

1993

Kenny Jim Shaw v. Layton Construction Co. : Brief of Appellee

Utah Court of Appeals

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COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

KENNY JIM SHAW,

Plaintiff/Appellant,

vs.

LAYTON CONSTRUCTION COMPANY, INC.,
a Utah corporation, STEEL DECK
ERECTORS, INC., a Utah corporation,
a Utah corporation, and
JOHN DOES A to Z,

Defendants/Appellees

Case No. 930475-CA

LAYTON CONSTRUCTION COMPANY, INC.,

Third-party Plaintiff,

vs.

BILT-RITE CONCRETE, INC., a Nevada
corporation; I. CHRISTENSEN INC.,
a Nevada corporation or partnership;
HARV & HIGHAM MASONRY, a Utah
corporation; and TECH STEEL, a
Utah corporation,

Third-party Defendant.

BRIEF OF APPELLEE

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, THE HONORABLE PAT B. BRIAN, JUDGE

FILED

OCT 13 1993

COURT OF APPEALS

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STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal pursuant to Section 78-2-2(3)(j) of Utah Code Annotated and Rule 3 of the Utah Rules of Appellate Procedure.

ISSUES PRESENTED

I. In a tort action, do Utah Courts follow the doctrine of Lex Loci Delicti where the injury occurred out of state?

II. If Utah does follow the doctrine of Lex Loci Delicti, does Utah's Worker's Compensation Act provide an exception to this rule?

III. If Utah does not follow the doctrine of Lex Loci Delicti, is plaintiff's action still barred under the substantial contacts or interests rule?

STANDARD OF REVIEW

The standard of review on appeal is to review the trial court's conclusion of law for correctness. Mountain Fuel Supply v. Salt Lake City, 752 P.2d 884 (Utah 1988).

DETERMINATIVE STATUTORY PROVISIONS

1. Nevada Revised Statutes, Section 616.270 (1986).
(attached as Exhibit "A")

2. Nevada Revised Statutes, Section 616.085 (1986).
(attached as Exhibit "B")

3. Nevada Revised Statutes, Section 616.260(1), (3) (1986).
(attached as Exhibit "C")

4. Utah Code Annotated, Section 35-1-62, 1953 as amended.
(attached as Exhibit "D")

5. Utah Code Annotated, Section 35-1-54, 1953 as amended.
(attached as Exhibit "E")

6. Utah Code Annotated, Section 35-1-44, 1953 as amended.
(attached as Exhibit "F")

STATEMENT OF THE CASE

A. Nature of the case:

This action was brought by plaintiff under common-law tort principles, for personal injuries he sustained while working on a construction project in Nevada. Contrary to plaintiff's assertion and record citation, this action was not brought pursuant to Utah Code Annotated, Section 35-1-62.

The owner of the project was the state of Nevada. The alleged negligent act occurred in Nevada. The injury occurred in Nevada. Nevada was the center of the parties' relationship. At least one of the subcontractors, a third-party defendant, was a Nevada corporation. See R. 40, 106.

B. Proceedings below:

This is an appeal from final orders of the Third Judicial District Court in and for Salt Lake County, State of Utah, before the Honorable Pat B. Brian, District Court Judge, dated November 26, 1991 granting Layton's Motion to Dismiss and Steel Deck's Motion for Summary Judgment which were docketed with the Clerk of the District Court of Salt Lake County, State of Utah on or about the same date, and from all Rulings and Orders of that court affecting or pertaining to the rights claimed and asserted by the plaintiff (R. 321-325; 326-329).

Defendants Layton and Steel Deck are the only defendants who have been served and who have entered an appearance in this matter. Defendant, Bilt-Rite Concrete, Inc. (named in the Complaint as Built-Right Concrete, Inc.) is a Nevada corporation. It has been served and entered an appearance as a third-party defendant in the underlying third-party action brought by Layton against the subcontractors involved. (R. 39-76; 86-87A; 105-110). I. Christensen, Inc., a Nevada company, is believed to be the successor corporation of Bilt-Rite Concrete. Harv and Higham, plaintiff's employer, has been named as a third-party defendant but is not a party to this appeal. Tech Steel, also a third-party defendant, is a Utah corporation.

Hearing on Layton's Motion to Dismiss and Steel Deck's Motion for Summary Judgment was held before the Honorable Pat B. Brian, Third District Court Judge, on November 8, 1991. Prior to the hearing, Layton and Steel Deck submitted memoranda in support of their respective motions. Shaw submitted memoranda in opposition to each of the motions. The court permitted oral argument and thereafter issued its Memorandum Decision, containing its Findings of Fact, Conclusions of Law and its Order dated November 26, 1991 granting both Motions and dismissing Plaintiff's Complaint (R. 110-120A; 121-138; 139-149; 165-174; 193-194; 195-237; 242-254; 256-272; 321-329).

This matter was previously on appeal as evidenced by a Notice of Appeal filed December 26, 1991 (R. 345-46). This court, on its own motion, dismissed that appeal on the grounds that the plaintiff-appellant had not obtained certification of the Orders of dismissal as final judgments as required by Rule 54(b) of the Utah Rules of Civil Procedure. As a result, that appeal (Case No. 920685-CA) was dismissed without prejudice.

Based on a motion and stipulation, the parties to this matter obtained a certification from the trial court as required by Rule 54(b) which was dated July 8, 1993. A Notice of Appeal was filed by the plaintiff with the Third Judicial District Court in and for Salt Lake County, State of Utah on July 20, 1993. This case is now

before this court for consideration of the issues raised by that appeal.

STATEMENT OF FACTS

1. Plaintiff claims he was injured in a construction accident while working on a project to build a Nevada state penitentiary in Ely, Nevada. (R. 122).

2. At the time of the accident, the plaintiff was employed as a brick-layer for Harv & Higham Masonry, a sub-contractor on the project. Id.

3. Defendant Layton Construction Company was the general contractor on the project pursuant to a contract with the State of Nevada. Id.

4. Defendant Layton Construction had entered into a subcontract with Harv & Higham Masonry to perform "all masonry work" on said penitentiary for the consideration of One Million One Hundred and Fifteen Thousand Dollars. Id.

5. As a result of his accident, plaintiff claimed and was paid worker's compensation benefits under Utah's Worker's Compensation Act. (R. 142).

6. The State of Nevada was the owner of the \$17 million dollar construction project and entered into a contract with the General Contractor, Layton Construction Company. (R. 140).

7. All of the alleged acts which give rise to plaintiff's tort cause of action occurred exclusively at Ely, Nevada. (R. 13).

8. Plaintiff purposefully chose to work for Harv & Higham in Nevada even though he could have worked for that company in Salt Lake City, Ogden, or Orem, Utah. (R. 377).

9. By working in Nevada rather than Utah, plaintiff received substantially more money. (R. 378).

10. In order to earn this higher income, plaintiff joined a Nevada union in Reno, Nevada. (R. 378).

11. In each subcontract entered between Layton Construction and its subcontractors, Layton Construction required all subcontractors to provide worker's compensation insurance for their employees while working in the State of Nevada. (R. 45), 50 and 55).

12. At least one of the subcontractors at the project, Bilt-Rite Concrete, Inc., was a Nevada company. (R. 40, 106).

SUMMARY OF ARGUMENT

Plaintiff filed his complaint in Utah as a tort cause of action for personal injuries he received while working in Nevada. Utah courts apply the doctrine of Lex Loci Delicti in determining which state's laws should apply to plaintiff's accident. Under that doctrine, Nevada law bars plaintiff's suit because Layton

Construction Company is considered his statutory employer and, therefore, is immune from suit.

Utah's Worker's Compensation Act, which provides that employees hired in Utah but injured out of state are entitled to receive "compensation" under Utah law, applies only to worker's compensation benefits. That statutory provision, however, does not create a right for the employee to maintain common-law tort action against his employer.

Even if this court were to adopt plaintiff's "substantial contacts" or "interests" approach, the result would be the same. In this case, it is undisputed that the plaintiff's accident occurred in Nevada. The alleged negligent act causing those injuries also occurred in Nevada. The plaintiff purposefully availed himself of the benefits found in Nevada by choosing to leave his job in Utah and to go to Nevada to earn more money. More importantly, the State of Nevada was the owner of the construction project and had entered into a contract with Layton Construction Company to build a state penitentiary in Ely, Nevada. Additionally, at least one of the subcontractors, Bilt-Rite Concrete, was a Nevada company. Nevada, therefore, clearly has the most substantial contacts and the most interest in seeing its laws applied.

Finally, plaintiff has inappropriately raised a constitutional issue. This issue, however, is precluded by the general rule that constitutional equal protection issues raised for the first time on appeal cannot be considered by the appellate court unless they pertain to a person's loss of liberty. As such, this court cannot consider plaintiff's equal protection argument.

ARGUMENT

I. BECAUSE UTAH APPLIES THE RULE OF LEX LOCI DELICTI, NEVADA LAW APPLIES TO PLAINTIFF'S TORT ACTION.

On December 28, 1990, plaintiff filed his complaint against Layton Construction Company, alleging that Layton's Negligence caused plaintiff to suffer personal injuries. Although plaintiff's action was filed in Utah, the accident giving rise to the complaint occurred in Nevada. The issue, therefore, is which state's law should apply to the plaintiff's cause of action.

In determining which state's law will apply, the conflict of laws rules of the forum state are determinative. Klaxom v. Stentor Electric Mfg. Co., 313 U.S. 487, 491, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). As this case was filed in Utah, Utah's conflict of law rules apply. See Buhler v. Maddison, 176 P.2d 118, 109 Utah 267 (1947).

When faced with a tort claim where the injury occurs outside the state, Utah courts apply the law of the state of injury,

otherwise known as the rule of lex loci delicti. Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir. 1978); Valasquez v. Greyhound Lines, Inc., 366 P.2d 989, 12 Utah 2d 379 (1961) (overruled on other grounds) (671 P.2d 217). Under the lex loci doctrine, the forum state will apply the law of the state of the injury to determine plaintiff's ability to maintain his tort suit. Accordingly, as the accident occurred in Nevada, plaintiff's claim for personal injuries in this matter is governed by Nevada law.

Under Nevada law, employers are immune from common-law liability for injuries suffered by their employees arising out of and in the course of employment. Nev. Rev. Stat. § 616.270 (1986). (attached as Exhibit "A"). Nevada law also provides that all subcontractors and their employees are deemed to be employees of the principal contractor. Nev. Rev. Stat. § 616.085 (Supp. 1989) (attached as Exhibit "B"). Accordingly, under Nevada law, plaintiff is deemed to be an employee of Layton Construction, the general contractor. Titanium Metals Corp. of America v. Eighth Judicial Dist. Court, 349 P.2d 444, 76 Nev. 72 (1960).¹ Therefore,

¹ Although Nevada law provides an exception to this rule in the case of employees hired outside of the state who are temporarily within the state, this exception does not apply to employees of a contractor on a project whose cost as a whole exceeds \$250,000. Nevada Revised Statute § 616.260(1); 616.260(3) (attached as Exhibit "C"). Because the cost of the construction project in Nevada was approximately \$17,000,000, this exception does not apply.

as the employer of plaintiff, Layton Construction is shielded from common-law tort liability for plaintiff's personal injuries incurred in the course and scope of his employment.

II. THE LEX LOCI DELICTI RULE FOLLOWED BY UTAH COURTS IS NOT AFFECTED BY THE PROVISION OF UTAH'S WORKER'S COMPENSATION ACT WHICH ALLOWS AN EMPLOYEE TO OBTAIN "COMPENSATION" FOR HIS OUT-OF-STATE INJURY.

In order to avoid the effect of Utah's adherence to the rule of lex loci delicti, plaintiff has repeatedly attempted to recast the issue in this case as being a worker's compensation conflict of law question. Although probably irrelevant, plaintiff has gone so far as to misstate in his Statement of Facts that he filed this action for negligence "pursuant to the provisions of Utah Code Annotated, Section 35-1-62 [attached as Exhibit "D"] ... to recover damages from negligent third parties including the defendants." Compare Appellant's Brief at p. 7 with R. 2-7, 12-18. Plaintiff clearly did not mention the statute in his pleadings.

Plaintiff now argues that Section 35-1-54 of the Utah's Worker's Compensation Act allows him to maintain a negligence claim against defendants by statutory exception to the general rule of Lex Loci Delicti. That section provides:

If an employee who has been hired or is regularly employed in this state, receives personal injury by accident arising out of and in the course of such employment outside of

the state, he, or his dependents, in case of his death, shall be entitled to compensation according to the law of this state.

Utah Code Ann. § 35-1-54 (emphasis added) (attached as Exhibit "E"). Plaintiff's assertion, however, depends on too broad of reading of that Section.

Section 35-1-54 addresses the issue of what law will govern an injured party's entitlement to worker's "compensation" benefits. It requires, as to a Utah employee, that Utah law governs the entitlement to worker's compensation benefits, regardless of the state in which he or she is injured. This makes sense; Utah has a legitimate interest in assuring that Utah workers, who are injured out of state, will receive at least the minimum statutory support guaranteed by Utah law. After all, such workers will presumably return to Utah to live and must be assured that they receive compensation for their work related injuries in light of the cost of living in Utah.

The issue in this case, however, is not whether sufficient compensation benefits will be provided to the injured worker. After all, plaintiff has already received such benefits pursuant to Utah's Worker's Compensation Act. (R. 146). Rather, the issue here is whether Nevada law allows plaintiff to maintain his common-law tort claim. Section 35-1-54, however, has no impact on this latter issue.

This conclusion is clear from the definition given the term "compensation" in Section 35-1-44 of the Utah Worker's Compensation Code. That statute defines the term "compensation" as "the payments and benefits provided for in this title." Utah Code Ann. § 35-1-44 (attached as Exhibit "F"). This definition clearly indicates that the term "compensation," as used in Section 35-1-54, refers only to entitlement to Worker's Compensation benefits and rate of compensation.

To avoid this straightforward reading of the statute, plaintiff has cited a Wyoming case and the model Worker's Compensation Act to support his argument that "compensation" and "benefits" includes the right to maintain a common-law tort action. However, when faced with this identical argument, the United States Court of Appeals for the District of Columbia held that "benefits" under the Worker's Compensation Act could not sensibly be interpreted to include a common-law tort action. Woodner v. Mather, 210 F.2d 868, 871-72 (D.C. Cir. 1954). Similarly, Section 35-1-54 only addresses the issue of what state's law will apply to an injured party's worker's compensation benefits. It does not have any impact on the pivotal issue of what tort law a Utah court will apply when the injury occurred out of its jurisdiction. That issue, as explained above, is governed by the rule of lex loci delicti.

This interpretation also squares with Nevada's worker's compensation law. Nevada specifically recognizes other states' interests in regulating the worker's compensation benefits for out-of-state employees injured in Nevada. Section 616.260 of Nevada's Revised Statutes exempts non-residents from the provisions of the Nevada worker's compensation laws if the employer has furnished worker's compensation insurance under the applicable law of the other state. See § 616.260 (attached as Exhibit "C"). However, Section 616.085, which defines "employee" for the purpose of immunity from civil liability, contains no exception for injuries involving out-of-state employees. See § 616.085 attached as Exhibit "B"). These provisions reflect an assumption on the part of the drafters of the statute that Nevada law should not apply to worker's compensation benefits payable to out-of-state employees, but should apply to the employee's general tort remedy.

Moreover, Nevada law contains an exception to extra-territorial application of another state's worker's compensation law. That exception, contained in Nevada Review Statute, § 616.260(3) provides that another state's worker's compensation law shall not apply to employees of a contractor on a project whose cost as a whole exceeds \$250,000. This exception clearly makes the exclusive remedy provision of Nevada's worker's compensation law apply to all employees injured in the state of Nevada on major

projects, regardless of the state of domicile of the employee. The exception applies here where the cost of the project exceeded \$17 million.

The plaintiff's interpretation of Utah's statute, on the other hand, not only requires too broad of reading of Section 35-1-54, but also makes no sense in terms of policy. Under the plaintiff's interpretation, a Nevada contractor's immunity from suit would depend upon the state in which the injured party was hired. For example, there is no question that a Nevada contractor who hires all Nevada subcontractors would be immune from suit by a subcontractor's employee for a work related injury. However, under the plaintiff's reading of the law, a Nevada contractor who hired a Utah subcontractor would lose that immunity regarding injuries suffered by the Utah subcontractor's employees. Presumably, the situation would be the same as to subcontractors having employees from other states with statutory provisions similar to Utah's. Clearly, neither Utah nor Nevada law could have intended this result. In fact, the likely impact of such a scenario would create a huge disincentive for Nevada contractors to hire subcontractors from Utah.

Furthermore, plaintiff's reliance on Allen v. Industrial Commission, 110 Utah 328, 172 P.2d 669 (1946), is misplaced. That court merely addressed the issue of whether the Utah Industrial

Commission had jurisdiction to award compensation benefits to an employee hired in the state of Utah whose injury was sustained in another state. The Allen court held that the Utah Industrial Commission does have jurisdiction in such a case. Allen did not involve the issue of which state's law would govern the injured party's tort claim.

Additionally, Wessel v. Mapco, Inc., 752 P.2d 1363 (Wyo. 1988), is similarly inapplicable. In Mapco, the choice of law provisions of the two states concerned (Colorado and Wyoming) were different from the choice of law provisions at issue here. The Wyoming statute, found controlling in Mapco, was much broader than Utah's statute, Section 35-1-54. The Wyoming statute's was not confined to "compensation"² as defined in Utah's act. The Mapco

²That statute provided: If an employee, while working outside of the territorial limits of this state, suffers an injury on account of which he, or in the event of his death, his dependents, would have been entitled to the benefits provided by this act [§§ 27-12-101 through 27-12-804] had the injury occurred within this state, the employee, or in the event of his death, resulting from the injury, his dependents, are entitled to the benefits provided by this act, if at the time of the injury:

- (i) His employment is principally localized in this state;
- (ii) He is working under a contract of hire made in this state in employment not principally localized in any state; or
- (iii) He is working under a contract of hire made in this state in employment principally localized in another state whose worker's compensation law is not applicable

court interpreted its act to encompass not only the rate of compensation, but the statutory immunity provisions as well. Because Utah's statute is much narrower, Mapco has no application.

**III. THE SIGNIFICANT CONTACTS TEST SUGGESTED
BY PLAINTIFF WOULD PRODUCE THE SAME
RESULTS.**

Authorities relied upon by plaintiff represent the "significant contacts" or "interest" approach used by some courts.

That rule is set forth in the Restatement (Second) of Conflicts of Laws, Section 145(2) as follows:

- (1) The place where the injury occurred;
- (2) The place where the conduct causing the injury occurred;
- (3) The domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (4) The place where the relationship, if any, between the parties is centered.

Under the facts of the present matter, and as previously detailed, it is conceded that the first two factors (place of injury and place of conduct) were located in Nevada. The third

to his employer.

§ 27-12-208(a) Wyo. Stat. (Supp. 1983).

factor (domicile or place of business of parties) is plaintiff's only argument. However, the place where the relationship of the parties at the time of the accident was centered was clearly in Nevada. Moreover, not all the parties were Utah companies. At least one of the parties to this action, Bilt-Rite Concrete, Inc., is a Nevada company. The fourth factor, the place where the parties' relationship is centered, clearly also is State of Nevada. Therefore, even under the significant contacts approach, Nevada clearly has a stronger relationship to this accident than does the State of Utah. Furthermore, the State of Nevada is the owner of the project. A more compelling reason to apply Nevada law can hardly be imagined.

Under the "contacts" or "interests" approach, Nevada worker's compensation law should apply to determine the extent of the worker's compensation exclusive remedy. This was the same conclusion reached by the Nevada Supreme Court in Tab Construction Co. v. Eighth Judicial District Court, 83 Nev. 364, 432 P.2d 90 (1967). In that case, the employee of an Arizona subcontractor was injured on a construction project in Nevada. He brought a civil action against the Nevada general contractor and several of its employees. Under Arizona law, like Utah law, such a suit was allowed. Nevada law, however, barred such claims. The Nevada Supreme Court held that Nevada law would apply to bar the suit.

The following factors, among others, were key to the Court's decision: The general contractor on the project was a Nevada resident, his business was localized in Nevada, the alleged negligent act and the injury occurred in Nevada. Based in part on these factors, the Court observed that, "the State of Nevada has a legitimate constitutional interest in application of its own domestic law and policy to a work injury occurring within its borders." Tab Construction, 432 P.2d at 91.

In the case at bar, although the general contractor is not a resident of Nevada, Nevada was the owner of the project. (R. 140). If the State of Nevada does not have a sufficient interest in having its own law apply to a state owned prison project then it is hard to imagine who does. Furthermore, both the alleged negligent act and the injury occurred in Nevada. Also, plaintiff's presence in Nevada was not a fortuitous circumstance, such as being involved in an automobile accident while driving through the state. Here, plaintiff purposefully took advantage of Nevada's benefits: First, plaintiff chose to work for Harv & Higham in Nevada even though he could have worked for that company in Salt Lake City, Ogden, or Orem, Utah. See R. 377. Second, plaintiff received substantially more money by working in Nevada rather than Utah. See R. 378. Finally, plaintiff joined a Nevada union in Reno, Nevada, in order to earn this higher income. Id. In sum, plaintiff purposefully

availed himself of Nevada's benefits, he then came home to Utah to collect worker's compensation benefits and now wants to maintain an action in Utah's courts to further compensate him for his Nevada injury.

Based on the foregoing facts, it is clear that even if this court chooses to adopt plaintiff's "substantial contacts" or "interests" rule, that Nevada, not Utah, has the most substantial interests in seeing that Nevada law applies. As noted earlier, a contrary conclusion would erect a serious impediment to Utah companies and employees who want to work in Nevada. Nevada companies would be unlikely to hire Utah companies (and their employees) because those employees could make an end-run around Nevada's worker's compensation law by collecting benefits in Utah and then suing the general contractors and other subcontractors in Utah. Clearly this was not the intent of the Utah legislature.

IV. PLAINTIFF HAS INAPPROPRIATELY ARGUED A CONSTITUTIONAL ISSUE.

In his opposing memorandum, plaintiff has argued that "[a]lthough no constitutional issues were raised before the trial court, the denial of Shaw's right to bring and maintain this lawsuit may constitute a violation of the Equal Protection provisions of both the United States and Utah Constitutions." Appellant's Brief at 21. Plaintiff, however, failed to raise the

issue in the lower court and has completely failed to adequately brief this issue on appeal or to include it as an issue in his brief. As such, this court cannot reach this issue on appeal. See State v. Yates, 189 Utah Adv. Rep. 7, 9 (Utah Ct. App. 1992); Utah Rules App. Proc., Rule 24(a)(9). Moreover, if constitutional issues are not raised before its lower court, an appellant cannot raise them on appeal unless a person's liberty is at stake. Pratt v. City of Riverton, 639 P.2d 172 (Utah 1981). Nevertheless, on the merits, appellant has not raised a legitimate constitutional issue. That is, under either state's law, all employees from Utah are treated similarly. Thus, there is no equal protection issue. Should this court decide to entertain this issue, however, appellee requests that it be allowed to further address this question.

CONCLUSION

Utah adheres to the lex loci delicti rule. As such, plaintiff's tort claim is barred by Nevada law. "Compensation," as allowed under Utah's statute, refers to worker's compensation benefits and not the right to maintain a common-law tort action. However, even if this court adopts plaintiff's "significant contacts" or "interests" approach, Nevada law should be applied because of the numerous contacts and interests tied to Nevada.

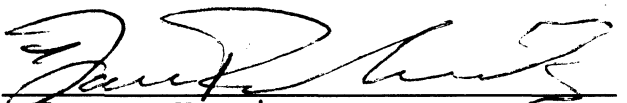
As a matter of policy, plaintiff's position would do Utahan's a serious disservice. Nevada companies would avoid hiring Utah

subcontractors due to the risk of being sued. Also, although plaintiff's proffered solution would seem to allow the greatest rights to injured Utahans, this would not necessarily be true under different facts. For example, if plaintiff were injured through his own fault and his immediate employer failed to provide worker's compensation benefits and was financially defunct, plaintiff would recover nothing under his approach. In that situation, plaintiff would likely argue that Nevada law should apply, which requires the statutory employer to guarantee worker's compensation benefits.

Finally, Lex Loci provides a clearly understandable test which parties can rely upon and would prevent forum shopping by parties such as plaintiff.

DATED this 12 day of October, 1993.

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CERTIFICATE OF MAILING

I certify that 4 copies of the foregoing brief were mailed first class mail, postage prepaid, this 12 day of October, 1993, to the following:

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Exhibits

Exhibit A

616.270. Employers to provide compensation; relief from liability.

1. Every employer within the provisions of this chapter, and those employers who shall accept the terms of this chapter and be governed by its provisions, as in this chapter provided, shall provide and secure compensation according to the terms, conditions and provisions of this chapter for any and all personal injuries by accident sustained by an employee arising out of and in the course of the employment.

2. Travel for which an employee receives wages shall, for the purposes of this chapter, be deemed in the course of employment.

3. In such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this chapter otherwise provided. (1947, p. 572; CL 1929 (1949 Supp.), § 2680.26; 1971, p. 2058.)

CASE NOTES

- I. General Consideration.
- II. Injury Arising Out of and In Course of Employment.
- III. Exclusivity of Act.
- IV. Provision of Coverage by Employer.

I. GENERAL CONSIDERATION.

Cited in: *Simon Serv. Inc. v. Mitchell*, 73 Nev. 9, 307 P.2d 110 (1957); *Tab Constr. Co. v. Eighth Judicial Dist. Court*, 83 Nev. 364, 432 P.2d 90 (1967); *Heitman v. Bank of Las Vegas*, 87 Nev. 201, 484 P.2d 572 (1971); *Nevada Indus. Comm'n v. Reese*, 93 Nev. 115, 560 P.2d 1352 (1977); *Spencer v. Harrah's Inc.*, 98 Nev. 99, 641 P.2d 481 (1982); *Lewis v. United States*, 680 F.2d 68 (9th Cir. 1982).

II. INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

Negligence of fellow employee. — When an employee is injured on the job as a result of the negligence of a fellow employee, his remedy is compensation under the Nevada Industrial Insurance Act. *Leslie v. J.A. Tiberti Constr. Co.*, 99 Nev. 494, 664 P.2d 963 (1983).

Assault while at work. — Where an employee is assaulted and injury is inflicted upon him through animosity and ill will arising from some cause wholly disconnected with the employer's business or the employment, the employee cannot recover compensation simply because he is assaulted when he is in the discharge of his duties. Under such circumstances, the injury does not arise out of the course of employment, and the employment is not the cause of the injury, although it may be the occasion of the willful act and may furnish the opportunity for its execution. *McColl v. Scherer*, 73 Nev. 226, 315 P.2d 807 (1957).

Assault by insane coemployee. — Employee's death, as a matter of law, arose out of the employment, where he was assaulted in the course of his employment by an insane fellow employee. *Cummings v. United Resort Hotels, Inc.*, 85 Nev. 23, 449 P.2d 245 (1969).

Shooting of employee. — In a personal injury action brought against a club owner by a waitress who was shot by a customer while on duty, summary judgment for the employer on grounds that she was covered by the Industrial Insurance Act was improper, where there was no determination as to whether her injury resulted from being placed in a position of danger by reason of her employment or was the result of enmity, grudge, or other personal relationship. *McColl v. Scherer*, 73 Nev. 226, 315 P.2d 807 (1957).

Recreational activity. — Recreational activity should not be deemed to be within the course of employment unless it is a regular incident of employment, or is required by the employer, or is of direct benefit to the employee beyond the intangible value of employee health and morale common to all kinds of recreation and social life; thus, where it was not a regular incident of employee's employment to enjoy recreation on his day off at golf driving range, and his employer did not require his presence there, nor did the employee receive a direct benefit from that off-duty activity beyond the intangible value of employee health and morale common to all kind

Exhibit B

Cross references. — As to determination of disability for vocational rehabilitation, see NRS 615.220.

616.084. "Employee": Volunteer workers at Nevada mental health institute.

Volunteer workers at the Nevada mental health institute, while acting under the direction or authorization of the supervisor of volunteer services of the mental health institute, shall be deemed, for the purpose of this chapter, employees of the Nevada mental health institute in the mental hygiene and mental retardation division of the department of human resources, receiving a wage of \$350 per month, and shall be entitled to the benefits of this chapter upon compliance therewith by the Nevada mental health institute. (1969, p. 236; 1973, pp. 118, 1406.)

Cross references. — As to labor by clients of mental health centers, see NRS 433.524.

616.085. "Employee": Subcontractors and employees.

Subcontractors and their employees shall be deemed to be employees of the principal contractor. (1947, p. 571; 1951, p. 485.)

CASE NOTES

Constitutionality. — This section and NRS 616.115 neither compel an employee to labor against his will, for the benefit of another, nor prohibit or restrict any employee from leaving the service of the employer, and thus do not violate the involuntary servitude provisions of either the federal or state Constitutions. *Cavagnaro v. State Wide Investigations, Inc.*, 94 Nev. 467, 581 P.2d 859 (1978).

Nevada's Industrial Insurance Act is uniquely different from the industrial insurance acts of other states in that independent contractors and subcontractors by NRS 616.115 and this section are accorded the status of employees. *Noland v. Westinghouse Elec. Corp.*, 97 Nev. 268, 628 P.2d 1123 (1981).

Purpose. — The purpose of this section is, at least in part, to protect the employees of subcontractors against the possible irresponsibility of their immediate employers, by making the principal contractor or principal employer having general control of the construction liable as if he had directly employed every worker on the job. *Simon Serv. Inc. v. Mitchell*, 73 Nev. 9, 307 P.2d 110 (1957).

In order to make the determination of which types of subcontractors and independent contractors are covered and thus

immune from liability, it is necessary to make an initial determination as to the statutory employer; the type of work performed by the subcontractor or independent contractor will determine whether the employer is the statutory employer. *Meers v. Haughton Elevator*, — Nev. —, 701 P.2d 1006 (1985).

Owner who acts as general contractor or principal employer. — The 1951 amendment to this section, which deleted "or other person having the work done" from the end thereof, eliminated an owner whose only status was as owner, but who might be said, as such owner, to be the person having the work done. However, when that owner assumed the additional status of being principal employer or principal contractor, he was not eliminated just because he was also the owner. *Simon v. Serv. Inc. v. Mitchell*, 73 Nev. 9, 307 P.2d 110 (1957).

Where a defendant owner, in constructing a building, entered into separate contracts, the fact that defendant was a general contractor or principal employer would preclude an employee of another contractor who suffered injuries in the course of his employment and accepted benefits under the Industrial Insurance Act from recovering at common law from defendant for the injuries sustained. *Titanium*

Exhibit C

SCOPE AND OPERATION

616.255. Applicability to interstate commerce and certain plans for benefits in effect before July 1, 1947.

LEGAL PERIODICALS

Review of Selected Nevada Legislation,
Health and Welfare, 1987 Pac. L.J. Rev. Nev.
Legis. 117.

616.256. Plans for benefits in effect before July 1, 1947: Determination of sufficiency; applicability of chapter.

LEGAL PERIODICALS

Review of Selected Nevada Legislation,
Health and Welfare, 1987 Pac. L.J. Rev. Nev.
Legis. 117.

616.260. Exemption of employer and employee temporarily within state; exception; effect of employee working in another state where coverage required.

1. Except as limited in subsection 3, any employee who has been hired outside of this state and his employer are exempted from the provisions of this chapter while the employee is temporarily within this state doing work for his employer if his employer has furnished industrial insurance coverage under the industrial insurance act or similar laws of a state other than Nevada so as to cover the employee's employment while in this state, provided;

(a) The extraterritorial provisions of this chapter are recognized in the other state; and

(b) Employers and employees who are covered in this state are likewise exempted from the application of the industrial insurance act or similar laws of the other state.

The benefits under the industrial insurance act or similar laws of the other state are the exclusive remedy against the employer for any injury, whether resulting in death or not, received by the employee while working for the employer in this state.

2. A certificate from the administrator or similar officer of another state certifying that the employer of the other state is insured therein and has provided extraterritorial coverage insuring his employees while working within this state is prima facie evidence that the employer carried the industrial insurance.

3. The exemption provided for in this section does not apply to the employees of a contractor, as defined in NRS 624.020, operating within the scope of his license on a project whose cost as a whole exceeds \$250,000.

4. An employer is not required to pay premiums to the system for an employee who has been hired or is regularly employed in this state, but who is

performing work exclusively in another state, if the other state requires the employer to provide coverage for the employee in the other state. If the employee receives personal injury by accident arising out of and in the course of his employment, any claim for compensation must be filed in the state in which the accident occurred, and such compensation is the exclusive remedy of the employee or his dependents. This subsection does not prevent an employer from maintaining coverage for the employee under the provisions of this chapter. (1947, p. 594; 1955, p. 187; 1981, p. 1464; 1989, ch. 276, § 1, p. 578; 1989, ch. 325, § 1, p. 682.)

Editor's note. — This section was amended by two 1989 acts which do not appear to conflict and have been compiled together.

Effective date. — Acts 1989, ch. 276, § 1 became effective October 1, 1989. Acts 1989, ch. 325, § 1, became effective June 13, 1989, pursuant to ch. 325, § 2.

Effect of amendment. — The 1989 amend-

ment by ch. 276, § 1, as amended by ch. 325, § 1, in the introductory paragraph of subsection 1, added "Except as limited in subsection 3" at the beginning of the paragraph; added the present subdivision 1(a) and redesignated the former subdivisions 1(a) and 1(b) as the present subdivisions 1(b) and 1(c), respectively, and added subsections 3 and 4.

616.263. Real estate broker or salesman who hires independent contractor not considered employer.

Any person licensed pursuant to the provisions of chapter 645 of NRS who engages an independent contractor to maintain or repair property on behalf of an individual property owner or an association of property owners is not a statutory employer for the purposes of this chapter. (1987, ch. 199, § 4, p. 450.)

LEGAL PERIODICALS

Review of Selected Nevada Legislation.
Worker's Compensation, 1987 Pac. L.J. Rev.
Nev. Legis. 219.

616.265. Devices modifying liability void; exception.

1. Except as otherwise provided in subsection 2:

(a) A contract of employment, insurance, relief benefit, indemnity, or any other device, does not modify, change or waive any liability created by this chapter.

(b) A contract of employment, insurance, relief benefit, indemnity, or any other device, having for its purpose the waiver or modification of the terms or liability created by this chapter is void.

2. Nothing in this section prevents an owner or lessor of real property from requiring an employer who is leasing the real property from agreeing to insure the owner or lessor of the property against any liability for repair or maintenance of the premises. (1947, p. 572; CL 1929 (1949 Supp.), § 2680.25; 1989, ch. 582, § 1, p. 1245.)

Exhibit D

35-1-62. Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of said employer — Rights of employer or insurance carrier in cause of action — Maintenance of action — Notice of intention to proceed against third party — Right to maintain action not involving employee-employer relationship — Disbursement of proceeds of recovery.

When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said employer, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission. Before proceeding against the third party, the injured employee, or, in case of death, his heirs, shall give written notice of such intention to the carrier or other person obligated for the compensation payments, in order to give such person a reasonable opportunity to enter an appearance in the proceeding.

For the purposes of this section and notwithstanding the provisions of Section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear. Any such fee chargeable to the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made less the proportionate share of costs and attorneys' fees provided for in Subsection (1).

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

History: L. 1917, ch. 100, § 72; C.L. 1917, L. 1945, ch. 65, § 1; 1971, ch. 76, § 3; 1973, § 3133; L. 1921, ch. 100, § 1; R.S. 1933, ch. 67, § 7; 1975, ch. 101, § 3. 42-1-58; L. 1939, ch. 51, § 1; C. 1943, 42-1-58;

Exhibit E

35-1-54. Employee injured outside state — Entitled to compensation — Limitation of time.

If an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of such employment outside of this state, he, or his dependents in case of his death, shall be entitled to compensation according to the law of this state. This provision shall apply only to those injuries received by the employee within six months after leaving this state, unless prior to the expiration of such six months period the employer has filed with the Industrial Commission of Utah notice that he has elected to extend such coverage a greater period of time.

History: L. 1917, ch. 100, § 65; C.L. 1917, § 3126; R.S. 1933, 42-1-52; L. 1941, ch. 37, § 1; C. 1943, 42-1-52.

NOTES TO DECISIONS

ANALYSIS

Employees of foreign corporation.
Foreign compensation laws.
Injuries in interstate commerce.
Operation and effect.
Words and phrases defined.
Cited.

Employees of foreign corporation.

Since relation of employer and employee existed between foreign transportation company and truck driver in this state at time of injury, Industrial Commission had jurisdiction to make award, and such power in nowise depended upon reading into his contract of employment the law of Colorado where the contract was made, for when employer sent his employee into Utah to work for it there, it subjected itself to this chapter. *Buckingham Transp. Co. v. Industrial Comm'n*, 93 Utah 342, 72 P.2d 1077 (1937).

Employer or its insurance carrier are not required to make payments to injury benefit fund where airline stewardess, employed in California by employer with its principal offices in California, is killed in course of temporary employment in Utah leaving no surviving dependents. *United Air Lines Transp. Corp. v. Industrial Comm'n*, 110 Utah 590, 175 P.2d 752 (1946).

Foreign compensation laws.

In action by employee for personal injuries arising in state of Wyoming, defense that Wyoming had adopted Workmen's Compensation Act, and that such act furnished adequate and exclusive remedy to employee to recover compensation, was sustained. *Bozo v. Central Coal & Coke Co.*, 54 Utah 289, 180 P. 432 (1919).

Resident employee who was injured in

course of employment in another state was entitled to compensation for such injuries, although employer was insured under laws of other state. *Pickering v. Industrial Comm'n*, 59 Utah 35, 201 P. 1029 (1921).

In the absence of proof it will be presumed that the provisions of the Workmen's Compensation Act of another state are the same as those of the forum. *Shurtliff v. Oregon Short Line R.R.*, 66 Utah 161, 241 P. 1058 (1925).

Injuries in interstate commerce.

Industrial Commission had power to make award under this section for injury to trucker employed by foreign corporation under foreign contract notwithstanding that trucker was in interstate commerce when injured. *Buckingham Transp. Co. v. Industrial Comm'n*, 93 Utah 342, 72 P.2d 1077 (1937).

Operation and effect.

If employer-employee relationship is maintained in this state, Industrial Commission has jurisdiction to make an award notwithstanding that original contract of employment was entered into in foreign state and that injury occurred in foreign state. *Fay v. Industrial Comm'n*, 100 Utah 542, 114 P.2d 508 (1941).

Commission had right to award compensation for death of salesman occurring in Idaho, under first sentence of this section, notwithstanding that original contract of employment

Exhibit F

Educ. of Alpine School Dist. v. Olsen, 684 P.2d 49 (Utah 1984).

Welfare or relief recipients.

Under voluntary arrangement between two state agencies, state fair association and public welfare department, pursuant to latter's plan to compel welfare recipients who were able to work to work out their relief payments on certain projects, whereby such recipients were directed to report to association for work and were placed by latter under supervision and control of its superintendent of fairgrounds at work having substantial economic value to as-

sociation, recipient was "employee," association was "employer" and "contract of hire" existed within meaning of this section, as amended in 1945, so as to entitle injured recipient to compensation, where association was required by welfare commission to furnish compensation insurance for such workers, and had right to hire, fire, control, supervise and regulate pay of them, although payment of compensation and relief payments were made by welfare board. Commission of Fin. v. Industrial Comm'n, 113 Utah 73, 191 P.2d 598 (1948).

COLLATERAL REFERENCES

C.J.S. — 99 C.J.S. Workmen's Compensation § 59 et seq.

Key Numbers. — Workers' Compensation ⇨ 230.

35-1-44. Definition of terms.

The following terms as used in this title shall be construed as follows:

(1) "Order" shall mean and include any decision, rule, regulation, direction, requirement or standard of the commission, or any other determination arrived at, or decision made, by such commission.

(2) "General order" shall mean and include an order applying generally throughout the state to all persons, employments or places of employment of a class under the jurisdiction of the commission. All other orders of the commission shall be considered special orders.

(3) "Welfare" shall mean and include comfort, decency and moral well-being.

(4) "Safe" and "safety," as applied to any employment or place of employment, shall mean such freedom from danger to the life, health or welfare of employees as the nature of the employment will reasonably permit.

(5) "Personal injury by accident arising out of or in the course of employment" shall include any injury caused by the willful act of a third person directed against an employee because of his employment. It shall not include a disease, except as it shall result from the injury.

(6) "Compensation" shall mean the payments and benefits provided for in this title.

(7) "Award" shall mean the finding or decision of the commission as to the amount of compensation due any injured, or the dependents of any deceased, employee.

(8) "Average weekly earnings" shall mean the average weekly earnings arrived at by the rules provided in Section 35-1-75.

History: L. 1917, ch. 100, § 52; C.L. 1917, § 3112; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-42.

