

2007

# Michael Bee v. Anheuser Busch Incorporated, a Missouri Corporation, and Prominence, Inc., a Nevada Corporation : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Matthew H. Raty; Law Office of Matthew H. Raty; ; Attorneys for Plaintiff.

Don Dalton; Dalton and Kelley; Peter H. Christensen; Ryan P. Atkinson; Strong and Hanni; Attorneys for Defendant.

---

## Recommended Citation

Brief of Appellee, *Bee v. Busch*, No. 20070804 (Utah Court of Appeals, 2007).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/501](https://digitalcommons.law.byu.edu/byu_ca3/501)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

MICHAEL BEE,

Appellant and Plaintiff,

v.

ANHEUSER BUSCH  
INCORPORATED, a Missouri  
Corporation, and PROMINENCE, INC.,  
a Nevada Corporation.

Appellees and Defendants.

**BRIEF OF APPELLEE ANHEUSER  
BUSCH INCORPORATED**

Appellate Case No. 20070804-CA

District Court Case No. 020910483

---

Response to Appeal from a Judgment following a jury trial, entered by the Third Judicial

District Court for Salt Lake County, The Honorable Robert P. Faust, presiding.

---

Matthew H. Raty (#6635)  
LAW OFFICE OF MATTHEW H. RATY, PC  
Cory B. Mattson (#9292)  
9677 South 700 East, Suite D  
Sandy, Utah 84070  
Telephone: (801) 495-2252  
*Attorneys for Plaintiff/Appellant  
Michael Bee*

Peter H. Christensen (#5453)  
Ryan P. Atkinson (#10673)  
STRONG & HANNI  
3 Triad Center, Suite 500  
Salt Lake City, Utah 84180  
Telephone: (801) 532-7080  
*Attorneys for Defendant/Appellee  
Anheuser-Busch Incorporated*

Don Dalton (#4305)  
DALTON & KELLEY  
P.O. Box 58084  
Salt Lake City, UT 84158  
*Attorneys for Defendant/Appellee  
Prominence, Inc.*

---

IN THE UTAH COURT OF APPEALS

---

MICHAEL BEE,

Appellant and Plaintiff,

v.

ANHEUSER BUSCH  
INCORPORATED, a Missouri  
Corporation, and PROMINENCE, INC.,  
a Nevada Corporation.

Appellees and Defendants.

**BRIEF OF APPELLEE ANHEUSER  
BUSCH INCORPORATED**

Appellate Case No. 20070804-CA

District Court Case No. 020910483

---

Response to Appeal from a Judgment following a jury trial, entered by the Third Judicial

District Court for Salt Lake County, The Honorable Robert P. Faust, presiding.

---

Matthew H. Raty (#6635)  
LAW OFFICE OF MATTHEW H. RATY, PC  
Cory B. Mattson (#9292)  
9677 South 700 East, Suite D  
Sandy, Utah 84070  
Telephone: (801) 495-2252  
*Attorneys for Plaintiff/Appellant  
Michael Bee*

Don Dalton (#4305)  
DALTON & KELLEY  
P.O. Box 58084  
Salt Lake City, UT 84158  
*Attorneys for Defendant/Appellee  
Prominence, Inc.*

Peter H. Christensen (#5453)  
Ryan P. Atkinson (#10673)  
STRONG & HANNI  
3 Triad Center, Suite 500  
Salt Lake City, Utah 84180  
Telephone: (801) 532-7080  
*Attorneys for Defendant/Appellee  
Anheuser-Busch Incorporated*

## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	1
RELEVANT STATUTES & RULES.....	2
STATEMENT OF THE CASE.....	2
A.    Nature of the Case.....	2
B.    Course of the Proceedings .....	2
C.    Disposition of the Trial Court.....	3
D.    Statement of the Facts .....	4
The Accident at Bud World .....	4
Voir Dire .....	5
Peremptory Challenges .....	6
Plaintiff's Advertising Evidence.....	7
SUMMARY OF THE ARGUMENTS .....	8
Point 1:    Plaintiff failed to preserve the voir dire issues for appeal during trial.....	8
Point 2:    Plaintiff invited any errors committed by the trial court on voir dire with respect to tort reform and personal injury bias. ....	9
Point 3:    Even if Plaintiff did not invite error at trial, any errors committed by the trial court were not obvious and were not harmful. ....	9
Point 4:    Additional peremptory challenges for Prominence were necessary because a substantial controversy existed between Defendants at trial. ....	10
Point 5:    Evidence of Anheuser's alcohol advertising was properly excluded. ....	10

ARGUMENT .....	11
I. PLAINTIFF FAILED TO PROPERLY PRESERVE THE VOIR DIRE ISSUE FOR APPEAL AT TRIAL AFTER VOIR DIRE WAS CONDUCTED BY THE COURT.....	11
II. THE INVITED ERROR DOCTRINE PRECLUDES PLAINTIFF FROM CHALLENGING THE ISSUE REGARDING TORT REFORM AND PERSONAL INJURY BIAS VOIR DIRE ON APPEAL WHERE PLAINTIFF FAILED TO OBJECT TO THE VOIR DIRE CONDUCTED BY THE COURT AFTER IT WAS COMPLETED .....	17
III. IN THE EVENT PLAINTIFF DID NOT INVITE ERROR AT TRIAL BY FAILING TO OBJECT TO THE COURT’S PRESENTED VOIR DIRE, PLAINTIFF CAN NOT ESTABLISH THAT ANY ERROR COMMITTED BY THE TRIAL COURT IN FAILING TO PRESENT PLAINTIFF’S REQUESTED VOIR DIRE REGARDING TORT REFORM AND PERSONAL INJURY BIAS SHOULD HAVE BEEN OBVIOUS TO THE TRIAL COURT OR THAT THE ERROR WAS HARMFUL.....	19
IV. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY GRANTING EACH DEFENDANT A SET OF PEREMPTORY CHALLENGES BECAUSE A SUBSTANTIAL CONTROVERSY EXISTED BETWEEN THE DEFENDANT’S IN THE FORM OF A THIRD-PARTY COMPLAINT FILED BY ANHEUSER-BUSCH AGAINST PROMINENCE .....	21
V. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY PRECLUDING ANY AND ALL EVIDENCE OF ANHEUSER- BUSCH’S ALCOHOL ADVERTISEMENTS.....	26
A. The doctrine of notice pleading precluded the admissibility of new evidence regarding advertising .....	26
B. Evidence of ads was inadmissible under the rules of civil procedure because it was never disclosed and could not be used for impeachment purposes .....	28
C. Evidence of advertising was properly excluded for lack of foundation and competence from any witness.....	30

	<u>Page</u>
D. Evidence of ads was properly held to be inadmissible because it was not relevant and its probative value was substantially outweighed by the danger of unfair prejudice .....	31
E. Plaintiff's stated theory of relevance fails to state a claim as a matter of law. ....	33
CONCLUSION.....	35

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases Cited</u>	
<i>Accord Maguire v. Pabst Brewing Co.</i> , 387 N.W.2d 565, 568-69 (Iowa 1986) .....	34
<i>Alcanzar v. University of Utah</i> , 2008 UT App 222 .....	15, 16
<i>Barrett v. Peterson</i> , 868 P.2d 101 (Utah App. 1993) .....	17
<i>Canfield v. Layton City</i> , 112 P.3d 622, 625 (Utah 2005) .....	26, 27
<i>Carrier v. Pro-Tech Restoration</i> , 944 P.2d 346 (Utah 1997) .....	21
<i>Ellis v. Gilbert</i> , 429 P.2d 39 (Utah 1967) .....	28
<i>Evans v. Doty</i> , 824 P.2d 460 (Utah App. 1991) .....	17
<i>Gawloski v. Miller Brewing Co.</i> , 644 N.E.2d 731 (Ohio Ct. App. 1994) .....	34
<i>Georgia Ports Authority v. Harris, et al</i> , 243 Ga. App. 508, 512 (Ga. App. 2000) .....	25
<i>Malek v. Miller Brewing Co.</i> , 749 S.W.2d 521 (Tex. App. 1988) .....	34
<i>Overton v. Anheuser-Busch Co.</i> 205 Mich App. 260, 517 N.W.2d 309 .....	33
<i>Pratt v. Nelson</i> , 2007 UT 41 .....	12, 15, 17, 19

	<u>Page</u>
<i>Randle v. Allen</i> , 862 P.2d 1329 (Utah 1993) .....	21, 22, 23, 24
<i>Robinson v. Anheuser-Busch, Inc.</i> , No. 00-D-300-N, 2000 U.S. Dist. LEXIS 22474 (M.D. Ala. July 7, 2000), <i>aff'd</i> , No. 00-D-300-N, 2000 U.S. Dist. LEXIS 22475 (M.D. Ala. Aug. 1, 2000).....	34
<i>Smith v. Anheuser-Busch, Inc.</i> , 599 A.2d 320 (R.I. 1991) .....	34
<i>State v. Casey</i> , 2003 UT 55.....	19, 20
<i>State v. Rammel</i> , 721 P.2d 498 (Utah 1986) .....	29
<i>State v. Reed</i> , 820 P.2d 479 (Utah 1989) .....	30
<i>State vs. Lindgren</i> , 910 P.2d 1268 (Utah Ct. App. 1996).....	32
<i>Terry vs. Zions Coop. Mercantile Institute</i> , 605 P.2d 314 (Utah 1979) .....	32
<i>White v. State</i> , 579 P.2d 921 (Utah 1978) .....	28
<i>Williams v. State Farm Ins. Co.</i> , 656 P.2d 966 (Utah 1982) .....	26

#### **Other Authorities**

Utah Code Ann. § 78-2-2 (2007) .....	1
Utah Rules of Civil Procedure. 8(a)(1)-(2) .....	26
Utah Rules of Civil Procedure, Rule 47(e) .....	2, 26



	<u>Page</u>
Utah Rules of Civil Procedure, Rule 26.....	28
Utah Rules of Civil Procedure 26((a)(1)(B). ....	29
Utah Rules of Civil Procedure, Rule 26(a)(4).....	29
Utah Rules of Evidence, Rule 401 .....	31
Utah Rules of Evidence, Rule 403 .....	31
Utah Rules of Evidence, Rule 602 .....	30
Utah Rules of Evidence, Rule 607-608.....	29

## **STATEMENT OF JURISDICTION**

Jurisdiction of proper pursuant to Utah Code Ann. § 78-2-2 (2007)

## **STATEMENT OF THE ISSUES**

In his opening brief, Plaintiff/Appellant (“Plaintiff”) presents three issues on appeal. Defendant/Appellee Anheuser-Busch Incorporated (“Anheuser”) contends that these three issues are more properly expanded to the following five issues:

1. Whether Plaintiff properly preserved the issue with respect to Plaintiff’s requested voir dire regarding tort reform and personal injury bias for appeal after the trial court conducted voir dire?
2. Whether the invited error doctrine precludes Plaintiff from challenging the trial court’s apparent failure to conduct complete voir dire regarding tort reform and personal injury bias where Plaintiff failed to object or request that the trial court conduct additional voir dire after the court indicated voir dire was completed?
3. Whether Plaintiff can establish that any error of the trial court in not conducting voir dire regarding tort reform and personal injury bias should have been obvious to the trial court and that any such error was harmful?
4. Whether the trial court properly acted within its broad discretion by granting both Anheuser and Prominence each a set of peremptory challenges where a “substantial controversy” existed between the Defendants in the form of a third-party complaint and causes of action for breach of contract and apportionment of fault?

5. Whether the trial court acted within its broad discretion by precluding any and all evidence of Anheuser's alcohol advertisements where no notice of Plaintiff's intent to use the ads was given and they were not part of Plaintiff's original claims in his Amended Complaint?

### **RELEVANT STATUTES & RULES**

Utah Rule of Civil Procedure 47(e):

(e) *Challenges to individual jurors; number of peremptory challenges.* The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as is just. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed.

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case.**

Plaintiff brought suit against Anheuser to recover for injuries incurred in a slip and fall at the Bud World event at the Gallivan Center during the 2002 Winter Olympics. (R. 1-7.)

#### **B. Course of the Proceedings.**

This case went to trial before a jury on March 26, 2007. (R. 2223 at 3.) Prior to the first day of Plaintiff's case at trial, Anheuser moved for exclusion of any evidence of Anheuser's advertising or marketing. (R. 1975-88.) Also, prior to voir dire on the first day of trial, the court received Plaintiff's Requested Voir Dire and heard arguments from counsel regarding Plaintiff's request that tort reform and personal injury bias voir dire be

conducted. (R. 2226 at 1:6-2:23.) After voir dire, the trial court asked counsel if there was any more voir dire that they wanted the court to conduct. Plaintiff failed to object to the voir dire that was given or to ask for additional voir dire. (R. 2226 at 44:12-15.) Finally, during argument before the first day of trial, Plaintiff objected to each defendant being given a set of peremptory challenges. (R. 2223 at 115:13-116:16.)

After the trial, the jury found that Anheuser and Prominence were negligent toward Plaintiff, but that Plaintiff and his wife, Kristi Winkler, were also negligent. The jury attributed 10% of the fault to Anheuser, 10% to Prominence, 75% to Plaintiff, and 5% to Plaintiff's wife. The jury awarded Plaintiff economic damages of \$2,464.31. (R. 2079-85.)

### **C. Disposition of the Trial Court.**

With respect to evidence of Anheuser's marketing or advertising, the trial court ruled that such evidence would be excluded. (R. 2223 at 65:10-78:2, 105:24, 106:13, 107:13-108:8.)

Regarding voir dire with respect to tort reform and personal injury bias, the court concluded before voir dire took place that it would likely reduce the questions from those requested by Plaintiff to give a more general flavor of the issues to the jury. However, the court did not state specifically what it would ask, and Plaintiff's counsel made no request that the court tell him precisely what would be asked on the issues. (R. 2226 at 1:6-2:23.) After voir dire was completed by the court, it gave all counsel an opportunity to object or address any issues missed by the court. Plaintiff failed to object to the court's

apparent failure to inquire completely into juror bias regarding tort reform or personal injury bias, or to ask for additional voir dire. (R. 2226 at 44:12-15.)

The court also determined that a “substantial controversy” existed between Defendants and granted each Defendant a set of peremptory challenges based on its finding. (R. 2223 at 44:23-48:14.)

#### **D. Statement of the Facts**

##### **The Accident at Bud World**

This case arises out of Plaintiff’s slip and fall when he attended the Bud World exhibit in downtown Salt Lake City on or about February 22, 2002. Plaintiff attended a mock hockey game on an ice rink that was part of Bud World. Plaintiff volunteered to participate and play for a chance to win a pair of tickets to the gold medal hockey game. Plaintiff alleged he was intoxicated at the time and that Prominence employees should have seen he was drunk and prevented him from participating. (R. 2223 at 1:6-3:3.) Plaintiff admitted that he had consumed all but six (6) ounces of alcohol before even going to Bud World. (R. 245-46.) Further, there was no evidence that Anheuser served Plaintiff alcohol. Prominence was the food and alcohol vendor at Bud World, not Anheuser. (R. 40-42.) After going on to the ice, Plaintiff ignored instructions to stand still and “putt” the puck. Instead, he took off down the ice and fell on his head while taking a slap shot. (R. 245-46.)

### Voir Dire

On the morning of the first day of trial, the trial court heard arguments from counsel on Plaintiff's requested voir dire regarding tort reform and personal injury bias. The questions proposed by Plaintiff were asked for the purpose of suggesting to the jury pool that damages should be awarded to Plaintiff. Further, Plaintiff required that the specific questions regarding "Tort Reform" and a "lawsuit crisis" be discussed in chambers with each individual juror. (R. 1741.) Clearly, the trial court did not have time, given the scheduled length of the trial, to take each juror into chambers to ask Plaintiff's Tort Reform questions.

Moreover, contrary to Plaintiff's argument, the trial court did not "reject" Plaintiff's proposed Tort Reform questions. At that time, the trial court stated, "I may reduce them down. I don't know as I'm going to go into the detail. I think more of a general flavor of some of these questions would be fine." (R. 2226 at 1:6-2:23.) The trial court did not specify precisely what questions would be posed to the jury, nor did Plaintiff request prior to voir dire that the court specify what questions would be posed. (R. 2226 at 1:6-2:23.) The trial court asked the jury if any outside influences would keep them from being biased and impartial. (R. 2223 at 27:21-23.) During and after the trial court conducted voir dire, it repeatedly asked counsel if counsel had anything further on voir dire. There was no response from Plaintiff's counsel. (R. 2223 at 40:7-9; 44:12-13.) Plaintiff failed to object and further failed to request a sidebar with the trial court to

request additional voir dire or to object to the court's failure to ask any of Plaintiff's requested voir dire on tort reform and personal injury bias issues. (R. 2226 at 44:12-15.)

### **Peremptory Challenges**

Prior to jury selection, the trial court heard arguments from counsel as to whether Defendants should each be granted a set of peremptory challenges because of the presence of a "substantial controversy" between Defendants. The court concluded that a "substantial controversy" existed between Defendants and granted each Defendant a set of peremptory challenges based on its conclusion. (R. 2223 at 44:23-48:14.) Plaintiff claims Defendants settled all disputes between them prior to trial. However, such is not the case. In fact, a third-party claim existed between Anheuser and Prominence that was not dependent on Plaintiff's claims against either Defendant. Anheuser claimed that Prominence was contractually liable to Anheuser for general liability insurance (which it failed to procure), failure to properly and skillfully manage the Bud World event (which Prominence denied) and for all costs associated with Anheuser's defense of the claim. (R. 43.) Further, beyond its contractual duties to Anheuser, Anheuser alleged that if Plaintiff was injured at Bud World, it was due to Plaintiff's fault and Prominence's fault, not Anheuser's fault. Thus, there would have to be a separate apportionment of fault to Prominence. (R. 42, 45, 110, 112-13.) Clearly, a controversy existed between the parties that was not resolved by the parties' settlement and would not be resolved until after trial. The Stipulation between the parties dealt exclusively with the indemnification issues after the verdict had been entered. (R. 2223 at 47.) These issues were not inconsiderable, and

depending on the outcome of the trial, could have been quite financially significant.

During trial, Prominence still faced the allegations of both Plaintiff and Anheuser, that if the jury found that the Bud World event was not properly managed, Prominence, as the hired manager, would face paying damages to Plaintiff for its own portion of fault, plus damages to Anheuser for its breach of contract.

The trial court considered the Stipulation agreed to by Anheuser and Prominence and concluded that despite the Stipulation, because claims remained between Anheuser and Prominence aside from the third-party claim for indemnification and apportionment of fault, a “substantial controversy” existed between the parties that permitted the trial court to grant an additional set of peremptory challenges to Prominence. (R. 2223 at 44:23-48:14.)

### **Plaintiff's Advertising Evidence**

Plaintiff claims further that the trial court refused introduction at trial of Anheuser's alleged “irresponsible, reckless and deceptive alcohol marketing and advertisements.” The trial court excluded this evidence because Plaintiff never disclosed the alleged advertisements in any initial disclosures, discovery responses or pre-trial disclosures. (R. 2223 at 65:10-70:9.) Further, Plaintiff's amended complaint alleged negligence for letting Plaintiff on the ice while intoxicated. It gave no notice of the theory that Anheuser's advertising somehow lured Plaintiff into getting drunk outside of Bud World, and then to participate in the Shoot on the Goalie Contest. (R. 99-103.) Finally, the evidence was excluded because Plaintiff's counsel failed to lay the



foundation for the advertisements through Plaintiff. He claimed Plaintiff had researched the issue about the advertisements and the volume of beer that Anheuser sells annually. (R. 65-79.) The trial court found that there was improper notice of this evidence, and insufficient foundation.

There is also no evidence, as Plaintiff alleges, that (1) the jury apportioned 75% fault to Anheuser, or (2) that under question 12(b) on the Special Verdict Form the jury answered the Question “no”, and then scribbled that answer out which apparently constitutes reversible error. (R. 2028.) The jury was polled and unanimously found Plaintiff 75% at fault and answered 12(b) “no”. Further, Plaintiff’s claims are irrelevant because there is no argument in his brief on these issues. (See Plaintiff’s Appellate Brief.)

### **SUMMARY OF THE ARGUMENTS**

#### **Point 1: Plaintiff failed to preserve the voir dire issues for appeal during trial.**

This Court should not consider Plaintiff’s arguments regarding error with respect to voir dire. Though Plaintiff made an initial objection regarding the court not asking all of his voir dire prior to jury selection (the court said it would ask a modified version of Plaintiff’s questions), Plaintiff made no objection and no request for additional voir dire after it became clear the trial court did not ask the voir dire requested by Plaintiff regarding tort reform and personal injury bias. In Utah, it is well settled that in order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on the issue. Where Plaintiff failed to object

or request additional voir dire when given the opportunity at the close of voir dire, he waived his right to challenge the issue on appeal.

**Point 2: Plaintiff invited any errors committed by the trial court on voir dire with respect to tort reform and personal injury bias.**

Again, as stated above, Plaintiff did not object or request additional voir dire at the close of voir dire. By failing to object or make a request for additional voir dire, Plaintiff invited the trial court to commit error. It is well settled that a party can not take advantage of an error committed at trial when that party led the trial court into committing the error. Accordingly, because Plaintiff failed to object or request additional voir dire at the close of voir dire, if error was committed, Plaintiff invited the trial court to commit the error. Therefore, this Court should not consider Plaintiff's arguments regarding voir dire conducted by the trial court.

**Point 3: Even if Plaintiff did not invite error at trial, any errors committed by the trial court were not obvious and were not harmful.**

Finally, this Court should refuse to consider Plaintiff's arguments regarding voir dire because any errors committed by the trial court were not obvious. Plaintiff failed to notify the court that an error may have taken place when given the opportunity at trial after voir dire was completed. It could not have been obvious to the trial court at the time because Plaintiff did not object or make additional requests. Moreover, there is no evidence any error was harmful. Voir dire was presented to the jury pool on issues related to potential bias, and there is no evidence that a different jury would have been impaneled, or that a more favorable outcome would have resulted.

**Point 4:**     **Additional peremptory challenges for Prominence were necessary because a substantial controversy existed between Defendants at trial.**

This Court should affirm the trial court's discretionary decision to grant an additional set of peremptory challenges to Prominence. A substantial controversy existed between Defendants in the form of Anheuser's Third-Party Complaint against Prominence in which Anheuser alleged causes of action for breach of contract, indemnity, and apportionment of fault. Prior to trial, Anheuser and Prominence came to agreement regarding indemnity. However, during trial, Defendants' position differed substantially because of Prominence's failure to procure liability insurance and defend Anheuser. Anheuser's claims against Prominence for breach of contract are not derivative of Plaintiff's claims against either Defendant and survived the trial and can still be pursued against Prominence. Therefore, because a substantial controversy existed between Defendants at trial, it was within the trial court's discretion to grant additional peremptory challenges to Prominence at trial.

**Point 5:**     **Evidence of Anheuser's alcohol advertising was properly excluded.**

This Court should also affirm the trial court's discretionary decision to exclude evidence regarding Anheuser's advertising. This evidence was properly excluded for several reasons. First, at no time since amending his Complaint did Plaintiff assert a legal or factual claim that Anheuser's negligence went beyond the incident at Bud World and Anheuser's role in the exhibition during the 2002 Winter Olympics. Second, contrary to the Utah Rules of Civil Procedure, Plaintiff never designated or produced any

of Anheuser's advertising material or financial information prior to trial. Third, no foundation could have been laid to introduce any of Anheuser's advertising. Fourth, any evidence concerning advertising of Anheuser's products was clearly inadmissible, irrelevant and unduly prejudicial to the extent a jury could base a decision about liability on something other than the facts. Finally, Plaintiff's attempt to blame advertising for his own intoxication and negligence fails to state a claim as a matter of law. Therefore, the trial court properly excluded evidence regarding Anheuser's advertising.

### **ARGUMENT**

#### **I. PLAINTIFF FAILED TO PROPERLY PRESERVE THE VOIR DIRE ISSUE FOR APPEAL AT TRIAL AFTER VOIR DIRE WAS CONDUCTED BY THE COURT.**

Contrary to Plaintiff's assertions, the trial court never refused to ask Plaintiff's tort reform questions. Plaintiff made clear in his proposed voir dire questions that his voluminous tort reform and excess verdict questions had to be asked in chambers. (R. 1741.) Clearly there was not time for that process to occur. The trial court did ask the jury pool if any outside influences would prevent them from being fair and impartial. (R. 2223 at 27:21-23.) If that was insufficient, then Plaintiff's counsel should have requested that the trial court ask more specific tort reform questions when presented with the opportunity. The trial court went on to say:

Did counsel have any additional questions they'd like the Court to consider? If so, let's approach the bench if you would.

(R. 2223 at 40:7-9.) After the sidebar, additional questions were asked by the trial court to the jury pool. None involved tort reform or concerns regarding excessive verdicts. Then the trial court said: “All right, anything else counsel before we move forward.” (R. 2223 at 44:12-13.) There was no response from Plaintiff’s attorney. He did not demand that the trial court ask his tort reform or excessive verdict questions and he did not object to the trial court failing to ask the questions. (R. 2226 at 44:12-15.)

The Utah Supreme Court set forth the standard for preserving an issue for appeal in *Pratt v. Nelson*, 2007 UT 41:

Generally, in order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. We have set forth three factors that help determine whether the trial court has such an opportunity: (1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority. In short, a party may not claim to have preserved an issue for appeal by merely mentioning . . . an issue without introducing supporting evidence or relevant legal authority. Ultimately, the preservation requirement is based on the premise that, in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it.

*Id.* at ¶ 15 (internal quotations and citations omitted.)

In the instant case, the trial court provided an initial decision on whether all of Plaintiff’s requested voir dire questions with respect to tort reform and personal injury bias would be presented to the jury. The discussion between the trial court and counsel was as follows:

THE COURT: Okay. We’ll go on the record with case number 020910483. We’re not [sic] discussing the potential voir dire questions and objections. And two, we’re addressing the plaintiffs. All right.

You've objected to the questions one through four, and the reasons were for the record, counsel?

MR. DALTON: The reasons were that these types of questions generate – are just intended to generate an inflammatory responses, Your Honor. I had this same experience just in my last trial where they used these same questions. All the jurors don't like lawsuits. They don't like high verdicts. When those questions were last – asked at the last trial that I got at, we spent an inordinate amount of time bringing people in that said, oh, the McDonald's case or the BMW case. And I think a reasonable question is, do you have a problem with resolving disputes through lawsuits is okay. But when you start trying to bait people to get, you know, the conservatives who don't like big verdicts, then you're just going to get all kinds of responses, and it's intended to just – to try to inflame people.

MR. RATY: Your Honor, these are taken right out of the case law. Our appellate courts have recognized we live in a tort reform society. The plaintiffs have an absolute right to know the exposure of these potential jurors to the propaganda that's generated by these big companies and insurance companies on these issues. And, you know, I don't really want to threaten you and say, you know, that would be prejudicial error and not to give these. But they are right out of the case law, Your Honor, and they're very fair questions. When we have a need a right to know if we've got tort reformers on this jury. We have the right to intelligently exercise our peremptory challenges, and we can't do that if we don't know what their opinions are. We don't know what they've been exposed to. These are all legitimate questions. I've always had these given in my past trials, and they're very appropriate.

THE COURT: I may reduce them down. I don't know as I'm going to go into the detail. I think more of a general flavor of some of these questions would be fine. Like – and like for example, question three. Do you personally believe that jury verdicts are unreasonable? Well, that's so broad, at least to me. Which jury verdict? How much – you know. I think

(R. 2226 at 1:6-2:23.)

It is thus clear from the record that the trial court determined initially that it would reduce the questions proposed by Plaintiff in his voir dire request with respect to tort reform and personal injury bias, and that the trial court would craft its own questions.

However, the court did not set forth what questions would specifically be asked, or precisely how the tort reform and personal injury bias questions proposed by Plaintiff would be pared down. Nor did Plaintiff's counsel request that the trial court tell him precisely what questions would be posed or in what form the questions would be asked. Therefore, though the trial court made an initial finding on the issue, it left open how the questions would be asked. During voir dire, the trial court asked the following questions with respect to personal injury bias:

Is there anybody who has had a family member or a friend or themselves ever make a claim for a personal injury that they may have suffered? If so, please raise your hand. (R. 2226 at 28:2-4.)

After receiving some responses to the question, the trial court asked this additional question:

Has anyone had any family member or themselves or a friend make a claim for personal injury which you felt was not properly resolved? If so, please raise your hand. (R. 2226 at 29:14-17.)

The trial court went on to ask:

Is there anybody in the audience that has any questions in your own mind [sic] about your ability to be fair and impartial and to be able to return a jury verdict solely base upon the evidence that's presented, free from any outside influence? If so, please raise your hand.

(R. 2223 at 27:21-25.)

At no point during voir dire did Plaintiff's counsel object to the court's questions or request a conference with the trial court in chambers to make an objection for the record regarding the court's questions with respect to personal injury bias. After

completion of voir dire, the court asked all counsel if there was anything else that needed to be addressed:

THE COURT: Thank you. All right. Anything else counsel before we move forward?

MR. CHRISTENSEN: No, Your Honor.

THE COURT: All right. Fine.

(R. 2226 at 44:12-15.) It was only at that point in the proceedings that Plaintiff knew that the trial court was not going to ask any more of the voir dire he requested with respect to tort reform and personal injury bias.

Accordingly, though Plaintiff made an initial objection regarding voir dire prior to jury selection, because Plaintiff made no objection during or after it became clear the trial court would not be asking the voir dire requested by Plaintiff regarding tort reform and personal injury bias, Plaintiff failed to object to the trial court's decision not ask the questions in a timely manner as required under *Pratt*. *Id.* at ¶ 15. Plaintiff thus waived his objection and failed to preserve the issue for appeal.

In support of Plaintiff's arguments regarding error with respect to voir dire, Plaintiff may reference a case recently decided by this Court in which the plaintiff was represented by the same attorney currently representing Plaintiff in the instant case. In *Alcanzar v. University of Utah*, 2008 UT App 222, ¶19, this Court concluded that the trial court committed reversible error in refusing to ask the plaintiffs' requested voir dire questions regarding tort reform and medical malpractice. Plaintiff will likely assert in his reply brief that this case is on point with the instant case.



However, *Alcanzar* is distinguishable from the instant case because in the instant case Plaintiff failed to properly preserve the issue for appeal by requesting additional questions at the close of voir dire, or objecting when given the opportunity at the same time. This Court does not reference a similar circumstance in *Alcanzar*. Moreover, *Alcanzar* was a medical malpractice case in which the trial court permitted extensive questioning as to potential jurors experiences with doctors and hospitals and any negative aspects of those experiences. *Id.* at ¶ 18. In the instant case, Plaintiff was alleging personal injuries as a result of an incident at Bud World. Potential jurors were questioned regarding whether anyone had ever suffered a closed head injury, whether anyone had any dealings with Anheuser or its products, whether anyone attended the Bud World exhibit during the Olympics or participated in any activities, whether anyone had any particular feelings or attitude toward companies that manufacture and sell alcohol or beer, whether anyone had any background knowledge in subjects such as large events, planning, marketing or promotions, or whether anyone had any experience with ice related activities and whether any outside influences would affect their ability to be fair jurors. (R. 2223 at 24:22-37:13.) In short, it is clear that the trial court conducted voir dire sufficient to give Plaintiff enough information about potential jurors' experiences with Anheuser, Bud World, and Anheuser products to make an informed decision that was not available to potential jurors in *Alcanzar*.

**II. THE INVITED ERROR DOCTRINE PRECLUDES PLAINTIFF FROM CHALLENGING THE ISSUE REGARDING TORT REFORM AND PERSONAL INJURY BIAS VOIR DIRE ON APPEAL WHERE PLAINTIFF FAILED TO OBJECT TO THE VOIR DIRE CONDUCTED BY THE COURT AFTER IT WAS COMPLETED.**

As illustrated by the facts outlined above, the trial court made an initial ruling that it would not present all of Plaintiff's requested voir dire to the jury regarding tort reform and personal injury bias but would give a modified version. (R. 2226 at 1:6-2:23.) However, once Plaintiff heard the voir dire given to the jury pool, he never asked the court to follow up and give more precise questions on tort reform and personal injury bias issues, and he never objected to the trial court's failure to give a question on those issues. Plaintiff's attorney was aware of this Court's holdings in *Barrett v. Peterson*, 868 P.2d 101 (Utah App. 1993), and *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991), because they were cited in Plaintiff's Requested Voir Dire.

In *Pratt*, the Utah Supreme Court stated, "[o]ur invited error doctrine arises from the principle that a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." 2007 UT 41, at ¶ 17. The *Pratt* court went on to state:

By precluding appellate review, the doctrine furthers this principle by discouraging parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal. Further, parties are not entitled to both the benefit of not objecting at trial and the benefit of objecting on appeal. Thus, encouraging counsel to actively participate in all proceedings and to raise any possible error at the time of its occurrence fortifies our long-established policy that the trial court should have the first opportunity to address a claim of error.

*Id* (internal quotations omitted.)

In the instant case, if the trial court erred, the invited error doctrine precludes appellate review on the issue of tort reform and personal injury bias voir dire because Plaintiff failed to object to voir dire presented by the trial court as soon as it became clear that the trial court did not present enough questions on point to the issues of tort reform and personal injury bias. When the trial court completed voir dire it gave all counsel the opportunity to object or raise any additional questions with respect to voir dire. Plaintiff invited error by failing to suggest additional questions or to make any objections with respect to the trial court's questions regarding tort reform or personal injury bias.

The invited error doctrine also typically requires an affirmative representation to the trial court that a party has no objection to the proceedings.

Affirmative representations that a party has no objection to the proceedings fall within the scope of the invited error doctrine because such representations reassure the trial court and encourage it to proceed without further consideration of the issues.

*Id.* at ¶ 18. In the instant case, Plaintiff affirmatively represented to the trial court that it had no objection to the court's failure to present Plaintiff's requested voir dire regarding tort reform and personal injury bias when the trial court asked if counsel had anything further and Plaintiff made no objection. (R. 2226 at 44:12-15.)

Therefore, Plaintiff invited any error committed by the trial court because he failed to object to voir dire once it was concluded. Because Plaintiff did not give the trial court an opportunity to correct any error, Plaintiff invited the error and review of the issue should be precluded.

**III. IN THE EVENT PLAINTIFF DID NOT INVITE ERROR AT TRIAL BY FAILING TO OBJECT TO THE COURT'S PRESENTED VOIR DIRE, PLAINTIFF CAN NOT ESTABLISH THAT ANY ERROR COMMITTED BY THE TRIAL COURT IN FAILING TO PRESENT PLAINTIFF'S REQUESTED VOIR DIRE REGARDING TORT REFORM AND PERSONAL INJURY BIAS SHOULD HAVE BEEN OBVIOUS TO THE TRIAL COURT OR THAT THE ERROR WAS HARMFUL.**

In *Pratt*, the Utah Supreme Court reaffirmed that in cases where a party raises an issue on appeal that was not properly preserved at the trial court, Utah appellate courts review under the plain error standard.

Under plain error review, we may reverse the lower court on an issue not properly preserved for appeal when a party can show the following: (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the [party], or phrased differently, our confidence in the verdict is undermined.

In the instant case, there is no evidence that any error committed by the trial court should have been obvious to the court or that absent the error there is a reasonable likelihood Plaintiff would have received a more favorable outcome at trial.

In *State v. Casey*, 2003 UT 55, ¶ 44, the Utah Supreme Court explained that the second element of the plain error test requires:

[T]hat the error be plain, manifest, or obvious to the trial court. In explaining this prong, we have held that after examining the record, an appellate court must be able to say that it should have been obvious to a trial court that it was committing error. In other words, given the circumstances, the trial court should have been aware that an error was being committed at the time.

(Internal quotations and citations omitted.) There is no evidence in the instant case that the trial court knew or should have known it was committing error. It gave broad voir

dire questions on the issues of prejudices and the effect of outside influences on the jury. After voir dire concluded, Plaintiff's counsel never pointed out to the trial court that any error had been committed. The trial court clearly believed it was within its broad discretion with respect to voir dire to reduce Plaintiff's voir dire from what was requested to what was asked by the trial court. There is certainly no evidence that it was obvious to the trial court that it was committing error. Therefore, if the trial court committed error by failing to ask more precise questions regarding tort reform or personal injury bias, because there is no evidence that the error should have been obvious to the trial court, Plaintiff can not meet the second prong of the plain error test to establish that the error should have been plain to the trial court.

The *Casey* court further explained that the third element of the plain error test requires that the appellate court:

[D]etermine whether the error was of sufficient magnitude that it affects the substantial rights of a party. . . . In other words, . . . the appellant must show a reasonable likelihood that absent the error, the outcome would have been more favorable. Plain error undermines our confidence in the verdict.

*Id.* at ¶ 45 (internal quotations and citations omitted.) In the instant case, Plaintiff can not show that any error was of sufficient magnitude that it affected the rights of Plaintiff. There is also no evidence that absent the error, the outcome would have been more favorable at trial. Plaintiff used his peremptory challenges and a jury was impaneled from the primary jury pool. Plaintiff can not show that had voir dire with respect to tort reform and personal injury bias been presented to the jury more thoroughly, a different jury would have been impaneled, or that a more favorable outcome would have resulted.

Therefore, even if this Court determines that Plaintiff did not invite error by failing to object to voir dire presented by the trial court, Plaintiff can not establish that any error committed by the trial court in failing to present Plaintiff's requested voir dire regarding tort reform and personal injury bias should have been obvious to the trial court, or that the error was harmful.

**IV. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY GRANTING EACH DEFENDANT A SET OF PEREMPTORY CHALLENGES BECAUSE A SUBSTANTIAL CONTROVERSY EXISTED BETWEEN THE DEFENDANT'S IN THE FORM OF A THIRD-PARTY COMPLAINT FILED BY ANHEUSER-BUSCH AGAINST PROMINENCE.**

Plaintiff asserts that the trial court committed prejudicial and reversible error by granting both Anheuser-Busch and Prominence each a set of peremptory challenges prior to trial. Plaintiff cites to *Carrier v. Pro-Tech Restoration*, 944 P.2d 346 (Utah 1997), and *Randle v. Allen*, 862 P.2d 1329 (Utah 1993) in support of his arguments that the trial court erred in its ruling. However, neither *Carrier* nor *Pro-Tech* involved circumstances in which a non-derivative third-party complaint was filed to bring a third-party defendant into a lawsuit. In the instant case, Plaintiff filed his original Complaint against Anheuser-Busch only. (R. 1-7.) Anheuser-Busch then filed a Third-Party Complaint against Prominence, after which Plaintiff amended his Complaint to include Prominence as a defendant. (R. 40-55, 99-103.)

There are no cases in Utah that address the issue of whether the filing of a third-party complaint by an original defendant against a third-party defendant constitutes a "substantial controversy". However, in *Randle*, the Utah Supreme Court determined that

there are only a few scenarios under Utah law that can constitute a substantial controversy. The *Randle* court also held that a trial court has limited discretion only in determining whether defendants in a case have a substantial controversy between them that would make it proper for a trial court to award additional peremptory challenges. *Id.* at 1333. It defined a “substantial controversy” as the existence of a separate and distinct lawsuit from the action existing between the plaintiff and defendants.

In our view, a “substantial controversy” exists when a party on one side of a lawsuit has a cross-claim against a co-party that constitutes, in effect, a separate, distinct lawsuit from the action existing between the plaintiffs and defendants. When, however, a cross-claim is merely a derivative of the original action, such as a cross-claim for indemnification or contribution, a “substantial controversy” does not exist for the purposes of Rule 47.

*Id.* In *Randle*, the court concluded that an actual independent lawsuit existed between defendant Allen and the two governmental defendants. Defendant Allen cross-claimed against co-defendant UDOT and the County, alleging, as had plaintiff Randle, that the negligent design and maintenance of the intersection proximately caused his injuries. The *Randle* court concluded that “Allen therefore not only had to defend against Randle’s claim, but he also had to establish the liability of both UDOT and the County to him. Thus, Allen’s interest in choosing jurors aligned him with both plaintiff and the other defendants.” *Id.*

In the instant case, Anheuser-Busch’s Third-Party Complaint against Prominence alleges causes of action for breach of contract, apportionment of fault, and indemnification. (R. 21-27.) Anheuser-Busch’s Third-Party Complaint against Prominence thus constitutes an entirely separate, non-derivative lawsuit between the

parties with issues that have still not yet been resolved to the present. Just prior to trial, Anheuser-Busch and Prominence entered into the following stipulation regarding indemnification:

Anheuser-Busch, Inc., (“AB”) and Prominence, Inc., hereby stipulate, that as to AB’s third-party claims against Prominence, AB will have an automatic judgment against Prominence, for any damages, judgment, expenses, costs, and reasonable attorney’s fees, either awarded by the jury against AB, or incurred by AB in defense of plaintiff’s claims.

(R. 1973-74.)

Thus, with respect to the indemnification issue, Defendants came to an agreement prior to trial. However, *Randle* requires only that a “separate, distinct lawsuit” exist from the action between plaintiff and defendants. In the instant case, Anheuser-Busch had, and continues to have to the present, a cause of action against Prominence for breach of contract, which is separate and distinct from the causes of action for negligence asserted by Plaintiff against Defendants at trial. Anheuser-Busch’s claims against Prominence for breach of contract are not derivative of Plaintiff’s claims against either Defendant and survived the trial and can still be pursued against Prominence. Anheuser’s pursuits at trial were thus very different from the interests of Prominence.

Specifically, in its Third-Party Complaint, Anheuser-Busch alleged that Prominence contracted with Anheuser to procure general liability insurance naming Anheuser as an additional insured, which it alleges Prominence failed to do. (R. 24.) The required liability insurance was never procured. Further, Anheuser asserted that Prominence contracted to defend Anheuser should a claim such as the claim made by Plaintiff be asserted, and that as a result of Prominence’s breach of the contract with



Anheuser, it is liable to Anheuser for those damages. (R. 24-25.) These claims, which were based on a contract between the Defendants, were independent of any claims Plaintiff had asserted against either Defendant. Prominence did not accept Anheuser's tender of defense and Anheuser defended itself at trial. Thus, similar to *Randle*, Anheuser not only had to defend against Plaintiff's claims, but it also made efforts at trial to establish that Prominence and Plaintiff were the parties responsible for Plaintiff's injuries and damages. (R. 40-55.) Anheuser's goals at trial thus differed from those of Prominence.

Accordingly, it was in Anheuser's best interest to convince the jury to apportion fault to either Plaintiff or Prominence because any fault apportioned to Prominence would have made it easier for Anheuser to pursue its breach of contract claim against Prominence. Anheuser does not speak for Prominence, but it was certainly in Prominence's best interest for the jury to conclude that Plaintiff was primarily responsible for his own injuries. That outcome helped prevent Prominence from having to indemnify Anheuser for any judgments awarded to Plaintiff against Anheuser, but it has also made it much more difficult for Anheuser to pursue its breach of contract claim against Prominence. However, this was something that could not be known until after the jury made its decision, which was after Defendants entered into their Stipulation. As a result, despite Defendants' Stipulation, Anheuser had to expend additional significant time and energy defending against Plaintiff's claims at trial. Prominence was contracted to defend those claims. Anheuser believed when it contracted with Prominence prior to the Olympics that Prominence would fulfill its obligation to provide liability coverage

should any claims be made against Anheuser for personal injury at Bud World, which it failed to do. Now that the jury has concluded Anheuser and Prominence bore an equal amount of fault for Plaintiff's injuries, it is more difficult for Anheuser to pursue its breach of contract claim.

All of these considerations remained to be determined at trial, despite the Stipulation of Defendants. Thus, Anheuser-Busch's interest in choosing jurors aligned it with both Plaintiff and Prominence. Anheuser concedes that its interest was much more similar to Prominence's interests, but it also had interests similar to Plaintiff in that it wanted to show that both Prominence and Plaintiff were liable for Plaintiff's damages and injuries, not Anheuser-Busch.

As stated above, there are no Utah cases that directly address the issue of granting a third-party defendant a set of peremptory challenges in addition to those granted to the defendant. However, the rationale behind granting each defendant a set of peremptory challenges has been extended in Georgia to cases in which a third-party claim can be severed from the underlying claim. In *Georgia Ports Authority v. Harris, et al*, 243 Ga. App. 508, 512 (Ga. App. 2000), the Court of Appeals of Georgia held that where a third-party claim can be severed from an underlying claim, the trial court may exercise its discretion to grant additional peremptory challenges to Defendants.

In the instant case, Anheuser-Busch's claims for breach of contract could have been severed from Plaintiff's underlying causes of action against both Defendants for negligence. A trial on Anheuser-Busch's breach of contract claim against Prominence would have been entirely different from trial in the instant case and would have been

more properly tried to the court, rather than the fact-finder, because it would have been primarily regarding interpretation of contractual language. Thus, because of the breach of contract issues between Defendants, their interests were certainly different at trial.

Therefore, because Anheuser-Busch filed a Third-Party Complaint against Prominence alleging causes of action separate and distinct from the action existing between Plaintiff and Defendants, a “substantial controversy” existed between Defendants for purposes of Rule 47(e) of the Utah Rules of Civil Procedure. Thus, the trial court acted within its discretion and did not commit reversible error in granting each Defendant a set of peremptory challenges at trial.

**V. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY PRECLUDING ANY AND ALL EVIDENCE OF ANHEUSER-BUSCH’S ALCOHOL ADVERTISEMENTS.**

**A. The doctrine of notice pleading precluded the admissibility of new evidence regarding advertising.**

The Utah Rules of Civil Procedure require a plaintiff to submit a “short and plain statement . . . showing that the pleader is entitled to relief” and “a demand for judgment for the relief.” Utah R. Civ. P. 8(a)(1)-(2). The defendant is required to receive “fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.” *Canfield v. Layton City*, 112 P.3d 622, 625 (Utah 2005) (quoting *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982)).

In his Amended Complaint, Plaintiff brought a negligence claim against Anheuser based on the allegations that Anheuser “observed Plaintiff handing the beer in his hand to a friend, and was then escorted onto the ice by a Bud player,” was told “to swing the stick

at a puck on the ice and shoot it into the net,” and “was not given skates, a helmet, or any other protective equipment” to shoot the puck. (R. 101 at ¶¶ 14-17.)

At no time since amending his Complaint did Plaintiff assert a legal or factual claim that Anheuser’s negligence went beyond the incident at Bud World and Anheuser’s role in the exhibition during the 2002 Winter Olympics. Plaintiff’s counsel admitted at the conclusion of the first day of trial that his intentions were to show evidence in the form of advertising aired or shown to Plaintiff and that the ads played a role in the negligence alleged in his Complaint, i.e. the advertising lured Plaintiff into getting drunk and thus Anheuser should have protected him from getting on the ice. (R. 2223 at 72:3-8.) This evidence is not only irrelevant to the claim pleaded, it is inadmissible under the doctrine of notice pleading because Plaintiff never raised a claim in any of his moving papers that he intended to include a claim of false advertising, negligent advertising, or that Anheuser’s ads had a causal connection to the Bud World ice rink events and Plaintiff’s injuries. In short, Plaintiff’s pleaded claims against Anheuser and Prominence have never included allegations of negligent misrepresentation in its advertising for which relief should be granted.

Moreover, as the Utah Supreme Court has clearly ruled a defendant requires “fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.” *Canfield*, 112 P.3d at 625. The first notice Anheuser received of Plaintiff’s intent to show clips of Anheuser’s purported ads were in his opening statements to the jury. The nature and basis of his negligence claim in the pleadings against Anheuser dealt exclusively with Plaintiff’s alleged personal injuries suffered on

February 22, 2002 as a result of Anheuser's alleged failure to provide a safe environment on the ice rink at the Gallivan Center. (R. 99-103.) Nothing in discovery alluded to the allegation that Plaintiff's attendance or conduct at Bud World that night was induced or triggered by advertising. For this reason, any evidence of advertising was properly excluded.

Further, Plaintiff tried to lay the foundation for this evidence through testimony from Plaintiff. (R. 2223 at 65:10-70:9.) Plaintiff had no foundation to establish who created the advertising or for what purpose such advertising was crafted.

Plaintiff will argue that Anheuser had notice because questions of Anheuser's advertising were asked by Plaintiff's attorney in some of the discovery depositions. However, that did not equate to notice that Plaintiff was going to introduce ads and advertising statistics at trial to show Anheuser lured Plaintiff into being drunk. None of that evidence was ever disclosed in witness or exhibit lists before trial.

**B. Evidence of ads was inadmissible under the rules of civil procedure because it was never disclosed and could not be used for impeachment purposes.**

It is well established that the discovery rules have the purpose of eliminating elements of surprise and trickery so that the court and the parties may determine the facts and resolve the issues as directly, fairly, and expeditiously as possible. *See Ellis v. Gilbert*, 429 P.2d 39 (Utah 1967). Also, "a trial is not to be by ambush" by presenting withheld evidence. *See White v. State*, 579 P.2d 921, 924 (Utah 1978). For this purpose Rule 26 requires that "a party shall, without awaiting a discovery request, provide to the other parties . . . a copy of . . . all discoverable documents, data compilations, and

tangible things in the possession, custody or control of the party supporting its claims or defenses, unless solely for impeachment.” Utah R. Civ. P. 26((a)(1)(B).

With respect to pretrial disclosures, Rule 26(a)(4) requires a party to provide to the other parties “an appropriate identification of each documents or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.”

In the instant case, and contrary to the rules, there was no designation or production of any advertising material, or Anheuser’s financial information in Plaintiff’s initial disclosures, pretrial disclosures, or any supplementations. In fact, Plaintiff’s counsel remained mum and vague about the exact evidence he intended to introduce at trial until the first day of trial. (R. 2223 at 65:10-70:9.) Plaintiff’s tactics in hiding the evidence until trial is the quintessential, forbidden “trial by ambush” or surprise. His failure to disclose the evidence he expected to offer at trial, even as it had begun, violated the letter and spirit of the rules of discovery and proper decorum.

Concerning the use of the evidence for the purpose of impeachment, any evidence of advertising was properly excluded because it did not meet the requirements under the Rules of Evidence. In particular, Rules 607-610 deal with the use of evidence to impeach a witness. Under Rule 607, “the credibility of a witness may be attacked by any party, including the party calling the witness.” Extrinsic evidence relevant to issues of credibility is admissible. *State v. Rammel*, 721 P.2d 498 (Utah 1986). Rule 608 deals with addressing a witness’s credibility, character for truthfulness, or bias. The rule and its supporting case law authority narrow the use of evidence to attack these issues and to

impeach. The evidence is certainly inadmissible for meeting a party's burden of proof and proving his case. *See State v. Reed*, 820 P.2d 479 (Utah 1989) (impeachment evidence is admissible if it goes to credibility). In sum, the rules allow evidence to impeach a witness if their credibility or character for truthfulness is at issue only.

In the instant case, when the trial court concluded Plaintiff could not use evidence of ads in his case in chief to prove the elements of his negligence claim, Plaintiff intended to use ads allegedly produced by Anheuser to impeach Anheuser's witnesses. Most likely, Plaintiff would have sought to impeach an Anheuser witness concerning the ads and their effects on the public in an attempt to poison the jury and gain their sympathy and passion. There was no purpose of the ads to establish negligence on the part of Anheuser at the Bud World event in general or the activities on the ice rink in particular. Simply stated the evidence was not relevant in any way to Plaintiff's bodily injury claim or to the credibility of any witness and was therefore properly excluded.

**C. Evidence of advertising was properly excluded for lack of foundation and competence from any witness.**

Any evidence of the advertising of Anheuser's products was inadmissible because Plaintiff could not set forth the requisite foundation. Rule 602 of the Utah Rules of Evidence provides that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

There is no foundation that could have been laid to introduce the ads. Plaintiff did not disclose the source of the ads. Even if Plaintiff could have testified at trial that he

saw or heard a particular advertisement, and pinpoint the date when he saw or heard it, he could not testify that he has personal knowledge that they were, in fact, advertisements by Anheuser verses one of its independent distributors.

Finally, even if the trial court permitted Plaintiff to attempt to lay the foundation through an Anheuser employee, such as Anheuser's Charlie Hodges, no adequate foundation could have been laid because he is admittedly not qualified to testify as to Anheuser's alcohol advertising, having testified in his deposition that his role in the company is narrowly focused on sponsorship of sporting events and, as it related to the 2002 Winter Olympics, the activation of Bud World. (R. 759-760.) Had plaintiff disclosed his intent to use advertising during discovery, he could and should have been able to request the department or person with more knowledge about advertising of Anheuser's products. Without a proper foundation, the evidence was properly excluded.

**D. Evidence of ads was properly held to be inadmissible because it was not relevant and its probative value was substantially outweighed by the danger of unfair prejudice.**

Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 403 excludes any evidence whose "probative value is substantially outweighed by the danger of unfair prejudice." Evidence is unfairly prejudicial if it has the tendency to influence the outcome of the trial by improper means, if it appeals to the jury's sympathy's, arouses its sense of horror, and provokes its instinct to punish or otherwise cause a jury to base its



decision on something other than the facts of the case. *Terry vs. Zions Coop. Mercantile Institute*, 605 P.2d 314 (Utah 1979). *See also, State vs. Lindgren*, 910 P.2d 1268 (Utah Ct. App. 1996).

Any evidence concerning advertising of Anheuser's products was clearly irrelevant to Plaintiff's case. No fact "that is of consequence" existed to warrant the admissibility of the ads because Plaintiff alleged that Anheuser's negligence arose only out of its failure to provide a safe place to conduct activities on the ice rink. Plaintiff did not plead in his Complaint that the negligence alleged extended to advertising on television, radio, or other mediums or that such negligence had a causal connection to Plaintiff's injuries. Also, the evidence of ads could not establish that Anheuser's negligence during the Bud World event was more probable or less probable. Thus, it was properly deemed by the trial court to be inadmissible, irrelevant evidence.

Moreover, Plaintiff's attempt to introduce surprising new evidence in the form of advertisements had as its sole objective to prove his case of negligence by improper means. Nothing in his pleadings revealed that Anheuser's alleged negligence went beyond its involvement with Bud World. In other words, Plaintiff attempted to expand his negligence claim to include evidence regarding Anheuser's advertising when the case involved merely a slip and fall on ice. The introduction of any evidence of ads had no relevance to prove negligence on the ice rink and would have had the effect of proving plaintiff's case by gaining the jury's sympathies, arousing their passion, and provoking their instinct to punish only.

Lastly, besides not having any probative value, such evidence was unduly prejudicial to the extent that it had any tendency to cause a jury to base its decision about liability on something other than the facts; namely, Anheuser's role as sponsor, Prominence's contract and scope of work, and Plaintiff's actions prior to and during his attendance at Bud World. As such, the trial court properly precluded Plaintiff from introducing this evidence in his case in chief at trial.

**E. Plaintiff's stated theory of relevance fails to state a claim as a matter of law.**

Plaintiff argues that Anheuser-Busch's advertising was relevant because it allegedly "contributed to plaintiff's alcohol consumption" and "Anheuser-Busch did not warn the public" that drinking could lead to intoxication and subsequent injury. (*See* Plaintiff's Brief at 21.) But this theory – which was never pled – fails to state a claim as a matter of law. There are no statutes or cases in Utah that impose a duty on sellers or vendors of alcoholic beverages to warn drinkers that drinking too much may cause intoxication, and that intoxication may cause injury.

Courts across the country have uniformly refused to allow those who drink irresponsibly to foist the blame on advertising. For example, in *Overton v. Anheuser-Busch Co.*, plaintiff alleged that he was induced to drink by "defendant's television advertisements featuring Bud Light as the source of fantasies coming to life, fantasies involving tropical settings, and beautiful women and men engaged in unrestricted merriment." 205 Mich. App. at 260, 517 N.W.2d at 309. The court rejected the notion

that these ads wrongfully caused plaintiff to drink, explaining that “the dangers inherent in alcohol consumption are well known to the public.” *Id.* at 262, 517 N.W.2d at 310.

Similarly, in *Smith v. Anheuser-Busch, Inc.*, 599 A.2d 320 (R.I. 1991), plaintiff argued that “the defendant’s media advertising caused the plaintiff, who was under age, to purchase and consume beer, to drive while intoxicated and to suffer serious permanent injuries.” *Id.* at 320. The Rhode Island Supreme Court completely rejected this theory of causation as a matter of law. *Id.* at 321. And in *Malek v. Miller Brewing Co.*, 749 S.W.2d 521 (Tex. App. 1988), plaintiff argued, *inter alia*, that defendant should be held liable because its advertising purportedly misled a 17-year-old drunk driver to erroneously believe that “Lite” beer was less intoxicating than other beers. *Id.* at 521-22, 524. The court held that underage drivers “are bound, as a matter of law, to recognize the danger of intoxication.” *Id.* at 524;<sup>1</sup> *see also Robinson v. Anheuser-Busch, Inc.*, No. 00-D-300-N, 2000 U.S. Dist. LEXIS 22474, at \*7 (M.D. Ala. July 7, 2000) (recommendation of magistrate judge) (“[A] minor’s age does not neutralize any common knowledge about the dangers of alcohol consumption.”), *aff’d*, No. 00-D-300-N, 2000 U.S. Dist. LEXIS 22475 (M.D. Ala. Aug. 1, 2000); *Gawloski v. Miller Brewing Co.*, 644 N.E.2d 731, 735 (Ohio Ct. App. 1994) (rejecting plaintiffs’ claim that “Miller’s advertising subconsciously induces people to use its product by ‘showing Miller [beer] to be a product that enhances life, by it being depicted as socially acceptable, [and] that it is

---

<sup>1</sup> *Accord Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 568-69 (Iowa 1986) (rejecting assertion that brewer created a danger to highway safety by running commercials that allegedly promoted consumption of alcohol at taverns by consumers who have traveled there by automobile).

a positive activity, attractive and harmless.”” (quoting complaint) (alterations in original)).

Plaintiff’s attempt to blame advertising for his own intoxication and negligence fails to state a claim as a matter of law, and thus the advertising evidence was properly excluded.

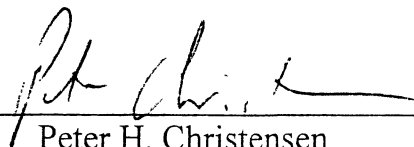
### CONCLUSION

This Court should affirm the trial court’s judgment. Plaintiff clearly failed to properly preserve the voir dire issue for appeal and invited the trial court to commit any errors that may have been committed by not objecting when it became clear the court may have committed error. Even if Plaintiff did not invite the error, he can not show that the error should have been obvious to the trial court or that the error was harmful. Furthermore, the trial court acted well within its discretion in determining that a “substantial controversy” existed between Anheuser and Prominence because of Anheuser’s third-party complaint and because a separate and distinct lawsuit existed between Anheuser and Prominence on issues of breach of contract and apportionment of fault. Finally, the trial court properly excluded evidence of Anheuser’s advertising.

Respectfully submitted this 30 day of June, 2008.

STRONG & HANNI

By



Peter H. Christensen

Ryan P. Atkinson

*Attorneys for Defendant/Appellee  
Anheuser-Busch Inc.*

### CERTIFICATE OF MAILING

I hereby certify that on this 30<sup>th</sup> day of June, 2008, a true and correct copy of the foregoing **BRIEF OF APPELLEE ANHEUSER BUSCH INCORPORATED** was served by the method indicated below, to the following:

Matthew H. Raty  
9677 South 700 East, Suite D  
Sandy, Utah 84070  
*Attorneys for Plaintiff*

☐ U.S. Mail, Postage Prepaid  
☒ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile

Donald Dalton  
DALTON & KELLEY  
P.O. Box 58084  
Salt Lake City, Utah 84158  
*Attorneys for Prominence, Inc.*

☐ U.S. Mail, Postage Prepaid  
☒ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile

Gwen Mortensen