

n9 "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm" *RESTATEMENT (SECOND) OF TORTS § 323* (1965). Utah has adopted *Restatement of Torts (Second) section 323*. See *Weber v. Springville*, 725 P.2d 1360, 1364 n. 7, n. 8 (Utah 1986); *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433, 436 (Utah 1983).

[*33]

Therefore, even if the COM Plan could somehow create a duty from Kern River to APC's employees, which we need not decide, no such duty was created here. The COM Plan was, therefore, irrelevant. Accordingly, the trial court did not err in excluding the evidence relating to the COM Plan. We overrule point of error two.

Because the COM Plan and related testimony were properly excluded, the record contains no evidence to support the Erwins's assumed duty argument. Accordingly, we overrule the final ground under point of error one.

Testimony of Pipeline's Cost

In point of error three, the Erwins contend the trial court erred in excluding the deposition testimony of Cuba Wadlington, Kern River's vice president, concerning the pipeline's cost, because they claim the testimony was relevant to show Kern River's motive to exercise improper control over the construction methods causing the accident. The excluded testimony was as follows:

Q: All right, sir. At the time that your company formed a partnership with Tenneco, which became Kern River Gas Transmission Company, what was generally the projected cost of the project to completion so that the gas could flow through [*34] the pipe, the entire project?

A: It seems to me that the cost of the pipeline was always somewhere in the neighborhood of 800 plus million dollars, was what we were looking at.

Q: All right, sir. Did you have . . . projections as to when that cost could be recovered, how long that might take?

A: Well, it was just -- it was really a function -- a function of the type of contracts that we entered into.

And at the time we were doing the feasibility study, we were looking at 20-year contracts with the intent of having out all of our capital recovered by the 20th year.

Q: Without needing to know the actual figures, did the project end up, ballpark, of what you expected, around 800 million, something like that?

A: Yes. The ultimate cost turned out to be 900 -- I think about \$ 980 million. But that was a very acceptable overrun for that size of a project.

The Erwins argued below this testimony was relevant because it showed Kern River's motivation for rushing the project: the sooner the project was done, the sooner Kern River could start moving gas through the pipeline. The Erwins argued that, based on the total project cost, one could deduce the monthly profits [*35] necessary to recover costs and the amount Kern River would lose if the project were delayed by a few months.

We have already held that Kern River's economic motivation for accelerating the project had no bearing on whether Kern River actively participated in the day-to-day details of APC's work. Therefore, the testimony was irrelevant. Additionally, while this testimony shows the overall project's cost, it does not, as the Erwins claim, state that specific, monthly profits from the pipeline's use are necessary to meet Kern River's economic needs. Further, Wadlington was not qualified as an economic

expert, and the excluded testimony did not consider economic factors other than customers's use of the pipeline that might allow Kern River to pay the pipeline's costs. Finally, the jury later heard testimony that whether the job was completed on schedule had an enormous impact on Kern River's economics. Therefore, the excluded testimony was cumulative of evidence already before the jury. *See Reina*, 611 S.W.2d at 417. We hold the trial court did not abuse its discretion, under these circumstances, in excluding this testimony. *See Alvarado*, 897 S.W.2d at 753.

We overrule point [*36] of error three.

Conclusion

We affirm the trial court's judgment.

/s/Michael H. Schneider

Chief Justice

Justices Taft and Bass n10 also sitting.

n10 The Honorable Sam H. Bass, retired Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

Opinion issued and judgment rendered

Exhibit 17

Daily Report

NY FORM 3220
February 1983

Project name
HIGHLAND 4 & 20 WARDS

Project number
550-3191

Generalization

HALES & WARNER CONSTRUCTION, INC.

Date Aug 5, 1999

mean weather temperature

Maximum weather left delay in

Precipitation

☐ **Basin**

❑ Snow

Spec. no.	Job	No. of men working	Description of work
01	Mobilization		Arch. Visit
	Demobilization & cleanup		1) Paul Signed Shippo for Approval on Fiberglass Panels.
02.	Demolition, site improvement		2) He Gave me the Grade Changes for S.W. Approach
	Landscape and irrigation		3) Plans Show Mezzanine Doors against the High wall
	Paving and surfacing		which conflicts w/ Ducts. Paul Instructed me to Move them to the other Side of Walkway.
03	Concrete		
04	Masonry and precast		
05	Rebar and mesh		
	Structural steel		
06	Rough carpentry	9	Framing East High wall.
	Finish carpentry		
07	Dampproofing, vapor barriers		Ken Eghert (Framer) is Concerned with the Manner Manner in which we want the Bldg Framed,
	Insulating		Leaving Sheer Wall Studs Long to Be Cut
	Shingles and roofing		after trusses are up for a More accurate
08	Doors and windows		cut. Brent Landels with with whom our Contract
	Finish hardware		is with (Framing) Told Ken he Shouldn't Do it
09	Plaster and drywall		Because of Extra Labor Cost. At My Request
	Acoustic tile		Ken is Brady (another Framer who Always
	Resilient and hardwood flooring		Does his Church Framing this way) Met to Discuss
	Painting and caulking		this method of Framing. I Ken & I Also Went
1	Specialties		up to a Church with the Same Floor Plan
	Carpet		Directly North of us to see the Framing of it.
	Tower		Ken is Proceeding as we have Requested until
	Sound system		Final Decision from Brent Landels is given.
	HVAC		
	HVAC controls		
	Pumbing		
	Electrical		

30

30

EVANS

Director: Managerial & Financial

Exhibit 18

1 Q Thank you. And that's for what part of the
2 Highland project?

3 A The rough framing.

4 Q And how much is that proposal?

5 A \$156,000.

6 Q Does it include anything other than the rough
7 framing?

8 A It talks about them installing framing
9 anchors, nails, framing hardware, things like that.

10 Q All connected with framing; is that correct?

11 A Yes.

12 Q Does it have any provision there about timing?

13 A This is not a very good copy of that.

14 Q I understand, but it's the one that was given
15 to us.

16 A I don't think it does say anything about
17 timing.

18 MR. MORIARITY: If counsel has a better copy,
19 and you have an opportunity, we'd appreciate it, but
20 it's --

21 MR. DAVENPORT: Off the record. That's what
22 I've got. I don't have a better one either.

23 MR. MORIARITY: I figured as much. It

24 appeared that it must have been folded or something and
25 come that way. Thank you very much.

29

1 Q (BY MR. MORIARITY) You heard Maurice Egbert
2 testify regarding representations of a seven-week
3 completion time and number of framers on the job when
4 you were here this morning or earlier today, did you
5 not?

6 A Yes.

7 Q Do you know where that came from?

8 A The seven-week process?

9 Q Yes.

10 A I believe we would have established a schedule
11 for the project. It would have come from that schedule.

12 Q Established by whom, the seven-week
13 scheduling?

14 A Probably Joel.

15 Q Okay. And the number of framers on the job,
16 who would that have come from?

17 A Are you talking about the letter, one of those
18 letters that was -- said that he promised 12 or --

19 Q Yes. Let me show you that letter, if it will
20 help refresh your memory. I'm not talking about that
21 letter specifically, sir, but here's what -- Exhibit 16.

Exhibit 19

1 Q So did you actually know how to frame?
 2 A No. I'd never framed a building before.
 3 Q Okay. So your experience in carpentry
 4 consisted of?
 5 A I knew how to use the saw. I knew how to use
 6 the hammer. I didn't know how to frame, though.
 7 Q And you were hired?
 8 A Yeah.
 9 Q How much money did you make?
 10 A I want to say eight. I believe eight bucks an
 11 hour.
 12 Q If you remember.
 13 A I think it was eight.
 14 Q And did Mr. Egbert or anyone else train you
 15 after you got hired, before you started working on the
 16 church?
 17 A As we were working. It was kind of an
 18 on-the-job training.
 19 Q And what sort of training did you receive?
 20 A When I was doing something wrong, somebody
 21 would tell me. Pretty much that was it.
 22 Q Who would tell you?
 23 A Just one of the more experienced framers.
 24 Sometimes -- Ken Egbert really wasn't there very much,
 25 so . . .

1 Q Who else did you work with?
 2 A Just the crew, Ken Egbert's crew.
 3 Q Ken Egbert's crew, and who else did you say?
 4 A Maurice Smith, I think was his name, was the
 5 general contractor. Maurice something. I don't
 6 remember his last name.
 7 Q We can call him Maurice. And that was who?
 8 A He was the general contractor.
 9 Q And what, if any, instructions did he give
 10 you?
 11 A Really nothing. I mean, it was pretty much
 12 on-the-job training. I remember, you know, they came
 13 out and they would say, Look, here's an easier way to do
 14 it. You can do it like this. And they would show me.
 15 Q Who would show you?
 16 A Any one of the more experienced people that
 17 worked there.
 18 Q Did Maurice ever show you how to do anything?
 19 A No.
 20 Q Did he ever tell you what to do?
 21 A Well, actually that's not true, I better take
 22 that back. There was -- I think it was my first or
 23 second day, and we were -- there was like three of us
 24 there standing a wall. I think it was like me and
 25 Maurice and Ken. Oh, and another guy. I don't remember

1 his name. And he told me -- they taught me -- they just
 2 showed me how to raise the wall.
 3 MR. DAVENPORT: Are you saying Maurice Egbert,
 4 the general contractor, or are you saying --
 5 THE WITNESS: Well, Ken Egbert was actually
 6 telling me to do it, but Maurice was there. I think he
 7 was in the trailer or something. I don't know where he
 8 was.
 9 MR. DAVENPORT: There's a big difference
 10 between --
 11 THE WITNESS: Okay, sorry.
 12 Q (BY MR. BADARUDDIN) I'm just asking you, what
 13 did Maurice, if anything, tell you to do?
 14 MR. DAVENPORT: Keep in mind, distinguish Ken
 15 Egbert and Maurice.
 16 THE WITNESS: Really, nothing. Honestly, I
 17 never talked to Maurice more than one or two words, more
 18 than, you know, if I needed to ask him a question or
 19 something. I never really talked to him very much.
 20 Q (BY MR. BADARUDDIN) Did he ever tell you you
 21 were doing something wrong and to stop it?
 22 A No. That would more be the other framers.
 23 Q Who showed you how to raise a wall?
 24 A Ken Egbert.
 25 Q Okay.

1 A He taught me the proper way, you know, how to
 2 stand when you're holding the wall. You don't want to
 3 stand right up to it. You've got to put your foot back,
 4 you know, be ready to brace it, and bail if it goes out
 5 of the way.
 6 Q Okay.
 7 A That's what he told me.
 8 Q Do you remember Jason Smith?
 9 A Yes.
 10 Q How did you know Jason Smith?
 11 A He had been working there for maybe like two
 12 or three days. Just a couple of days.
 13 Q Did he get trained along with you?
 14 A No. He started after I did.
 15 Q And what, if anything, did he do, if you know
 16 what he did?
 17 A He was the same as I was; he was a laborer.
 18 Q And he worked for who?
 19 A He worked for Ken Egbert.
 20 Q And did you have any supervisors when you
 21 worked with Ken Egbert?
 22 A Oh, man. We had -- there was Ken, and I guess
 23 one of the other supervisors, his name was Manny. And
 24 then there was this guy named Dale. And they were
 25 always fighting with each other.

1 Q How, if at all, did they supervise you?
 2 A Like I said, if I was doing something wrong,
 3 you know, if I was cutting a board wrong, they'd come
 4 tell me.
 5 Q How did you know what boards to cut or what
 6 walls to build?
 7 A They would tell me. See, usually what I would
 8 do is, I would cut the boards for them, and they would
 9 actually put the boards together, because I was just
 10 learning. That's kind of how it goes when you're in
 11 that business.
 12 Q And so you would cut the boards. They would
 13 assemble the wall?
 14 A They'd say, I need 10 boards at 82 and a half
 15 inches or whatever, so I'd go cut 10 boards and bring
 16 them over to them. Sometimes I would assemble the wall.
 17 Q How did you know how to assemble a wall?
 18 A I was taught how.
 19 Q By?
 20 A By Manny.
 21 Q Do you know if Jason assembled any walls?
 22 A You know, I think from most of what I saw him
 23 doing, he did mostly cutting.
 24 Q Okay. Did you stand up any walls?
 25 A Oh, yeah. A lot of walls.

1 Q Who told you how to stand up a wall?
 2 A Ken Egbert.
 3 Q And how do you stand up a wall?
 4 A Well, you -- just depending on the size of the
 5 wall. Sometimes, if the wall was a real big wall, we
 6 would use the forklift, and they'd suspend like tow
 7 straps to the top of the wall and raise the wall with a
 8 forklift. But if it was a smaller wall that we could
 9 lift ourselves, we would stand it. Someone else would
 10 go around and position the wall into the bolts. You
 11 know, sometimes they'd use a board and jack underneath
 12 it to lift the wall up onto the bolts if it wasn't quite
 13 on there. You know, there would always be people
 14 raising the wall.
 15 And then once the wall was up, you put an
 16 A-frame on it. Once you have it down on the bolts, then
 17 you put an A-frame and a brace on it.
 18 Q But not before?
 19 A No.
 20 Q Okay. Do you know who Brent Reynolds is?
 21 A No. I recognize the name from the legal
 22 papers, but that's it.
 23 Q But you don't know how, if at all, he was
 24 involved in the framing process?
 25 A No.

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

1 Jason, he tried to catch it, and he kind of crouched
 2 down. I don't know if he was trying to catch it or
 3 what, it just came down on him.
 4 And they lifted the wall up, and Jason was
 5 just laying there. There was already a puddle of blood
 6 around his head like this. At first, I didn't know it
 7 was going to be serious. I thought he was knocked out
 8 or something, but I saw the blood.
 9 And we started yelling for help, and Maurice
 10 came out of the trailer, and the other guys, everyone
 11 else was working on the east -- yeah, the east side of
 12 the church, and there was a big wall already built on
 13 that side, so they couldn't really see into the church.
 14 I don't know if you guys have been out there
 15 and seen the site or anything, but it's more on the west
 16 side of the church where it happened.
 17 Q Okay.
 18 A So they all came running over from there, and
 19 Maurice got his cell phone, called the police, fire
 20 department.
 21 Q And an ambulance came?
 22 A Yeah. And some guy came that -- I guess he
 23 had a scanner or something. He was just a doctor. He
 24 was driving by, so he stopped. He got there way before
 25 the ambulance did.

1 Q The wall you were lifting, how big was it?
 2 A Maybe like -- I mean, it wasn't that big.
 3 Maybe like six feet long, eight feet long, probably like
 4 eight feet high.
 5 Q Do you know how heavy it was?
 6 A It was heavy. Heavy. I mean the three of us,
 7 it took the three of us really trying to lift it. It
 8 was made out of LVL.
 9 Q LVL?
 10 A It's a synthetic wood. It's much heavier.
 11 Q Do you have an opinion as to whether or not
 12 you needed more men to lift that wall than you had?
 13 A Honestly, I don't think so. I mean, because I
 14 framed for quite -- for like two years after that, and I
 15 would say no.
 16 Q Do you know what, if anything, Jason did
 17 wrong?
 18 A He should have bailed. He should not have
 19 tried to catch the wall. He should have bailed out to
 20 the side.
 21 Q And let the wall fall down?
 22 A Yeah.
 23 Q And did you have an opportunity to bail or not
 24 bail?
 25 A I was on the other side of the wall. I wasn't

1 commercial site, make sure you're wearing your hard
 2 hats, just stuff like that.
 3 Q How many days were you on the crew before the
 4 accident happened?
 5 A You know, probably about a month.
 6 Q Okay.
 7 A We'd been working on it for quite a while.
 8 Maybe not quite a month, but for a few weeks, at least.
 9 Q Do you know how many men were on your crew,
 10 men or women?
 11 A At the time of the accident?
 12 Q Prior to the accident.
 13 Well, you said you were working on the crew
 14 for some time prior to August 13; correct?
 15 A Yes.
 16 Q August 13, 1999 --
 17 A It was always changing. Guys were coming and
 18 going. Ken would get new guys in. He'd hire -- a bunch
 19 of temp workers would come in for like a week or so and
 20 leave.
 21 Q Were you there from the beginning?
 22 A Yeah, I was there from --
 23 Q So approximately your first day at work, how
 24 many men were on the crew?
 25 A My first day at work, it was just me and Manny

1 on the side that fell.
 2 Q And how did you know to bail when the
 3 circumstances called for it?
 4 A That was pretty much the first thing Ken
 5 Egbert told me when we were putting the wall up. He
 6 said, If anything happens, if it starts to go, don't
 7 worry about the wall, we can always rebuild the wall,
 8 just get out of the way, let it fall.
 9 Q And do you know if Jason received those same
 10 instructions?
 11 A I don't. I don't know if he did or I don't
 12 know if he didn't.
 13 Q Well, he wasn't present when you received
 14 them?
 15 A No.
 16 Q Did you receive any safety instruction or
 17 training?
 18 A Not really. I mean, I think I remember a
 19 couple of safety meetings, but that was before Jason was
 20 ever on the crew. He was only on the crew for two or
 21 three days.
 22 Q You remember attending safety meetings before
 23 Jason was on the crew?
 24 A Yeah, I think so. And the safety meetings was
 25 just, Okay, we have to wear hard hats, this is a

1 and one other guy, one other kid that Ken had hired to
 2 be a laborer.
 3 Q Do you remember his name?
 4 A I don't remember the kid's name.
 5 Q Do you know whether it was Jose?
 6 A No, it wasn't Jose.
 7 Q And then at some point in time, Jason was
 8 hired on?
 9 A Yeah. I think because like his uncle worked
 10 on there or something. I'm not sure.
 11 Q Do you know how many men were on the crew by
 12 the time Jason was hired on?
 13 A There was probably like 15 or 20. I don't
 14 know an exact number, I couldn't give you that, but an
 15 estimate, 15, 20.
 16 Q Okay. Did you wear a hard hat when you were
 17 working for Egbert Construction doing the framing?
 18 A Most of the time.
 19 Q Were you wearing one on August 13?
 20 A No, I wasn't.
 21 Q Do you know if Jason was wearing one?
 22 A No, he wasn't.
 23 Q Did you own one prior to August 13?
 24 A Yes. Most of the time they really didn't
 25 enforce it. Most of the time they made you wear a hard

1 hat if you were working under somebody that was working
2 above you or something.

3 Q So it was at your option whether or not you
4 were going to wear a hard hat?

5 A Well, we were told to wear them all the time,
6 but, you know, I mean, they're not there to babysit us,
7 so . . .

8 Q Right. Did you wear any other -- I call it
9 protective gear, but anything like a hard hat?

10 A Just a hard hat.

11 Q Goggles, gloves, steel-toed boots?

12 A Yeah, I did wear -- we had to have safety
13 glasses.

14 Q And you wore those?

15 A Yes.

16 Q Do you know if you were wearing them on the
17 13th?

18 A Probably. I wore them every day, because they
19 were my sunglasses. It got way too bright out there
20 without them.

21 Q Now, you were mentioning some documents you
22 signed -- before we got started.

23 A Yeah, I believe so.

24 Q Well there's an affidavit of Michael Lewis and
25 then there's a second affidavit of Michael Lewis. We

1 supposed to know? I don't know the legal part of it.

2 Q Okay. Well, why did you sign the affidavit?

3 A I don't know. At the time I thought it
4 sounded like a good idea.

5 Q All right.

6 A It just got on my conscience. You know, I
7 would be reading it over and just thinking about it. It
8 was just something that was eating away at me.

9 Q All right. Is there any other portion of that
10 Exhibit 40 that maybe you have some second thoughts
11 about?

12 A No.

13 Q Okay. And can you take a look at Exhibit 41?

14 A Is this the same one?

15 Q It's different. It doesn't have your
16 signature, but it's identical to the one that does.

17 MR. DAVENPORT: Is that the second affidavit?

18 MR. BADARUDDIN: Of Michael Lewis, correct.

19 MR. DAVENPORT: Actually, there's one that has
20 your signature.

21 THE WITNESS: Yeah, I remember you guys coming
22 out twice, I think.

23 MR. DAVENPORT: Well, one's related to Hales &
24 Warner and one is related to the Church of Jesus Christ
25 of Latter-day Saints, and the second one was prepared by

1 can mark them, and then I'll ask you about them.

2 (Exhibit No. 40 and 41 were marked for
3 identification.)

4 Q (BY MR. BADARUDDIN) Take a look at
5 Exhibits 40 and 41.

6 A Yeah, I've seen this one.

7 Q Well, they're pretty similar.

8 A The only one I was a little concerned about
9 was No. 9, when it says, "In my opinion, Hales & Warner
0 Construction, Inc., including Maurice Egbert, were not
1 in any way at fault in the accident involving Jason
2 Smith."

3 I just -- I've been feeling uncomfortable
4 making a judgment on that call, because I'm not a judge.
5 I don't know the legal proceedings of it. I don't know,
6 I just don't feel comfortable.

7 Q I smile, because that's more or less what the
8 judge said, at least as I can recall.

9 What, if anything, would you like to alter or
0 edit or change about No. 9?

1 A I was just thinking, if you could take it out,
2 it would be all right with me.

3 Q Do you know whether or not Hales & Warner was
4 at fault in the death of Jason Smith?

5 A I'm -- like I say, I'm not a judge. How am I

1 the Church attorney.

2 THE WITNESS: Okay. Is it pretty much the
3 same?

4 Q (BY MR. BADARUDDIN) It's a little different.

5 A Where are the differences?

6 Q Well, let me take a look at it. You're
7 welcome to read along. It looks like paragraph 8 is a
8 little different, and then there's a completely new 9.

9 Why don't you tell me whether you still stand
10 by the allegations in paragraphs 8 and 9.

11 A Okay.

12 MR. DAVENPORT: Is this of the second
13 affidavit?

14 MR. BADARUDDIN: Correct, Exhibit 41.

15 THE WITNESS: Well, eight, I would have to say
16 that sounds good, because I've never even met Dean
17 Schick.

18 Q (BY MR. BADARUDDIN) Okay.

19 A They had no control over any of that. No. 9,
20 you know, I guess that's the same thing. I'm not a
21 judge, but on the other hand, logic says to me, It's
22 just a person, how can they be responsible? You know
23 what I mean? Yeah, it was their building. But I don't
24 know. That's just -- like I say, it's not my position,
25 I guess, to make the call, because I don't know the law.

1 But I don't know. It just doesn't sound -- it sounds
2 like quite a stretch trying to blame the Church for it,
3 to be honest with you.

4 Q Let me just ask you this. You're not swearing
5 to paragraph 9 at this time, are you?

6 A No.

7 Q You don't really have an opinion with regard
8 to whether or not the Church is or is not at fault?

9 A Well, my opinion is that they're not, but
10 my -- is my opinion credible? No. That's what I'm
11 saying here.

12 Q All right. And then what does paragraph 8
13 say?

14 Paragraph 8, you don't know who Dean Schick
15 is?

16 A No. I've never even met him or --

17 Q Do you know who Paul Evans is?

18 A No.

19 Q Do you know whether or not he gave you or Ken
20 Egbert or Brent Reynolds any instructions?

21 A I never even talked to anybody from the
22 Church. The only time I talked to anybody from the
23 Church was the stake president that was going to be over
24 the building. That was at Jason's funeral.

25 Q What did y'all talk about then?

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

3 A It's okay, I understand that.

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

8 You understand that?

9 A Yeah, I understand that.

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

19 A Yes, that's right.

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

23 A Yeah.

24 Q Okay.

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

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

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

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

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

9 A No.

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

12 A No. I never personally, no.

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

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

17 MR. BADARUDDIN: That's all right.

18 MR. DAVENPORT: I've got some.

19 EXAMINATION

20 BY MR. DAVENPORT:

1 Q Do you want me to call you Mr. Lewis or
2 Michael or Mike or what?

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

4 Q Mike, I'm going to probably ask you some of
5 the same type of questions, but I just want to make sure

1 taught Jason Smith how to do anything.

2 Q Okay.

3 A That's the problem I've got. It might be a
4 problem. I don't know who's at fault. Like I say, I'm
5 not the person to make that call, but the only training
6 he had as far as raising a wall was, we were raising a
7 wall and he wasn't doing it right, and he was just
8 coming over to help, and he was just standing right next
9 to it, he wasn't holding onto it that well. He didn't
10 have his foot out to brace in case it came back. One of
11 the other framers said to him, Hey, you know, you should
12 kick your other foot back and brace yourself, hold the
13 wall, you know. As far as I know, that's all the
14 training he had.

15 Q Okay. And Maurice Egbert's testimony was -- I
16 think this is consistent with what you already said
17 today, is that at the time of the accident, he was in
18 the construction trailer.

19 A Yes.

20 Q That's your understanding, also?

21 A Yeah, that's where I think he was.

22 Q And you had previously indicated that the
23 initial stages of this job, as it relates to the
24 starting of the rough carpentry work, you were there
25 from the beginning; correct?

1 problem as it relates to a particular wall, wherein your
2 supervisors went and talked to Maurice Egbert, and if
3 so, did you hear what they had to say?

4 A Well, I don't know any particular incident,
5 but I mean, it's --

6 Q I'm not asking you to say, well, you're sure
7 it happened. I want to know just what you actually
8 heard someone do.

9 A No, I never saw it happen, no. That's not
10 true, because they were always talking to each other.
11 That's part of the construction site. You know, the
12 general tells the subcontractor, the lead framer, Bruce
13 Lemmon, Maurice would tell him, Okay, we need to get
14 this done today. And then Bruce would hand the orders
15 down to us.

16 Q I guess what I'm saying is, I just wanted to
17 be clear as to what you actually heard versus what
18 you're just assuming, because you saw someone talking?

19 A I couldn't even tell you how many times I saw
20 them talking, but I don't listen to their conversations,
21 so I can't tell you what was said.

22 MR. DAVENPORT: That's what I'm getting at.
23 Thank you.

24 MR. BADARUDDIN: Nothing. Thanks for your
25 time and trouble.

1 (Deposition concluded at 5:07 p.m.)
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CERTIFICATE
STATE OF UTAH)

COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the deposition of
MICHAEL LEWIS, the witness in the foregoing deposition
named, was taken before me, VIKI E. HATTON, a Certified
Shorthand Reporter, Registered Professional Reporter and
Notary Public in and for the State of Utah, residing at
Salt Lake City, Utah.

That the said witness was by me, before
examination, duly sworn to testify the truth, the whole
truth and nothing but the truth in said cause.

That the testimony of said witness was
reported by me in Stenotype and thereafter caused by me
to be transcribed into typewriting, and that a full,
true and correct transcription of said testimony so
taken and transcribed is set forth in the foregoing
pages numbered from 4 through 55, inclusive, and said
witness deposed and said as in the foregoing annexed
deposition.

I further certify that after the said
deposition was transcribed, the original of same was
delivered to Mr. Lewis, the witness, for reading and
signature, signed before a Notary Public, and to be
returned to me for filing with the Clerk of the said
Court.

I further certify that I am not of kin or
otherwise associated with any of the parties to said
cause of action, and that I am not interested in the
events thereof.

WITNESS MY HAND and official seal at Salt Lake
City, Utah, this 10th day of March, 2003.

VIKI E. HATTON, C.S.R., R.P.R.
Utah License No. 93

My Commission Expires:
June 9, 2006

Exhibit 20

Restatement (Second) of Torts § 414 (1965)

Restatement of the Law -- Torts
 Restatement (Second) of Torts
 Current through June 2003
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Division 2. Negligence
 Chapter 15. Liability Of An Employer Of An Independent Contractor
 Topic 1. Harm Caused By Fault Of Employers Of Independent Contractors

§ 414. Negligence In Exercising Control Retained By Employer

[Link to Case Citations](#)

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

See Reporter's Notes.

Comment:

a. If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.

b. The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so.

c. In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.