

2007

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

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

Reply Brief, *Bee v. Busch*, No. 20070804 (Utah Court of Appeals, 2007).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/502](https://digitalcommons.law.byu.edu/byu_ca3/502)

This Reply Brief 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.

## MICHAEL BEE,

**V.**

Appellees and  
Defendants.

Appellate Case No. 20070804-CA

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*

[illegible]

Peter H. Christensen  
STRONG & HANNI  
3 Triad Center, Suite 500  
Salt Lake City, Utah 84180  
*Attorney for defendant/appellee*  
*Anheuser Busch*

Don Dalton  
DALTON & KELLEY  
P.O. Box 58084  
Salt Lake City, Utah 84158  
*Attorney for Defendant/Appellee  
Prominence, Inc.*

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*

**Appellant requests oral argument and a published opinion.**

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	-ii-
TABLE OF AUTHORITIES .....	-iii-
REPLY TO DEFENDANT’S STATEMENT OF FACTS .....	1
ARGUMENTS .....	3
POINT I - THE TRIAL COURT’S PREJUDICIAL ERROR IN VOIR DIRE WAS PRESERVED FOR APPEAL .....	3
POINT II - THE DOCTRINE OF “PLAIN ERROR REVIEW” WOULD ALSO APPLY. ....	14
POINT III - THE INVITED ERROR DOCTRINE HAS NO APPLICATION .....	17
POINT IV - THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING THE CO-DEFENDANTS TWICE THE NUMBER OF PEREMPTORY CHALLENGES ALLOWED TO PLAINTIFF .....	18
CONCLUSION .....	25
ADDENDUM 1 .....	27

## TABLE OF AUTHORITIES

### Cases

*Alcazar v. University of Utah*, 2008 UT App. 222

*Bambrough v. Bethers*, 552 P.2d 1286 (Utah 1976)

*Barrett v. Peterson*, 868 P.2d 96, (Utah Ct. App. 1993)

*Blades v. DaFoe*, 704 P.2d 317, 322 (Colo. 1985)

*Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 353 (Utah 1997)

*Depew v. Sullivan* 2003 UT App. 152, 71 p. 3d 601

*Evans v. Doty*, 824 P.2d 460, 462 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992)

*Georgia Ports Authority v. Harris*, 243 Ga.App. 508, 533 S.E.2d 404 (Ga.App. 2000)

*Kentucky Farm Bureau Mut. Ins. Co. v. Cook*, 590 S.W.2d 875, 877 (Ky. 1979)

*Ostler v. Albina Transfer Company, Inc.*, 781 P.2d 445 (Utah 1989)

*Pratt v. Nelson*, 2007 UT 41

*Randle v. Allen*, 862 P.2d 1329 (Utah 1993)

*State v. Ball*, 685 P.2d 1055, 1060 (Utah 1984)

*State v. Hall*, 797 P.2d 470, 472 (Utah App.), cert. denied, 804 P.2d 1232 (Utah 1990)

*State v. James*, 819 P.2d 781, 797-98 (Utah 1991)

*State v. Saunders*, 1999 UT 59, 992 P.2d 951

*State v. Taylor*, 664 P.2d 439, 447 (Utah 1983)

*State v. Worthen*, 765 P.2d 839, 845 (Utah 1988)

## **REPLY TO DEFENDANT’S STATEMENT OF FACTS**

Anheuser-Busch misstates the facts surrounding its service of alcohol to plaintiff Michael Bee at its Bud World Party and its conduct in bringing him onto an ice rink without a helmet or other protective gear, to participate in a hockey-puck shooting contest. Mr. Bee fell and suffered serious brain, head, and neck injuries.

For example, Anheuser Busch states, “Plaintiff admitted that he had consumed all but six (6) ounces of alcohol before even going to Bud World. (R. 245-46.)” Anheuser-Busch also cites R. 245-46 for its allegation that “Plaintiff ignored instruction to stand still and ‘putt’ the puck”, and “[i]nstead, he took off down the ice and fell on his head while taking a slap shot. (R. 245-46).” These are contrived and totally false statements. *See* R. 245-46.

R 245-46 contains the “Statement of Relevant Facts” of Anheuser-Busch’s memorandum in support of motion for summary judgment to dismiss plaintiff’s punitive damages claim. Rather than state what Anheuser-Busch has represented, Anheuser Busch’s “Statement of Relevant Facts” states as follows:

3. Plaintiff continued to drink three to four 22-oz. cups of beer while at the Bud World exhibit and claims he was drunk throughout his visit at the event. . . .  
.
6. Plaintiff was invited to participate in a contest to shoot a hockey puck towards a goal by event personnel and Plaintiff agreed to participate. . . .
7. Plaintiff slipped on the ice while swinging to shoot the puck, lost his balance, and fell, cutting the back of his head. . . .

R. 245-46.

Anheuser-Busch's actual statements in the record comport more with the court's findings in ruling on Anheuser-Busch's motion for summary judgment on plaintiff's claim for punitive damages. Denying the motion for summary judgment, the court, Judge Roth presiding, found as follows:

1. AB supplied Plaintiff with approximately 90 oz. of alcohol on top of what he had consumed before his arrival at the Bud World Party.
2. AB had arranged the Bud World Party to promote its product and sell it.
3. AB had a higher reason to believe that people participating at the Bud World Party would have been drinking, by the atmosphere and intention AB had there.
4. AB arranged the ice rink contest in the context of a drinking place, where drinking was being promoted.
5. Plaintiff was drunk or considerably intoxicated at the time, he had a beer in hand, he had been reaching for a puck on the ice and interacting with people running the contest.
6. AB had reason to know Plaintiff had been drinking and was drunk and had been acting rowdy.
7. Plaintiff did not do anything in particular to cause the accident other than what was expected of him, including to raise a hockey stick and hit a puck.
8. AB knew others were falling on the ice and that Plaintiff was unsteady, but took no precautions to give Plaintiff a steady surface to stand on or protective gear.
9. Children participating in ice contests were put on carpet and given helmets.
10. AB knew or should have known that there was a high probability of harm or danger to Plaintiff in the circumstances.

R. 2223, 1:6-3:3, R. 280-83, R. 731-749.

## **ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT'S PREJUDICIAL ERROR IN VOIR DIRE WAS PRESERVED FOR APPEAL**

Anheuser-Busch attempts to distinguish this court's recent decision in *Alcazar v. University of Utah*, 2008 UT App. 222, by arguing that plaintiff in the case at bar did not preserve the trial court's failure to give voir dire to prospective jurors on tort reform and negligence issues. The court in *Alcazar* reaffirmed its longstanding holding that trial courts are obligated to elicit disclosure from prospective jurors during voir dire about their exposure to tort reform propaganda and to negative reports about negligence cases, as well as to inquire as to juror prejudices against negligence cases. *Id.* at ¶¶ 11-14, 19. See, *Barrett v. Peterson*, 868 P.2d 96, 102-104 (Utah Ct. App. 1993), *Evans v. Doty*, 824 P.2d 460, 462, 467 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992). Following *Barrett* and *Evans*, *Alcazar* held that plaintiffs in negligence cases are entitled to such voir dire, "first, 'to allow counsel to uncover biases of individual jurors sufficient to support a for-cause challenge' and second, 'to gather information enabling counsel to intelligently use peremptory challenges.'" *Alcazar* at ¶ 10. Plaintiff's requested voir dire that was rejected by the trial court in the matter at bar was nearly identical to voir dire approved by the court in *Alcazar* and its predecessors. *Alcazar* at ¶¶ 4, 14, Addendum 1.

The Utah Supreme Court set forth the rule governing preservation of an issue for appeal, as follows:



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 had 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.”

*Pratt v. Nelson*, 2007 UT 41, ¶ 15, (footnotes omitted).

The record in the case at bar reveals that all three factors outlined by the supreme court were met to preserve the issue of whether the trial court erred in not giving voir dire on exposure to tort reform propaganda and negative reports of negligence cases, as well as prejudice against negligence cases. First, the issue was raised in a timely fashion, since it was raised before voir dire, when the court first addressed defendants’ objections to plaintiff’s requested voir dire. R. 2226, 1:6-3:1. Second, the issue was specifically raised. Plaintiff had submitted his requested voir dire well before the start of trial to the court and defendants. RR. 1740-44. When the court addressed plaintiff’s requested voir dire on tort reform and negligence case prejudice, defendants objected and argued that the questions were designed to “inflame” prospective jurors and were a waste of time. R. 2226, 1:6-3:1. Plaintiff responded by explaining, in detail, why the questions were proper and mandatory. *Id.* Thus, the issue was specifically raised.

Third, plaintiff provided relevant, and, indeed, controlling legal authority to the court. R. 1741, R. 2226, 1:6-3:1. Plaintiff gave the court full citations to the *Ostler*, *Evans*, and *Barrett* decisions in support of the requested voir dire questions, and then referenced the controlling Utah appellate court decisions while countering defendants' arguments. *Id.* The court then ruled that it would not give plaintiff's requested voir dire, but would ask one question to cover, to the court's satisfaction, plaintiff's voir dire questions nos. 1 through 4. R. 2226, 1:6-3:1. All of this is clear from the following dialogue:

THE COURT: Okay. We'll go on the record with case number 020910483. We're no[w] 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 type of questions generate - are just intended to generate 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 these 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 not to give these. But they are right out of the case law, Your Honor, and they're very fair questions. [W]e have a need and 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 - you know. I think -

MR. CHRISTENSEN: The court can craft one question and -

THE COURT: Yeah.

R. 2226, 1:6-3:1.

The court thus expressed its unwillingness to ask plaintiff's requested voir dire, which, it apparently found too detailed and too broad. This, in spite of plaintiff's citation and reference to controlling case law and plaintiff's warning of prejudicial error. The trial court appeared to have a similar attitude toward the case law as the trial court in *Alcazar*. *Alcazar* at ¶ 5. At the suggestion of counsel for Anheuser-Busch, the court decided that instead of giving plaintiff's requested voir dire, it would cover matters with one question of its own.

Under *Pratt*, the issue of voir dire of prospective jurors for exposure to and biases from tort reform propaganda and negative reports of personal injury cases, was

“presented to the trial court in such a way that the trial court ha[d] an opportunity to rule on that issue.” *Pratt* ¶ 15. The issue was preserved for appeal.

Nevertheless, Anheuser-Busch argues, as did defendant in *Alcazar*, that the trial court did not so much reject plaintiff’s voir dire, as it decided to ask plaintiff’s questions in a different way. *See Alcazar* ¶ 5 and defendant’s brief pp. 13-14. Anheuser-Busch argues that the voir dire asked by the trial court was sufficient to satisfy Utah appellate court case requirements.

The Utah Court of Appeals has stated that a trial court does not necessarily have to accept the plaintiff’s formulation of tort reform and negligence voir dire questions, but if it rejects plaintiff’s formulation, it is obligated to craft and ask questions sufficient to reveal whether prospective jurors have been exposed to tort reform propaganda and negative reports of negligence cases. *Alcazar* at ¶ 14, *Barrett* at 101. The trial court must then be prepared to follow up any positive responses with more specific questions designed to probe prospective jurors’ attitudes and possible biases against negligence cases. *Id.* As the court said in *Barrett*,

Accordingly, we conclude that *the trial court should have asked the prospective jurors appropriate preliminary questions—either those suggested by appellant or alternative questions more to its liking—designed to detect, initially, whether any of the prospective jurors had been exposed to tort reform and medical negligence propaganda. Had the trial court done so, and had any of the jurors responded positively to these initial questions, appellant would have been entitled to have more specific questions put to the jurors designed to probe those*

*juror's attitudes regarding, and possible bias resulting from, the tort-reform information.*

*Barrett* at 101. (emphasis added).

Anhueser-Busch sets forth three voir-dire questions asked by the trial court which it claims were sufficient to meet the requirements of Utah appellate case law.

These are whether prospective jurors, family, or friends had previously made a personal injury claim, whether they felt that any such claim was not properly resolved, and whether prospective jurors believed they could be fair and impartial in the case. *See* defendant's brief p. 14, (citing RR. 27:21-25, 28:2-4, and 29:14-17). However, similar questions asked in *Alcazar*, *Barrett*, and *Evans* were held by the court to be inadequate. *Alcazar* at ¶ 5, *Evans* at 467, *Barrett* at 101. These questions do not reveal prospective juror exposure to tort reform propaganda and to negative reports about negligence cases. *Id.* These questions also do little, if anything, to reveal even overt, let alone subtle, biases against personal injury cases. *Id.* Also, the court of appeals has made clear that "broad questions concerning the prospective jurors' self-assessed ability to be fair and impartial" do not suffice. *Barrett* at 101.

In fact, the voir dire of the trial courts in *Alcazar*, *Barrett*, and *Evans*, while held to be inadequate, was actually more extensive than the voir dire performed by the trial court in the case at bar. *Alcazar* at ¶¶ 14, 18, *Evans* at 462, 467, *Barrett* at 100. For example, in *Alcazar*, the voir dire lasted approximately three hours and included private interviews with eighteen members of the venire panel. The trial court even asked

whether prospective jurors, close friends, or relatives were in favor or opposed to tort reform. *Alcazar* at ¶ 14, 18. However, when a panel member asked, “What’s tort reform” the trial court cut-off any further discussion. *Id.* The court of appeals noted that the trial court’s approach did not, therefore, aid plaintiff’s understanding of prospective juror exposure to tort reform and medical negligence material. *Id.*

As inadequate as the voir dire was in *Alcazar*, it was more-so in the case at bar. The court’s total voir dire was less than one and one-half hours and included no private interviews to follow up on responses made by the venire panel in court. Of course, there was no mention about tort reform or whether the panel had watched, read, or heard anything about personal injury cases, nor the other appropriate topics raised by plaintiff’s rejected voir dire. R. 2223 3:9-44:16, Addendum 1.

Anheuser-Busch asserts that the trial court had broad discretion over what voir dire to give. That, however, is not the case on the voir dire at issue:

"We review challenges to the trial court's management of jury voir dire under an abuse of discretion standard. Generally, the trial court is afforded broad discretion in conducting voir dire, ***'but that discretion must be exercised in favor of allowing discovery of biases or prejudice in prospective jurors.'***" *Barrett v. Peterson*, 868 P.2d 96, 98 (Utah Ct. App. 1993) (quoting *State v. Hall*, 797 P.2d 470, 472 (Utah Ct. App.), cert. denied, 804 P.2d 1232 (Utah 1990)) (other citations omitted).

Due to the strong interest in enabling parties "to elicit necessary information for ferreting out bias," *State v. Saunders*, 1999 UT 59, ¶34, 992 P.2d 951, a trial court's discretion is most broad when it is exercised with respect to questions that have no apparent link to any potential bias. ***However, the trial judge's discretion narrows to the extent that questions do have some possible link to possible bias, and when proposed voir dire questions go directly to the existence of an***

***actual bias, that discretion disappears. The trial court must allow such inquiries.*** Id. at ¶43.

*Depew v. Sullivan* 2003 UT App. 152, 71 p. 3d 601, at ¶¶ 11, 12. (emphasis added).

Anheuser-Busch also incorrectly argues that “[p]laintiff made clear in his proposed voir dire questions that his voluminous tort reform and excess verdict questions had to be asked in chambers.” Anheuser-Busch’s brief p. 11. First, the questions were not voluminous, but fit on a single page. *See* Addendum 1. Second, following the procedure recommended by the court of appeals, plaintiff’s voir dire included threshold question to be asked in court and follow-up questions to be asked in chambers if a concerning response were given to the threshold questions. The questions were designed to identify potential prejudice of any prospective juror while preventing such prejudice from being communicated to the whole panel by inviting such a juror to express his opinions in chambers. Again, the questions were either taken from or were approved by the *Evans*, *Barrett*, and *Alcazar* cases. The trial court had the right, and, having rejected plaintiff’s formulation of voir dire questions, clearly had the obligation to properly inquire into prospective juror exposure to tort reform propaganda and negative reports about negligence cases, and then follow up on the responses. The trial court failed to fulfill its obligation. The court also would not permit the attorneys to ask any of their own voir dire questions. R. 2223, 6:24-71.

Nevertheless, Anheuser-Busch repeatedly argues that the court “repeatedly” gave plaintiff the opportunity to reassert its rejected voir dire questions and to assert

additional objections to the court's voir dire, but plaintiff failed to do so. *See* Anheuser-Busch's brief pp. 3, 5, 11-18. Defendant cites just two places in the record in support of this contention of repeated opportunities, and manufactures its argument out of the fact that the court turned off the record when it called counsel to side bar after completing its voir dire. After the court asked all the questions it had, it stated:

THE COURT: Thank you. Did counsel have *any additional questions they'd like the Court to consider*? If so, let's approach the bench if you would. Ladies and gentlemen, what we're doing is counsel is going to come up here and *give me some suggestions of some additional questions that they would like me to consider to ask you*. *We're going to go off the record and I'm going to turn off the record for a moment*. If you'll just be patient with us for a moment. (Whereupon a sidebar was held - inaudible)

R. 2223, 40:7-16.

Based on the above statement, Anheuser-Busch argues that plaintiff had the opportunity to object again, and that he should have objected again and reasserted his tort reform and negligence voir dire, but that plaintiff was "silent". This argument has no merit. First, plaintiff appears "silent" because the court had turned off the record. Second, the court asked for "any additional questions [counsel] would like the court to consider." As the court had already rejected plaintiff's voir dire, plaintiff did not have additional questions for the court to consider. As set forth above, under *Pratt*, the issue of the court's error in rejecting plaintiff's voir dire on tort reform and negligence case prejudice was preserved for appeal on the record. Anheuser-Busch's request that the



court discard that and, instead, assume that plaintiff did not object again while the record was turned off, should be rejected.

As Anheuser-Busch has attempted to take advantage of the record being off, to represent to the court of appeals that plaintiff did not object again or reassert his rejected voir dire, plaintiff states that, in fact, he did again express the need for his voir dire, but this was again rejected by the court. Thereafter, the trial court only asked additional questions requested by counsel for Anheuser-Busch, Mr. Christensen. R. 40:18-44:15. At the end of those questions for Mr. Christensen, we find the second instance that Anheuser-Busch claims gave plaintiff an opportunity to reassert his voir dire, but did not:

THE COURT:	Thank you. All right. Anything else counsel before we move forward?
MR. CHRISTENSEN:	No, Your Honor
THE COURT:	All right. Fine.

R. 2223, 44:12-15.

Defendant argues from the above that plaintiff's counsel was again silent when asked if there was "anything else." However, there was nothing else from plaintiff since his voir dire had already been rejected. The court would not and did not ask anything more requested by plaintiff's counsel. However, the real reason plaintiff did not respond was because the court was only addressing Mr. Christensen, since it had only asked Mr. Christensen's additional requested questions. Note that counsel for Prominence, Mr. Dalton, also did not respond to the court's question.

In any event, the “spin” which Anheuser-Busch attempts to put on the above dialogues and absence of dialogue is irrelevant, since the record does show that the trial court had the opportunity to rule on whether to give voir dire to elicit prospective jurors’ exposure to tort reform propaganda and negative reports of negligence cases, and to question prospective jurors so as to discover their prejudices against personal injury cases. Indeed, the court was presented with controlling authority, and urged, in the strongest of language, to follow the law and properly voir dire the panel. Unfortunately, the court was persuaded by defense counsel not to do so.

*Alcazar* is controlling in the matter at bar. The voir dire rejected by the trial court in *Alcazar* is nearly identical to the voir dire rejected by the trial court in the matter at bar. See RR. 1740-1742 and *Alcazar* ¶ 4. As noted by the court in *Alcazar*, this voir dire was “no less neutral or general than the preliminary questions required under the voir dire framework outlined in *Evans*.” *Alcazar* at ¶ 14. The court stated, “The trial court simply left Plaintiffs’ counsel without the necessary information needed to ferret out a potential juror’s actual bias or to intelligently exercise peremptory challenges, thus prejudicing Plaintiffs.” *Id.* at ¶ 18. The court then reversed the trial court’s judgment and remanded for a new trial, holding that “the trial court’s error was prejudicial because the trial court’s refusal to ask Plaintiffs’ counsel’s voir dire questions or questions similar in nature substantially impaired his ability to challenge jurors for cause or to exercise his peremptory challenges.” *Id.* at ¶ 19.

As in *Alcazar*, in the matter at bar the trial court left plaintiff's counsel without the information needed to ferret out a potential juror's actual bias or to intelligently exercise peremptory challenges, thus prejudicing plaintiff's case. As in *Alcazar*, the court should reverse the trial court's judgment and remand for a new trial.

## **POINT II**

### **THE DOCTRINE OF "PLAIN ERROR REVIEW" WOULD ALSO APPLY.**

Anheuser-Busch also argues that the "Plain Error Review" doctrine does not apply to the case at bar. Under that doctrine, the appellate court may reverse the lower court "on an issue not properly preserved for appeal", when a party can show (1) an error exists, (2) the error should have been obvious to the trial court, and (3) the error is harmful, *viz.*, absent the error, there is a reasonable likelihood of a more favorable outcome. *Pratt*, at ¶ 16.

While plaintiff has established that the issue of the trial court's voir dire error was preserved for appeal, plaintiff notes that the issue would, in any event, be reviewable under the plain error standard. First, the trial court erred, as set forth in Point I, above. Second, the error should have been obvious, especially given plaintiff's citation to authority, plaintiff's arguments, and the many and long-standing appellate court precedents supporting the voir dire requested by plaintiff. In *Alcazar*, the court reached its decision after noting its "prior, clear precedents." *Alcazar* at ¶ 19. The court of appeals also reminded trial courts in *Depew v. Sullivan*, 2003 UT App. 152, 71 P.3d 601,

of the validity of the voir dire principles set forth in its prior holdings. *Id.* at ¶¶ 10-11.

The court also cited holdings of the supreme court reminding trial judges of these same principles:

The Utah Supreme Court has instructed "trial judges to take care to adequately and completely probe jurors on all possible issues of bias." *State v. James*, 819 P.2d 781, 798 (Utah 1991). The purpose for this probing is to facilitate "both the detection of actual bias and the collection of data to permit informed exercise of the peremptory challenge." *State v. Taylor*, 664 P.2d 439, 447 (Utah 1983) (citations omitted). "All that is necessary for a voir dire question to be appropriate is that it allow '[a party] to exercise his peremptory challenges more intelligently.'" *State v. Worthen*, 765 P.2d 839, 845 (Utah 1988) (quoting *State v. Ball*, 685 P.2d 1055, 1060 (Utah 1984)). Accord *Saunders*, 1999 UT 59 at ¶34.

*Depew*, at ¶ 12.

Anheuser-Busch argues that "[t]he trial court clearly believed it was within its broad discretion" in choosing not to inquire into prospective jurors' exposure to and biases from tort reform propaganda and negative reports of negligence cases. However, if that is truly what the trial court believed, then such belief was obviously erroneous, since, as set forth above, Utah appellate courts have reiterated that trial courts have little or no discretion when it comes to such inquiries. *Depew v. Sullivan* 2003 UT App. 152, 71 p. 3d 601, at ¶¶ 11, 12.

Third, the error committed by the trial court was, per se, harmful, as previously held by this court. Rejecting the standard requirement that plaintiff show that an absence of error would have resulted in a different outcome, *Barrett* held that in the

context of voir dire questioning, prejudicial error is shown if the plaintiff's right to the informed exercise of peremptory challenges has been substantially impaired:

An appellant claiming that the trial court's unreasonable limitation of voir dire substantially impaired his ability to exercise peremptory challenges simply cannot prove, in the traditional way, that prejudice resulted from the error. Appellant cannot show with any certainty that had certain questions been asked, particular responses would have been received; that certain jurors would then have been challenged for cause or peremptorily; and that particular, more favorably predisposed jurors would have been seated instead, who would have deliberated to a different result. Accordingly, in this context, we apply the test enunciated in *Hornsby*: ***Prejudicial error is shown if the appellant's right to the informed exercise of peremptory challenges has been "substantially impaired."*** 758 P.2d at 933.

*Barrett* at 103. (emphasis added). Similarly, in *Depew*, the court determined the failure to ask questions to elicit biases of prospective jurors was, of itself, prejudicial, and that no showing of "actual prejudice" was required since there was no way for the plaintiff to show any particular juror as biased or prejudiced. *Depew*, at ¶¶28-34.

Plaintiff presented the court with the controlling authority regarding his requested voir dire, implored the trial court to follow the law, and warned of prejudicial error. While the trial court's error was preserved, the issue is reviewable, in any event, under the "Plain Error Review" doctrine.

### **POINT III**

#### **THE INVITED ERROR DOCTRINE HAS NO APPLICATION.**

Anheuser-Busch next argues that plaintiff invited the trial court to commit error on voir dire and should be precluded from arguing the error on appeal. However, the invited error doctrine has no application in the matter at bar. The Utah Supreme Court explained,

“Our 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.”

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, “[e]ncouraging 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.”

*Pratt* at ¶ 17(citations omitted). The invited error doctrine usually requires an affirmative representation to the trial court by the accused party, that he has no objection to the matter at issue. *Id.* at ¶ 18.

Anheuser-Busch asserts that plaintiff affirmatively represented no objection to the trial court’s voir dire and led the court into error by remaining “silent” when the court asked if the parties had any additional questions for the court to consider. However, as shown above, plaintiff’s silence was no more than the court turning off the record.

Furthermore, even assuming plaintiff made no further voir dire requests, the court had only asked for “any additional questions”, not ones that had already been rejected.

In reality, rather than invite error, as quoted above, plaintiff notified the court of the controlling authority and plaintiff’s absolute right to the voir dire. Plaintiff implored the court to give the voir dire and warned of prejudicial error if the court chose not to give it. Rather than plaintiff inviting error, defendants invited and persuaded the court to err by arguing the voir dire was inflammatory and a waste of time, and that the court could cover all the voir dire with one question crafted to its own liking.

#### **POINT IV**

#### **THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING THE CO-DEFENDANTS TWICE THE NUMBER OF PEREMPTORY CHALLENGES ALLOWED TO PLAINTIFF.**

The prejudice to plaintiff from the trial court’s unwillingness to voir dire prospective jurors on tort reform and negligence case bias was compounded by the trial courts grant of six peremptory challenges to defendants. This, of itself, was prejudicial error under Utah Supreme Court precedent, which requires reversal of the trial court’s judgment in the matter at bar and remand for a new trial. *See, Carrier v. Pro-Tech Restoration*, 944 P.2d 346 (Utah 1997), *Randle v. Allen*, 862 P.2d 1329 (Utah 1993). The court made clear that peremptory challenges are a powerful tool to shape the jury and

improper award of additional challenges to one side are unfairly prejudicial. *Carrier* at 352.

Anheuser-Busch argues that its third-party claim asserting comparative fault against Prominence and seeking reimbursement from Prominence of any damages awarded to plaintiff from Anheuser-Busch constituted a “substantial controversy”, allowing the trial court discretion to award defendants additional peremptory challenges. As explained in plaintiff’s principal brief, and reiterated below, the Utah Supreme Court made clear through *Carrier* and *Randle* that Anheuser-Busch’s third-party action does not constitute a “substantial controversy” that would allow for additional peremptory challenges.

However, as also pointed out in plaintiff’s principal brief, there is a more obvious and ready basis for rejecting Anheuser-Busch’s argument of “substantial controversy”: At the start of trial, Anheuser-Busch and Prominence stipulated to drop all third-party claims from the lawsuit. R. 2223, 48:15-49:19, 51:11-54:9, RR. 2022-2028. In fact, after stipulating to dismissal of the third-party claims, defendants insisted that the court correct its initial statement to the jury panel that Anheuser-Busch was asserting that Prominence was at fault, and the court obliged. R. 2223, 51:11-54:9, 64:7-18, 20:17-21:3. Anheuser-Busch’s dismissed third-party claims were not part of the trial in any way. *Id.*, RR. 2022-2028. Anheuser-Busch has not shown and cannot show that it introduced any evidence or made a single argument that Prominence was at fault, in breach of contract,



or responsible to indemnify. None of these dismissed third-party claims were put on the jury verdict form. RR. 2022-2028. Defendants stipulated to dismiss the third-party claims so as to present a united defense asserting that plaintiff alone was at fault.

Yet, when plaintiff renewed his objection to defendants' additional peremptory challenges, after defendants revealed to the court and plaintiff that they had settled all claims between them, the court maintained its initial ruling allowing defendants twice the number of peremptory challenges given to plaintiff. R. 2223, 44:21-48:14, 115:13-116:16.

Anheuser-Busch notes that even though the third-party claims of negligence, breach of contract, and indemnification had been dismissed, plaintiff's claim of negligence still existed against both Anheuser-Busch and Prominence. Anheuser-Busch argues that a "substantial controversy" existed in that the jury still had to apportion fault between defendants on plaintiff's claim. However, Anhesuer-Busch's argument is inapposite under *Carrier* and *Randle*. First, as demonstrated in plaintiff's principal brief, fault apportionment, even when co-defendants blame each other, does not create a "substantial controversy" that allows additional peremptory challenges. *Carrier* at 351, *Randle* at 1333. Both *Carrier* and *Randle* limit a "substantial controversy" to a cross-claim against a co-party:

To avoid favoring one side of a lawsuit over another, a trial Judge must carefully appraise the degree of adverseness among co-parties and determine whether that adverseness truly warrants giving that

side more challenges than the other. 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 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.

*Randle* at 1333, *Carrier* at 351-52.

In *Randle*, Randle, individually and on behalf of his children, sued Allen, UDOT, and Salt Lake County for the wrongful death of his wife from a truck/car collision. *Randle* at 1333. Allen cross-claimed against his co-defendants, UDOT and Salt Lake County, for Allen’s own injuries and damages from the collision. *Id.* The supreme court held that it was prejudicial error to grant UDOT and Salt Lake County separate peremptory challenges since they cross-claimed against each other and Allen “only for the purpose of indemnification or contribution in the event they should be found negligent.” *Id.* However, the court noted that separate peremptory challenges for Allen was appropriate, since his cross-claim for his own personal injuries against UDOT and Salt Lake County constituted a “separate, distinct lawsuit from the action existing between the plaintiffs and defendants. *Id.*

Anheuser-Busch and Prominence had no distinct, separate cross-claim, nor any cross-claim at all. However, Anheuser-Busch attempts to distinguish *Carrier* and *Randle* by arguing they did not involve “circumstances in which a non-derivative third-

party complaint was filed to bring a third-party defendant into a lawsuit.” This argument is without merit. First, as noted above, Anheuser-Busch dismissed its third-party complaint before the start of trial. Second, even had Anheuser-Busch not dismissed its action, it did not file a “non-derivative third-party complaint.” Indeed, “non-derivative third-party complaint” is an oxymoron. Third-party complaints are, by nature and definition, derivative of the initial suit filed. As set forth in Rule 14, Utah Rules of Civil Procedure,

(a) *When defendant may bring in third party.* At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.

Rule 14, Utah Rules of Civil Procedure.

Anheuser-Busch’s filing of its “Third-Party Complaint” was precisely the derivative procedure set forth under Rule 14 for asserting a claim against another “who is or may be liable to him for all or part of the plaintiff’s claim against him.” After plaintiff filed suit against Anheuser-Busch, Anheuser-Busch then moved the trial court for leave to file a third-party action against Prominence on the ground that Prominence was liable to Anheuser-Busch for part or all of plaintiff’s claims against Anheuser-Busch. RR. 13-19. The motion was granted and Anheuser-Busch filed its “Third-Party Complaint”. RR. 39-46. In its third-party complaint, Anheuser-Busch asserted that (1) Prominence was comparatively at fault for plaintiff’s injuries, (2) Prominence owed Anheuser-Busch

indemnification for any damages awarded Plaintiff against Anheuser-Busch, and (3) Prominence owed Anheuser-Busch for any damages awarded to Plaintiff against Anheuser-Busch as a result of Prominence's breach of contract to provide professional management of the Bud World Party and to provide liability insurance coverage for Anheuser-Busch. Id. 40-46. Of course, all this was subsequently dismissed before the start of trial, so there was no lawsuit between Anheuser-Busch and Prominence, let alone a "separate, distinct lawsuit."

Nevertheless, Anheuser-Busch asserts a future, non-derivative breach of contract claim against Prominence depending on the outcome of the case at bar. If plaintiff understands correctly, Anheuser Busch argues that a substantial controversy existed between it and Prominence in that Anheuser-Busch had an interest in showing Prominence at fault for plaintiff's injuries, since that would improve a future lawsuit against Prominence for breach of contract. This argument is both irrelevant and specious.

First, as described above and in plaintiff's principal brief, *Carrier* and *Randle* look at whether there is a substantial controversy to be tried in the case then before the court, not a theoretical future controversy. Second, even had Anheuser-Busch any interest in making Prominence appear at fault for a future purpose, fault shifting does not constitute a "substantial controversy" that would allow the trial court discretion to award additional peremptory challenges. *Carrier* at 351, *Randle* at 1333. Third, plaintiff notes that if Anheuser-Busch were positioning for damages in a future breach of contract

claim against Prominence, then its interest would be in making itself appear at fault and having damages awarded against it, rather than against Prominence. Damages awarded to plaintiff against Prominence would not be recoverable by Anheuser-Busch in a later breach of contract action. Fourth, plaintiff notes again that Anheuser-Busch and Prominence had dismissed their third-party action and their only defense at trial was that plaintiff was at fault for his own injuries.

Finally, *Georgia Ports Authority v. Harris*, 243 Ga.App. 508, 533 S.E.2d 404 (Ga.App. 2000) is irrelevant to the matter at bar. There, defendant Georgia Ports Authority appealed the equal allocation of defense peremptory challenges between it and plaintiff's employer, a third-party defendant. *Id.* at 512. Based on Georgia statutory law and facts unique to the case, the court found no abuse of discretion in the way the peremptory challenges were allocated between the defendants. *Id.*

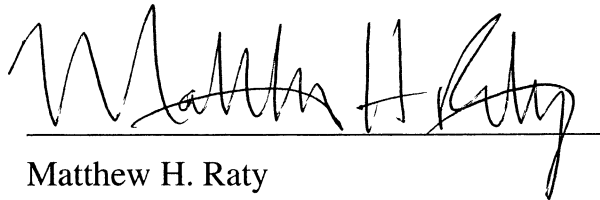
The record establishes, incontrovertibly, that there was no "substantial controversy" between the co-defendants, as that term has been defined by the Utah Supreme Court, that would allow the trial court to grant separate sets of peremptory challenges to the defendants. The trial court committed prejudicial error by giving defendants twice the number of peremptory challenges given to plaintiff. For this independent reason, the court should reverse the judgement of the trial court and remand for a new trial.

## CONCLUSION

The court should reverse the judgment of the trial court and remand the case for a new trial, since the trial court committed prejudicial errors in rejecting plaintiff's voir dire, requested to discover prospective juror exposure to negative reports of personal injury cases and prejudice against such cases. The trial court also committed prejudicial error in granting co-defendants six peremptory challenges, although there was no "substantial controversy" that would allow the trial court to allocate additional challenges.

WHEREFORE, plaintiff Michael Bee respectfully requests that the Utah Court of Appeals reverse the judgment of the trial court and remand the case for a new trial.

DATED AND SUBMITTED this 29<sup>th</sup> day of August, 2008.

A handwritten signature in black ink, appearing to read "Matthew H. Raty", written over a horizontal line.

Matthew H. Raty

Cory B Mattson

Attorneys for Plaintiff/Appellant

**CERTIFICATE OF SERVICE**

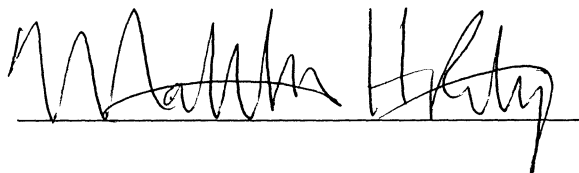
I hereby certify that two copies of the foregoing **APPELLANT'S REPLY BRIEF** was served upon appellee's counsel at the address listed below, by depositing the same in the United States mail, postage pre-paid on the 29<sup>th</sup> day of August, 2008.

**Attorney for Anheuser Busch Co.**

Peter H. Christensen  
STRONG & HANNI  
3 Triad Center, Suite 500  
Salt Lake City, Utah 84180

**Attorney for Prominence, Inc.**

Don Dalton  
DALTON & KELLEY  
P.O. Box 58084  
Salt Lake City, Utah 84158

A handwritten signature in black ink, appearing to read "Don Dalton", is written over a horizontal line.

## **ADDENDUM**

Addendum 1:       Plaintiff's Requested Voir Dire Nos. 1-4. RR. 1740-1744.



Tab 1

Question No. 1. Do you believe a lawsuit is a proper method of resolving disputes concerning compensation for personal injuries? *Ostler v. Albina Transfer Company, Inc.*, 781 P.2d 445 (Utah 1989). Please explain [in chambers].

Question No. 2. Have any of you watched, read, or heard anything that suggests a "lawsuit crisis" or the need for "tort reform"? *Barrett v. Peterson*, 868 P.2d 101 (Utah App. 1993); *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991). Please explain [in chambers].

- a. Do you think the article, program, etc. made some good points?
- b. Did you agree with the points made? Please explain [in chambers].
- c. Would you be inclined to reduce the damage award, if any, in this case, because of what you have watched, read or heard? Please explain [in chambers].

Question No. 3. Have any of you watched, read or heard anything which suggests that jury verdicts are too high or unreasonable? What have you seen, heard or read? (To be asked of jurors in chambers.)

- a. Do you personally believe that jury verdicts are unreasonable?
- b. Do you believe that monetary limits should be placed upon the amounts which a jury can award to an individual who sues for personal injuries?

Question No. 4. Would you be hesitant to award compensation for any of the following elements of damages, provided you first find that the plaintiff sustained his burden of proof to be entitled to damages:

- a. Past medical expenses?
- b. Past lost wages?
- c. Pain and suffering, including loss of enjoyment of life?
- d. Punitive damages to punish a wrong-doer?