

1993

# Joanna Mitchell v. Jerry L. Rice, John Does I-V : Brief of Appellant

Utah Court of Appeals

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930636 CA

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IN THE UTAH COURT OF APPEALS

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JOANNA MITCHELL,  
individually, and JOANNA  
MITCHELL, personal  
representative of the estate  
of Jerry Mitchell, deceased,

Appellants,

v.

Estate of JERRY L. RICE, and  
JOHN DOES 1 through V,

Appellees.

93-0636-CA

Court of Appeals No. 930296  
District Court No. 910902469

Priority No. 15

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BRIEF OF APPELLANT

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Appeal from the Second Judicial District Court  
of Weber County, State of Utah, the Honorable  
Michael J. Glasmann, District Judge.

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Patrick F. Holden  
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**FILED**

Utah Court of Appeals

OCT 20 1993

*Mary T. Noonan*  
Mary T. Noonan  
Clerk of the Court

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individually, and JOANNA	:	
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	:	District Court No. 910902469
Estate of JERRY L. RICE, and	:	
JOHN DOES 1 through V,	:	Priority No. 15
	:	
Appellees.	:	

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BRIEF OF APPELLANT

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**STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Annotated Section 78-2a-3(2)(k) (1992).

**STATEMENT OF THE ISSUES**

The sole issue on appeal is whether as a matter of law Jerry Rice was an employee or an independent contractor for Jerry Mitchell as defined under Utah Code Annotated Section 35-1-42(b).

This being an appeal from the trial court's granting of Appellee's motion for Summary Judgment, the applicable standards of review are as follows:

A. The appellant is entitled to have all the facts, and all inferences arising therefrom, considered in the light most favorable to her. Briggs v. Halcomb, 740 P.2d 281 (Utah Ct. App.

1987); Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

B. An appellate court accords no deference to the trial court's legal conclusions in support of the grant of summary judgment, but reviews them for correctness. Beynon v. St. George Dixie Lodge, 210 U.A.R. 63 (Utah 1993); Schurtz v. BMW of North America, Inc., 814 P.2d 1108 (Utah 1991).

#### **DETERMINATIVE STATUTES AND CONSTITUTIONAL PROVISIONS**

Utah Code Annotated Section 35-1-42 (1993)

Utah Code Annotated Section 35-1-60 (1953)

The full text of the above controlling statutory and constitutional authority is fully set out in appendix to appellant's brief in accordance with Rule 24(a)(6) and 24(f) of the Utah Rules of Appellate Procedure.

#### **STATEMENT OF THE CASE**

##### **Nature of the Case**

This is a wrongful death action brought against the Estate of Jerry Rice by the widow of the decedent Jerry Mitchell, JoAnna Mitchell as personal representative of his estate. Jerry Mitchell and Jerry Rice were killed in an accident while driving a truck for Logistics Express. The plaintiff has alleged that Jerry Mitchell's death was the result of the negligence of Jerry Rice in operating the motor vehicle.

##### **Course of Proceedings**

On March 16, 1993 the appellee moved for summary judgment claiming appellant's cause of action was barred by the exclusive remedy provision of Utah's Worker's Compensation Act, Utah Code

Annotated Section 35-1-60. After briefing and oral arguments from both parties, Judge Glasmann granted appellee's motion for summary judgment on June 1, 1993.

#### **DISPOSITION IN LOWER COURT**

Judge Glasmann granted appellee's motion for summary judgment on June 1, 1993.

#### **STATEMENT OF FACTS**

On September 19, 1989, Jerry L. Rice and Jerry H. Mitchell died in a motor vehicle accident while driving a truck for Logistics Express. (R. 135). Mr. Mitchell's widow, JoAnna Mitchell, filed a complaint against the Estate of Jerry L. Rice alleging that her husband's death was a result of Mr. Rice's negligence in driving the truck. (R. 1).

Mr. Mitchell drove for Logistics Express pursuant to an independent contractor lease agreement. (R. 136). This document attempts to define the relationship between Mr. Mitchell and Logistics Express. (R. 239). Jerry Rice was not a party to the above-referenced lease agreement. (R. 239). The lease agreement explicitly provides in several clauses that Jerry Mitchell was an independent contractor of Logistics Express. (R. 239). In paragraph 2 of the Terms and Conditions of the Lease Agreement, the document refers to the "Owner, its employees, agents and servants." (R. 239).

The lease agreement also provides that the "[o]wner warrants and agrees that it shall have full and direct control and supervision over the operation of the motor vehicle . . ." (R. 239). The



agreement further provides that the "[o]wner may determine the routes of travel, points of stop for rest and service to its equipment, and shall in every respect, direct and control its employees, including their hire, discharge, training, wages, hours and working conditions." (R. 239).

With respect to the maintenance of workers compensation coverage as well as the payment of withholding taxes, the agreement provides as follows:

Owner shall obtain and be solely responsible for Worker's Compensation insurance for Owner and Owner's employees, if any. In addition, Owner shall pay all withholding and employment taxes due to Federal, State or local government on account of Owner and/or Owner's employees . . . (R. 239).

Jerry Rice is not mentioned by name in the lease agreement executed among Mitchell and Logistics Express. (R.239).

The specific method by which Worker's Compensation coverage was provided in this case was through Logistic's Express as stated in paragraph 5 of the lease agreement.

In order to assist Owner in obtaining Worker's Compensation insurance coverage provided for herein with respect to any employee(s) employed by Owner . . . Logex has arranged for insurance in which Owner may voluntarily, at Owner's sole cost and expense, elect to participate . . ." (R. 239).

Jerry Mitchell elected to be insured under Logistics Express' program. Therefore, Logistics Express purchased Worker's Compensation insurance for Mitchell and Rice, and the Mitchells in turn paid for this coverage out of their reimbursement for each trip. (R. 139).

In addition to the lease agreement, other documents were presented in the proceedings below to aid the court in its determination. A document labeled "Exhibit C" on page 179 of the record was executed between Jerry Rice and Logistics Express. It characterizes Rice as an employee of Mitchell. Jerry Mitchell was not a party to this agreement. Kelly Jensen, an employee of Logistics Express stated that this document was not meant to define the relationship between Jerry Rice and Jerry Mitchell. (R. 165, 185, 186).

Another document submitted to the trial court is an agreement between Jerry Rice and Jerry and JoAnna Mitchell. (R. 180). This agreement provides that Jerry Rice was to work on a commission basis. It further states that Jerry Rice was responsible for paying his own income tax and social security tax. (R. 180).

The defendant submitted a document to the trial court entitled "Owner Operator and Owner Operator Driver Questionnaire." (R. 226). This document, filled out by Jerry Rice, lists as prior work history, work performed for Jerry Mitchell. The previous times he worked for Mr. Mitchell, Rice noted that he stopped working because of a "reduction in force." (R. 226, 227). This document does not attempt to define the relationship between Mitchell and Rice.

The record also reflects facts relating to the course of conduct between Mitchell and Rice. Jerry Rice would, on occasion, drive with Mr. Mitchell on the various trucking assignments Mr. Mitchell would receive from Logistics Express. (R. 163-65). However, Jerry Rice was under no obligation to drive with Mr.

Mitchell. In fact, Jerry Rice would often refuse to go on runs with Mr. Mitchell. (R. 164). When Jerry Rice would drive on runs with Mr. Mitchell, Jerry Rice would determine when, where and for how long to stop on rest breaks. (R. 164). When paying Jerry Rice, Mr. Mitchell did not withhold income tax or social security tax. (R. 165). In addition, Logistics Express purchased Workers Compensation Insurance for Mitchell and Rice, which was paid through a deduction in the reimbursement the Mitchells would receive from Logistics Express. (R. 139). Finally, Jerry Rice would sometimes use Jerry Mitchell's truck to perform runs for Logistics Express by himself. (R. 200).

#### **SUMMARY OF ARGUMENT**

Under the multifactor test set forth in Utah Code Annotated Section 35-1-42 and subsequent case law, Jerry Rice was an independent contractor of Jerry Mitchell and not his employee. Jerry Rice paid his own withholding tax. To the extent power and control could be exercised in a trucking assignment, both Mitchell and Rice had equal power and control. Rice worked when he wanted to, and not at Mitchell's command. There is no evidence to suggest that Mitchell exercised any power and control over the work beyond that which a proprietor would exercise over an independent contractor.

Furthermore, case law relied upon by the appellee in moving for summary judgment is not relevant. The facts presented in the Kinne decision are markedly different than the facts presently before the court. Thus, the court's reliance on Kinne was mis-

placed. The Kinne court was not presented with a fact situation which was entirely inconsistent with the existence of an employment relationship. Therefore, the Kinne decision is not controlling on the disposition of this case.

#### **ARGUMENT**

I. RICE WAS NOT AN EMPLOYEE OF MITCHELL, THEREFORE JOANNA MITCHELL'S CLAIM IS NOT BARRED BY THE EXCLUSIVE REMEDY PROVISION.

Judge Glasmann granted the Estate of Jerry Rice's summary judgment on three bases. First, Judge Glasmann believed the case of Kinne v. Industrial Commission, 609 P.2d 926 (Utah 1980), discussed below, was the closest on point. Second, the court based its decision on the written documents purporting to define the relationship between the parties. Finally, the court also noted that the conduct between the parties was suggestive of an employment relationship. It is Mitchell's position that Judge Glasmann erred in concluding that Jerry Rice was Jerry Mitchell's employee as a matter of law. The record clearly reflects both factual disputes, and in the alternative, facts which do not entitle the appellee to judgment as a matter of law. Essentially, under the multifactor tests set forth in Utah Code Annotated Section 35-1-42 and case law defining these factors, the facts of this case do not lend themselves to only one reasonable conclusion. As such, summary judgment was inappropriate in this case.

The Utah Supreme Court has set forth the proper test for determining whether an individual is an employee or an independent contractor under Utah's Worker's Compensation Act, Utah Code

Annotated Section 35-1-43(1)(b).

Speaking in generality, an employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties. In contrast, an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set total sum, who may do the job in his [or her] own way, subject to only minimal restriction or controls and is responsible only for its satisfactory completion. Harry L. Young & Sons v. Ashton, 538 P.2d 316 (Utah 1975).

The court went on to list the appropriate facts to be considered under this analysis. First, "whatever covenants or agreements exist concerning the right of direction and control over the employee, whether express or implied;" second, "the right to hire and fire;" third, "the method of payment, i.e. whether in wages or fees, as compared to payment for a complete job or project;" and finally, fourth, "the furnishing of the equipment." Id. at 318.

Several Utah cases have addressed independent lease agreements and their effect on the status of individuals under Utah's Workers Compensation system. While facing similar lease agreements, the courts in those cases faced markedly different facts regarding the parties' actual course of conduct. For instance, in Kinne v. Industrial Commission, 609 P.2d 926 (Utah 1980), the court was presented with a lease agreement between an owner operator and a trucking company. This lease agreement provided that the owner-operator was to be responsible for the direction and control of his employees. The owner-operator hired an individual to drive his

truck and that individual was later injured. In Kinne, the owner-operator was attempting to evade payment of Workers Compensation benefits to the driver. The court found that the driver was an employee of the owner-operator. The court reasoned as follows:

The agreement gave Kinne the legal right of direction and control over Wynn, even though such right may not have been exercised. It is the right of control that is the critical element underlying an employment relationship in the present case. Id. at 928.

In this context, the Utah Supreme Court affirmed the findings of the Industrial Commission. "These factors support the Commission's finding that Kinne was Wynn's employer." Id. The Kinne court was not presented with a course of conduct between the owner-operator and the driver which was inconsistent with and contrary to the terms of the lease agreement between the owner-operator and the trucking company. Neither was the Kinne court presented with a document between the actual parties to the case (the owner-operator and the driver) setting forth terms of the relationship inconsistent with the maintenance of an employer-employee relationship. Thus the Kinne decision was rendered in a factual context radically different than the one before the court today.

Appellees in the proceeding below attempted to focus on the potential right to control of Mr. Mitchell. Although language in the Kinne decision states the unexercised right to control was a crucial factor in its determination, again, the facts of this case present a different fact pattern. What is present in the instant case is not unexercised power, but rather, a course of conduct totally inconsistent with the exercise of the type of power found

crucial in Kinne.

The facts indicate that what right to power and control that existed was equally exercised by Mitchell and Rice. The right to determine the destination and the route to the destination did not exist. This was already predetermined by the very nature of the trucking assignment. A trucking assignment to deliver goods from Salt Lake City to Denver does not leave much in the way of discretion as to how and where to go. When there was room for discretion, both parties exercised equal power and control. The facts were undisputed that when Rice was driving he could determine where, when and for how long to break. Furthermore, as to the discretion as to whether to take an assignment, the facts also show that Rice would drive with Mitchell whenever he felt like it, and would often refuse to go on runs with Mr. Mitchell even though Mr. Mitchell needed him for the trip. This course of conduct is simply inconsistent with an employer relationship. As such, the Kinne decision is not controlling and Judge Glasmann's reliance on the Kinne case in this instance was error.

Also notably absent from the Kinne decision are documents executed between the actual parties manifesting an inconsistent intent. (R. 180). In a document executed between Jerry Rice and the Mitchells, Jerry Rice agrees to work on a commission basis, to take care of his own income and social security tax. Finally, a document attempting to label Rice as an employee of Mitchell, was not, according to an agent of Logistics Express, meant to define the relationship between Mitchell and Rice, but rather to make sure

that Rice was not to be considered an employee of Logistics Express. The only document executed between the parties before the court here is inconsistent with an employer-employee relationship.

The existence of these two sets of facts did not entitle the estate of Jerry Rice to judgment as a matter of law. The record clearly reflects a course of conduct entirely inconsistent with the maintenance of an employment relationship between Mitchell and Rice. Appellant has cited to the record facts establishing that Rice was able to determine when, where and for how long to take rest breaks. Rice also had discretion as to whether to go on a particular job with Mitchell. This type of independence was recognized as an indication of an independent contractor relationship in Graham v. R. Thorne Foundation, 675 P.2d 1198 (Utah 1984). In that case, the plaintiff "worked on any house he chose whether being constructed by Thorne or someone else who had employed [the worker] on unrelated jobs." Id. at 1197. Similarly with Rice, the facts indicate that Rice would work whenever he felt like it, and would take what jobs he wanted to take, not what jobs Mitchell wanted him to take.

The other set of facts refers to the documents executed among the parties: Jerry Rice, Jerry Mitchell and Logistics Express. First, the lease agreement by its own terms gives Mitchell power and control over those that drive with him. However, the factual record demonstrates a course of conduct inconsistent with the lease agreement. In fact, the lease agreement also states that Mitchell was supposed to pay Rice's withholding tax. Mitchell did not do



this. This is yet another aspect of the conduct of the parties inconsistent with the lease agreement. Further vitiating the effect of the lease agreement is the fact that Rice was not even a party to an agreement which allegedly defines the relationship between Mitchell and Rice. Instead, the document was drafted by Logistics Express and is clearly drafted so that Logistics Express can escape any liability to Rice. Jerry Rice is not specifically mentioned in the lease agreement. This shows that the provisions in the lease agreement are general provisions. In no way can they be said to define the relationship between Mitchell and Rice. In sum, the lease agreement in this case is not a proper basis for granting summary judgment to the appellees.

The other document characterizing Rice as an employee of Mitchell was entered into between Rice and Logistics Express. Mitchell was not a party to this agreement. An agent of Logistics Express stated that this document was not meant to define the relationship between Mitchell and Rice.

Finally, the one document to which Mitchell and Rice were both parties sets forth terms inconsistent with an employment relationship. This document states that Rice was to pay his own withholding taxes. This is another factor recognized in Utah law as favoring the conclusion that Rice was an independent contractor. In Graham v. R. Thorne Foundation, 675 P.2d 1196 (Utah 1984), the court found persuasive the fact that the worker "made no deductions for social security or withholding taxes as required generally by employers." Id. at 1197. The court also noted that "others that

employed him also did not deduct social security or withholding taxes." Id. This was also the case with Rice.

The Utah Supreme Court has stated that "[w]hether the factual inferences to be drawn from the evidence meet the legal definition of "employee" under the Worker's Compensation Act is a question for the jury." Gourdin By and Through Close v. Scera, 845 P.2d 242 (Utah 1992). In noting that a directed verdict was inappropriate, even though the facts may be undisputed, the court stated that "no single factor is completely controlling. Moreover, employee status is not by its dictionary definition, but rather by whether the facts and circumstances bring the worker within the requirements of the Workers Compensation Act." Id.

The determination of whether Rice was Mitchell's employee was not properly determined in the context of a summary judgment. The existence of facts pointing in both directions is further suggestive that summary judgment was inappropriate in this instance.

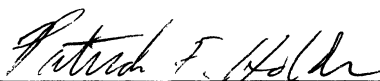
#### CONCLUSION

"Summary judgment can be granted when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Any doubts or uncertainties concerning issues of fact must be construed in favor of the party opposing summary judgment." Silcox v. Skaggs Alpha Betta, Inc., 814 P.2d 623 (Utah Ct. App. 1991). Construing the facts in the light most favorable to the appellant, summary judgment in this case was improper. There are factual disputes in this instance concerning the course of conduct between the parties. There is also a dispute about the

proper inferences to be drawn from the facts which are not disputed. Under Gourdin By and Through Close v. Scera, 845 P.2d 242 (Utah 1992) this is sufficient to preclude summary judgment. The determination as to whether an individual is an employee or an independent contractor is a fact sensitive inquiry. A full trial should have been held so that the trier of fact could properly make a determination as to whether Rice was an independent contractor. The facts in this case for the most part point to a finding that Rice was an independent contractor. Some factors point to the opposite conclusion. Given this factual conflict, Judge Glasmann should not have ruled on the matter absent a full evidentiary hearing.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF MAILING

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I hereby certify that on this 18<sup>th</sup> day of October, 1993, I mailed four true and correct copies of the above and foregoing Brief of Appellant, postage prepaid, to the following:

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PATRICK F. HOLDEN

## ADDENDUM

tomary trade relationship between general contractors and subcontractors.

(c) A portion of a construction project subcontracted to others may be considered to be a part or process in the trade or business of the general building contractor, only if the general building contractor, without regard to whether or not it would need additional employees, would perform the work in the normal course of its trade or business.

(d) Any person who is engaged in constructing, improving, repairing, or remodelling a residence that he owns or is in the process of acquiring as his personal residence may not be considered an employee or employer solely by operation of Subsection (a).

(e) A partner in a partnership or an owner of a sole proprietorship may not be considered an employee under Subsection (a) if:

(i) the person is not included as an employee under Subsection 35-1-43(3)(a); or

(ii) the person is included as an employee under Subsection 35-1-43(3)(a), but his employer fails to insure or otherwise provide adequate payment of direct compensation, which failure is attributable to an act or omission over which the person had or shared control or responsibility.

(f) For purposes of Subsection (e)(ii):

(i) a partner of a partnership and an owner of a sole proprietorship are presumed to have had or shared control or responsibility for any failure to insure or otherwise provide adequate payment of direct compensation, the burden of proof being on any person seeking to establish the contrary; and

(ii) evidence affirmatively establishing that a partner of a partnership or an owner of a sole proprietorship had or shared control or responsibility for any failure to insure or otherwise provide adequate payment of direct compensation may only be overcome by clear and convincing evidence to the contrary.

(g) A director or officer of a corporation may not be considered an employee under Subsection (a) if the director or officer is excluded from coverage under Subsection 35-1-43(3)(b). 1993

**35-1-43. "Employee," "worker" or "workmen," and "operative" defined — Mining lessees and sublessees — Partners and sole proprietors — Corporate officers and directors — Real estate agents and brokers.**

(1) As used in this chapter, "employee," "worker" or "workmen," and "operative" mean:

(a) each elective and appointive officer and any other person, in the service of the state, or of any county, city, town, or school district within the state, serving the state, or any county, city, town, or school district under any election or appointment, or under any contract of hire, express or implied, written or oral, including each officer and employee of the state institutions of learning and members of the National Guard while on state active duty; and

(b) each person in the service of any employer, as defined in Section 35-1-42, who employs one or more workers or operatives regularly in the same business, or in or about the same establishment, under any contract of hire, express or implied,

oral or written, including aliens and minors, whether legally or illegally working for hire, but not including any person whose employment is casual and not in the usual course of the trade, business, or occupation of his employer.

(2) Unless a lessee provides coverage as an employer under this chapter, any lessee in mines or of mining property and each employee and sublessee of the lessee shall be covered for compensation by the lessor under this chapter, and shall be subject to this chapter and entitled to its benefits to the same extent as if they were employees of the lessor drawing such wages as are paid employees for substantially similar work. The lessor may deduct from the proceeds of ores mined by the lessees an amount equal to the insurance premium for that type of work.

(3) (a) A partnership or sole proprietorship may elect to include as an employee under this chapter any partner of the partnership or the owner of the sole proprietorship. If a partnership or sole proprietorship makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the persons to be covered. No partner of a partnership or owner of a sole proprietorship is considered an employee under this chapter until this notice has been given. For premium rate making, the insurance carrier shall assume the salary or wage of the employee to be 150% of the state's average weekly wage.

(b) A corporation may elect not to include any director or officer of the corporation as an employee under this chapter. If a corporation makes this election, it shall serve written notice upon its insurance carrier and upon the commission naming the persons to be excluded from coverage. A director or officer of a corporation is considered an employee under this chapter until this notice has been given.

(4) As used in this chapter, "employee," "worker" or "workman," and "operative" do not include a real estate agent or real estate broker, as defined in Section 61-2-2, who performs services in that capacity for a real estate broker if:

(a) substantially all of the real estate agent's or associated broker's income for services is from real estate commissions;

(b) the services of the real estate agent or associated broker are performed under a written contract specifying that the real estate agent is an independent contractor; and

(c) the contract states that the real estate agent or associated broker is not to be treated as an employee for federal income tax purposes.

(5) As used in this chapter, "employee," "worker" or "workman," and "operative" do not include an offender performing labor under Section 64-13-16 or 64-13-19, except as required by federal statute or regulation. 1993

**35-1-44. Definition of terms.**

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

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

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

(3) "Compensation" means the payments and benefits provided for in this title.

tributory negligence. Proof of the injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in such injury. And such employers shall also be subject to the provisions of the two sections next succeeding [Sections 35-1-58, 35-1-59]. In any civil action permitted under this section against the employer the employee shall be entitled to necessary costs and a reasonable attorney fee assessed against the employer.

1969

**35-1-58 Rights of employees where employer fails to comply**

Any employee, whose employer has failed to comply with the provisions of Section 35-1-46, who has been injured by accident arising out of or in the course of his employment, wheresoever such injury occurred, if the same was not purposely self-inflicted, or his dependents in case death has ensued may in lieu of proceeding against his employer by civil action in the courts as provided in the last preceding section [Section 35-1-57], file his application with the commission for compensation in accordance with the terms of this title, and the commission shall hear and determine such application for compensation as in other cases, and the amount of compensation which the commission may ascertain and determine to be due to such injured employee, or his dependents in case death has ensued, shall be paid by such employer to the persons entitled thereto within ten days after receiving notice of the amount thereof as so fixed and determined by the commission.

1953

**35-1-59. Docketing awards in district court  
Enforcing judgment.**

An abstract of any award may be filed in the office of the clerk of the district court of any county in the state, and must be docketed in the judgment docket of the district court thereof. The time of the receipt of the abstract must be noted by him thereon and entered in the docket. When so filed and docketed the award shall constitute a lien from the time of such docketing upon the real property of the employer situated in the county, for a period of eight years from the date of the award unless previously satisfied. Execution may be issued thereon within the same time and in the same manner and with the same effect as if said award were a judgment of the district court.

In cases where the employer was uninsured at the time of the injury, the county attorney for the county in which the applicant or the employer resides, depending on the district in which the final award is docketed, shall enforce the judgment when requested by the industrial commission. Where the action to enforce a judgment is initiated by other counsel, reasonable attorney's fees and court costs shall be allowed in addition to the award.

1949

**35-1-60. Exclusive remedy against employer, or officer, agent or employee — Occupational disease excepted.**

The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian or any

other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. Nothing in this section, however, shall prevent an employee (or his dependents) from filing a claim with the industrial commission of Utah for compensation in those cases within the provisions of the Utah Occupational Disease Disability Act, as amended.

1953

**35-1-61 Repealed**

1971

**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 involving 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 pay-

DISTRICT COURT  
COUNTY

JUN 3 PM 4 56

Robert G. Gilchrist (A3715)  
RICHARDS, BRANDT, MILLER & NELSON  
Attorneys for Defendant Estate of Jerry L. Rice  
Key Bank Tower, Seventh Floor  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110-2465  
Telephone: (801) 531-2000  
Fax No.: (801) 532-5506

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
IN AND FOR WEBER COUNTY, STATE OF UTAH

---

JoANNA MITCHELL,  
individually, and JoANNA  
MITCHELL, personal  
representative of the estate  
of Jerry Mitchell, deceased,

Plaintiffs,

vs.

Estate of JERRY L. RICE, and  
JOHN DOES 1 through V,

Defendants.

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**JUDGMENT**

Civil No. 910902469

Judge Glasmann

1993  
FILED

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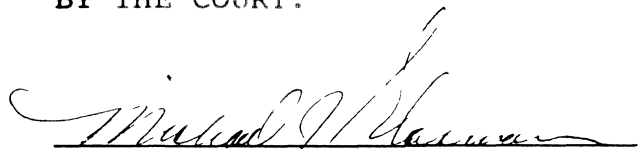
Based upon the order of the court granting the  
defendant's Motion for Summary Judgment issued concurrently  
herewith, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that  
defendant the Estate of Jerry L. Rice, is hereby awarded judgment  
in its favor against plaintiff JoAnna Mitchell, individually, and  
as personal representative of the estate of Jerry Mitchell,  
deceased, and that plaintiff's Amended Complaint and the  
Complaint filed in the consolidated action, are hereby dismissed

with prejudice and on the merits with each party to bear their own costs.

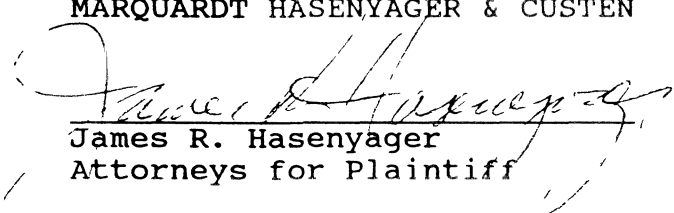
DATED 22 June, 1991.

BY THE COURT:

  
The Honorable Michael Glasmann

APPROVED AS TO FORM:

MARQUARDT HASENYAGER & CUSTEN

  
James R. Hasenyager  
Attorneys for Plaintiff

RICHARDS, BRANDT, MILLER  
& NELSON

  
Robert G. Gilchrist  
Attorneys for Defendant Estate of Jerry L. Ri...



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 24 day of May, 1993, to the following counsel of record:

James R. Hasenyager  
MARQUARDT HASENYAGER & CUSTEN  
Attorneys for Plaintiffs  
2661 Washington Blvd #202  
Ogden, Utah 84401

Gainer M. Waldbillig  
CHRISTENSEN JENSEN & POWELL  
Attorneys for Defendants Logistics Express  
175 South West Temple #510  
Salt Lake City, Utah 84101

Glice M Salome

Mitchell.jud  
9263-163  
5/12/93RGGas

DISTRICT COURT  
JURY

00 JUN 3 PM 4 56

Robert G. Gilchrist (A3715)  
RICHARDS, BRANDT, MILLER & NELSON  
Attorneys for Defendant Estate of Jerry L. Rice  
Key Bank Tower, Seventh Floor  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110-2465  
Telephone: (801) 531-2000  
Fax No.: (801) 532-5506

---

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
IN AND FOR WEBER COUNTY, STATE OF UTAH

---

JOANNA MITCHELL,  
individually, and JOANNA  
MITCHELL, personal  
representative of the estate  
of Jerry Mitchell, deceased,

Plaintiffs,

vs.

Estate of JERRY L. RICE, and  
JOHN DOES 1 through V,

Defendants.

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**ORDER**

Civil No. 910902469

Judge Glasmann

JUN 4 1993

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Defendant Estate of Jerry L. Rice's Motion for Summary  
Judgment having come on for hearing before the court on May 11,  
1993, and plaintiff being represented by counsel of record James  
R. Hasenyager, and defendant the Estate of Jerry L. Rice being  
represented by counsel of record Robert G. Gilchrist, and the  
court having reviewed the file, including the memoranda filed by  
all parties, and having heard argument, and therefore being fully  
informed on the issues, that

IT IS HEREBY ORDERED that for the reasons stated in the written memorandum and exhibits submitted therewith, that defendant's Motion for Summary Judgment is granted;

IT IS FURTHER HEREBY ORDERED that judgment on the merits be entered for defendant the Estate of Jerry L. Rice, dismissing the plaintiff's Amended Complaint and her Complaint filed in the consolidated action, with prejudice, with each party to bear its own costs.

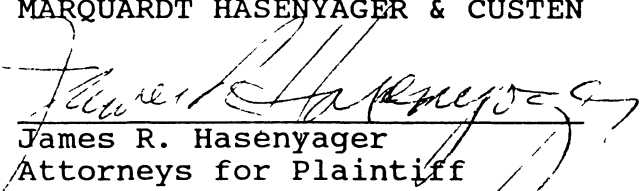
DATED this 1st day of May, 1993.

BY THE COURT:

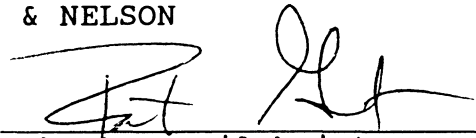
  
The Honorable Michael A.  
Glasmann

APPROVED AS TO FORM:

MARQUARDT HASENYAGER & CUSTEN

  
James R. Hasenyager  
Attorneys for Plaintiff

RICHARDS, BRANDT, MILLER  
& NELSON

  
Robert G. Gilchrist  
Attorneys for Defendant Estate of Jerry L. Rice

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 24 day of May, 1993, to the following counsel of record:

James R. Hasenyager  
MARQUARDT HASENYAGER & CUSTEN  
Attorneys for Plaintiffs  
2661 Washington Boulevard #202  
Ogden, Utah 84401

Gainer M. Waldbillig  
CHRISTENSEN JENSEN & POWELL  
Attorneys for Defendants Logistics Express  
175 South West Temple #510  
Salt Lake City, Utah 84101

*Julie M. Salome*

Mitchell opj  
9263-163  
5/12/93RG:mas