

1994

William Pace v. Cummins Engine Company, Inc.,
an Indiana corporation; Cummins Intermountain,
Inc., fka Cummins Intermountain Diesel Sales Co.;
Savage Fabrication Corp., fka Savage Rite-Way, Inc.;
Savage Manufacturing Corp.; Lowdermilk Rock
Products; and Steve's Diesel Service and Sales :
Reply Brief

Utah Court of Appeals

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D. David Lambert; Phillip E. Lowry; Howard, Lewis & Petersen; Attorneys for Plaintiff-Appellant.
Ford G. Scalley; John E. Hansen; Scalley & Reading; Attorneys for Defendant-Appellee.

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

WILLIAM PACE,

Plaintiff and Appellant,

vs.

CUMMINS ENGINE COMPANY, INC.,
an Indiana corporation; CUMMINS
INTERMOUNTAIN, INC., fka
CUMMINS INTERMOUNTAIN DIESEL
SALES CO.; SAVAGE FABRICATION
CORP., fka SAVAGE RITE-WAY, INC.;
SAVAGE MANUFACTURING CORP.;
LOWDERMILK ROCK PRODUCTS; and
STEVE'S DIESEL SERVICE &
SALES,

Defendants and Appellees.

A10

DOCKET NO. 940343CA

Case No. 940343-CA

Oral Argument
Priority 15

REPLY BRIEF OF APPELLANT

APPEAL FROM THE RULING OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, THE HONORABLE FRANK G. NOEL, PRESIDING

D. DAVID LAMBERT and
PHILLIP E. LOWRY, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84606

ATTORNEYS FOR Plaintiff-
Appellant

FORD G. SCALLEY
JOHN E. HANSEN
SCALLEY & READING
261 East 300 South, #200
Salt Lake City, UT 84111

ATTORNEYS FOR Defendant-Appellee
Lowdermilk

FILED
Utah Court of Appeals

Marilyn W. Branch
Clerk of the Court

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OF THE STATE OF UTAH

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CUMMINS INTERMOUNTAIN DIESEL	:	
SALES CO.; SAVAGE FABRICATION	:	
CORP., fka SAVAGE RITE-WAY, INC.;	:	Oral Argument
SAVAGE MANUFACTURING CORP.;	:	Priority 15
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SALES,	:	
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Provo, Utah 84606

ATTORNEYS FOR Plaintiff-
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JOHN E. HANSEN
SCALLEY & READING
261 East 300 South, #200
Salt Lake City, UT 84111

ATTORNEYS FOR Defendant-Appellee
Lowdermilk

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ARGUMENT

I. Pace Has Correctly Stated the Proper Standard for Summary Judgment, and Factual Issues Exist That Preclude Summary Judgment.

LRP has contended that Pace has "conveniently" omitted or misstated facts, skewing them in his favor, and that Pace has misstated the standard for summary judgment. The facts that LRP refers to, particularly the statement that an LRP employee was the "lead man on this job", speak to LRP's supervision over Pace. Any conflicting factual disputes surrounding the relationship between LRP and Pace show that summary judgment was inappropriate, as such conflicts must be resolved in favor of Pace, the nonmoving party. Pace has made no effort to avoid or "omit" LRP's characterization of the facts, but rather has exercised his right as the nonmoving party to present the facts in a light most favorable to him.

As to the correct standard for summary judgment, Pace acknowledges that when the nonmoving party presents opposing evidence that is insufficient as a matter of law, summary judgment is warranted, even when the issue concerned normally cannot be resolved at summary judgment. See, e.g., Pratt v. Mitchell Hollow Irr. Co., 813 P.2d 1169 (Utah 1991); Sorenson v. Hartford Accident and Life Ins. Co., 585 P.2d 440, 441-42 (Utah 1978); see also, Hussey Gay & Bell v. Georgia Ports Authority, 420 S.E.2d 50, 52-53 (Ga. Ct. App. 1992). This requirement makes sense in that it ensures the bona fides of a dispute.

LRP appears to claim that there was no bona fide dispute here because Pace has failed to present evidence of any factual conflict. In doing so LRP relies on a strained reading of Gheri v. Salazar, 883 P.2d 1352 (Utah 1994). LRP contends that Gheri held that the nature of the employment relationship could be determined on summary judgment, and in so arguing notes that Gheri "specifically" rejected Novenson v. Spokane Culvert & Fabricating Co., 588 P.2d 1174 (Wash. 1979) (which held that employment characterization issues are not normally resolvable on summary judgment) and "explicitly" held that facts concerning the terms and manner of the employment relationship could be determined on summary judgment.

This is not so. Gheri cited Novenson with a "but see" signal to illustrate that there are instances when an inference from the facts and circumstances is inappropriate *because the facts and circumstances themselves are a subject of dispute* (the Novenson opinion does not reveal whether all of the circumstances surrounding the worker's employment were undisputed, as the Gheri opinion did). The facts in Gheri were undisputed. One may make inferences from undisputed circumstances on summary judgment--that is what Gheri concludes. One cannot, however, *resolve* factual disputes and then make inferences from the findings.

Here there are disputes that cannot be resolved at summary judgment, evidence of which is certainly sufficient to create a bona fide dispute. One dispute already mentioned concerns the amount of control LRP could exert over Pace. Another is whether

LRP paid workers' compensation premiums.¹ LRP claims that evidence of such payment was readily available to Pace. It is not Pace's duty to prosecute LRP's defense. The only evidence of any kind in the record of payments between LRP and ELI is that referred to in Pace's initial brief. LRP produced nothing else, neither to Pace or the district court. If there were such evidence, it is not in the record, and that is LRP's fault.²

II. LRP Has Not Met the Three Gherzi Criteria Required for LRP to be Immune.

A. There Was No Contract Between LRP and Pace.

Pace has argued that there was no contract, express or implied, between LRP and him because the elements of contract did not exist. LRP suggests that an "implied" contract does not need those basic elements: offer, acceptance and consideration. LRP is wrong. There must be an offer and an acceptance, even of an implied contract between a special employer and employee, because

¹ With respect to payment of premiums, LRP has attacked Pace's interpretation of Gherzi, arguing that the payments made from the special employer to the general employer in Gherzi did not include any pro rata allocation for workers' compensation. Language from Gherzi refutes LRP's argument: "Huish [special employer] paid an hourly fee to Adia [general employer] with the understanding that a portion of the fee would be used to purchase workers' compensation insurance for the temporary employees." Gherzi, 883 P.2d at 1358. Huish was bound to pay Adia under contract, so even if Huish made payment after the accident (a fact unclear from the opinion), it was still bound with the contractual obligation to do so. No such contractual obligation existed in this case.

² Thus, to LRP's contention that Pace has made an *ipse dixit* denial, Pace responds *inopia non curat lex* (the law does not remedy a dearth).

the employee is relinquishing his right to sue the special employer by entering into it. Gherzi, 883 P.2d at 1357. Choice is the criterion emphasized in Gherzi, and an act of acceptance evidences such choice (even if merely implied). Pace did not choose to work for LRP.

LRP cites no cases in which choice prevailed over submission (apart from Gherzi, in which the choice was obvious and part of the entire temporary employment relationship). In contrast, Pace has cited cases that paint a spectrum between choice and submission. The cases indicate that Pace submitted to ELI and did not choose to work for LRP. Bourette demonstrated submission (instruction to help with repairs), as did Fisher (one cannot "choose" to work for an undisclosed special employer). Submission is key: "[Control or right to control the servant's physical conduct] must create a relationship of subordination between the borrowing master and the borrowed servant rather than a relationship of cooperation." Pichler v. Pacific Mechanical Constructors, 462 P.2d 960, 963 (Wash. Ct. App. 1969) (no control by special employer found--servant on site per general employer's instructions).

Pace had to do what he was told by ELI. So did the workers in the above cases and in the other cases that Pace cited. He did what he was told, and did so when requested by his general employer. Such conduct is not unusual--it is expected. LRP has failed to show that Pace had the choice to enter into any kind of contractual relationship with LRP.

B. The Work Was Not Essentially That of LRP.

Pace argued in his initial brief that his work was not "essentially" that of LRP because it benefitted ELI. The Larson treatise requires exclusivity, and LRP's position fails absent exclusivity. LRP disagrees, ascribing a colloquial meaning to the term "essential" instead of the technical meaning given the term in the Larson text. LRP's argument is unfounded. As pointed out in Pace's initial brief, Professors Larson coined the use of the term "essential" and also authored the exclusivity premise. If Larsons use the terms interchangeably, then LRP must also. If LRP *really* wishes to wax philological (unlikely), then one could argue that "essential", coming from the root "essence", really means elemental, which connotes exclusivity. But there is no point in speculating how many meanings can dance on the language of the statute, since the law is clear on this point. Essentially means exclusively.

C. LRP Did Not Have the Right to Control Pace.

LRP cites a number of cases, including Avila v. Northrup King Co., 880 P.2d 717 (Ariz. Ct. App. 1994), for the proposition that LRP had the right to control Pace. Avila simply got the law wrong. It stated,

[I]n the non-labor contractor cases, where an employer merely loans an employee and does not provide special equipment, the majority rule is that the loaned employee becomes the employee of the special employer. 1B Larson, *supra*, § 48.23, at 8-515. Consequently, even in the absence of a labor contractor relationship between EMCO, Avila, and Northrup, substantial precedent exists for holding that Avila is a lent employee of Northrup.

Avila, 880 P.2d at 724. Below is reproduced the section of the Larson treatise cited by Avila (italicized section is text that occurs on page 8-515).

§ 48.23 General employer in business of furnishing employees

The closest cases are those in which the business of the general employer consists largely of the very process of furnishing equipment and employees to others. When, for example, a truck owner furnishes trucks and drivers, or cranes and operators, at a profit to himself for the regular use of the special employer, it might at first seem that the bulk of the work being done is that of the special employer, and special employers have been held liable in these circumstances. Sometimes this result is produced in part by the fact that the special employer alone possesses a license to engage in interstate hauling. In a South Carolina case, Jordan Motor Lines leased a truck and claimant driver to defendant Coker Freight Lines. Coker had a license to operate in interstate hauling; Jordan did not. The ICC regulation of November 23, 1956, under which Coker operated stated that every lease of vehicles "shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto. . . ."

The court, relying heavily on the responsibility so assumed under ICC rules, held Coker to be a special employer. The amount of control exercised by Coker does not seem to have gone beyond specifying cargo, destination and route. But the responsibility legally assumed by Coker under the ICC regulation supplied the main basis for the decision.

But it is also possible to say that the owner is advancing his own business, which is simply the business of furnishing such equipment and labor for profit, and, particularly when the facts show ultimate retention of control for the protection of expensive equipment, it is quite common to find the general employer remaining liable.

If, however, the general employer merely arranges for labor without heavy equipment, the majority of the cases hold that the worker becomes the employee of the special employer, although there is substantial contra authority. For example, employers obtaining workers from the kind of labor service typified by Manpower, Inc. have usually, but not invariably, been held to assume the status of special employer.

1B Arthur Larson & Lex Larson, Larson's Workmens' Compensation Law § 48.23, at 8-496 to 8-532 (footnotes omitted)(hereinafter "Larson").

It is obvious that the Avila court cited Larson out of context and misapplied and misconstrued Larson's language. Section 48-23 deals specifically with "labor contractors" (suppliers of temporary or leased employees), and does not apply to "non-labor contractor cases" as Avila states. Indeed, every one of the 43 cases cited by Larson in footnote 65 in support of their "majority rule" argument is a labor contractor case, as are the 18 *contra* cases cited in footnote 65.1. It may be that footnotes were the log tripping the Avila court: they are so voluminous that in section 48.23 they take up all of pages 8-497, -498, -499, -500, -501, -502, -506, -507, -509, -510, -511, -512, -513, -514, -516, -517, -518, -519, -520, -521, -523, -524, -525, -526, -527, -529, -530, and -531. It is no wonder that an attorney or judge could miss the central theme of the section--"General Employer in Business of Furnishing Employees"--when the text is so disjointed.

LRP cited Avila and the other cases accompanying it--Sorenson, Nation, Rivera, Rodriguez, and Blacknall--in an effort to liken this case to Gherisi. All of the cited cases, however, are just like Gherisi in that they concern temporary employees lent by labor contractors or providers. They do not bridge the gap between the situation in Gherisi, where the right to control by the special employer was obvious, and the situation here, where it was not.

The fact that the borrowed servant obeys the requests of the borrowing employer as to the act involved does not necessarily cause him to be the servant of such borrowing

employer. Such obedience indeed may be obedience to a noncoercive request of the borrowing employer or the request may be in the nature of information given to the borrowed servant in a cooperative effort to get the job done.

Pichler v. Pacific Mechanical Constructors, 462 P.2d 960, 963 (Wash. Ct. App. 1969).

Answering LRP's specific contentions, LRP did not have the right to control where, when and how Pace was to carry out his assignment, since the assignment was made by ELI and specified its location and content. As noted above, the "lead man" characterization is a subject of dispute, and the contention of LRP's president that Pace was under LRP's exclusive supervision and control is self-serving and incredible.

In short, non-labor contractor cases like this one require the application of the enumerated criteria, as argued in Pace's initial brief. Such analysis leads to the conclusion that LRP was not an employer immune from tort liability.

III. The Joint Employment Doctrine Does Not Apply.

LRP, citing Aragon v. Clover Club Foods, 857 P.2d 250 (Utah Ct. App. 1993), claims that it and ELI are so interrelated that they should be treated as "joint employers." This case is nothing like Aragon, or its predecessor, Cook v. Peter Kiewit Sons Co., 386 P.2d 616 (Utah 1963). In Aragon a parent was found to be a joint employer with its subsidiary; in Cook two joint venturers who were helping each other build a tunnel were found to be joint employers.

While ELI and LRP do share a symbiotic relationship, they are different businesses, and can in no way be characterized as partners or joint venturers in the same sense as the companies in Cook or Aragon. ELI's success does not necessarily mean success for LRP, or vice versa. They are not linked in a "joint effort", Aragon, 857 P.2d at 256, nor does one ultimately control the other (as does a parent over a subsidiary) or have a substantial voice in the other's dealings as to the joint objective (as is the case in a partnership). See Hammer v. Gibbons & Reed Co., 510 P.2d 1104, 1105 (Utah 1973)(joint venturers are akin to partners in a partnership).³

Finally, LRP contends that Pace could not be a "stranger to the employment" because LRP "at times" borrowed Pace. LRP misreads Aragon. Only a "stranger to the employment" may be amenable to suit; an employee may always sue that stranger. Aragon, 857 P.2d at 255. A tortfeasor can be a stranger--a victim cannot. LRP presumably wishes to contend that LRP cannot be a stranger to the employment because it "at times" borrowed ELI employees, among them Pace. But this is not true. LRP is a stranger to the employment because it is not an employer or employee under the statute. If it wishes to prove that it is an employer under the statute and avoid being a stranger (its apparent goal), then it must show more than frequent borrowing. As has been demonstrated, it has not.

³ Pace has argued that LRP did not pay Pace's workers' compensation benefits, a factor important to the Aragon court's decision. Aragon, 857 P.2d at 256 (parent always is the ultimate payor of subsidiary's workers' compensation coverage).

IV. The Lee Affidavit Should Be Stricken.

With respect to LRP's contention that Mr. Lee's assertions concerning the employment relationship were proper and admissible, the untenability of LRP's position is clear:

[T]he fact that Rivera's affidavit asserted that he had no employment contract with Sagebrush and that he had not been told he would be considered Sagebrush's employee for purposes of the Act does not change [the result that there was an implied contract of hire between Sagebrush and Rivera]. See, e.g., [English v. Lehigh County Auth., 428 A.2d 1343, 1354 (Penn. Super. 1981)] (*characterization of relationship by worker or employer does not control determination of whether employment relationship exists*).

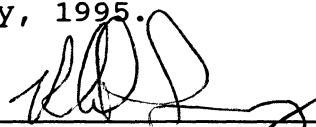
Rivera v. Sagebrush Sales, 884 P.2d 832, 835 (N.M. Ct. App. 1994) (emphasis supplied).

As for LRP's argument that the best evidence rule need not be satisfied with respect to payment records, it is once again not Pace's duty to prosecute LRP's defense. The supporting documents (if any) should have been attached to the affidavit as exhibits. Otherwise, Lee's statement violates the best evidence rule. This is true even if Lee could establish foundation that he knew what was in the documents. The best evidence rule can be violated--indeed, is probably often violated--with testimony that has plenty of foundation (i.e., "I have looked at the check seven times, and the 'memo' portion said 'haircut.'"). Such testimony is simply not good enough when the document is available. Lee's statement violates the rule.

CONCLUSION

LRP has argued that it enjoys immunity, either under Gherzi or Aragon. LRP relies on testimony that is inadmissible and glosses over significant factual disputes. Moreover, Aragon does not apply to this case because LRP and ELI are not sufficiently related. Gherzi's criteria apply, and LRP satisfies none of them. LRP did not have the right to control Pace, there was no contract of hire between LRP and Pace, and the work that Pace was doing was not essentially that of LRP. LRP's arguments to the contrary lack authority and speculate rather than substantiate. This case is not like Gherzi, and on that basis the district court should be reversed.

DATED this 15th day of May, 1995.



PHILLIP E. LOWRY
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiffs

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 15th day of May, 1995.

Ford G. Scalley, Esq.
John E. Hansen, Esq.
SCALLEY & READING
261 East 300 South #200
Salt Lake City, UT 84111



ATTORNEY