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Jeffrey D. Eisenberg; Alan W. Mortensen; Paul M. Simmons; Wilcox, Dewsnup & King; Attorneys for Appellant.
Paul M. Belnap; Tobert L. Janicki; Daren K. Nelson; Strong & hanni; Attorneys for Appellee.

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UTAH COURT OF APPEALS
BRIEF
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IN THE UTAH COURT OF APPEALS

GARY RICCI, Plaintiff, Appellant & Cross-Appellee, vs. CHARLES SCHOULTZ, M.D. Defendant, Appellee & Cross-Appellant.	))))))))))))	**REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT** Case No. 970189CA Priority No. 15

APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE HOMER F. WILKENSON PRESIDING

Jeffrey D. Eisenberg
Alan W. Mortensen
Paul M. Simmons
WILCOX, DESWNUP & KING
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 533-0400
Attorneys for Appellant &
Cross-Appellee

Paul M. Belnap, #0279
Robert L. Janicki, #5493
Darren K. Nelson, #7946
STRONG & HANNI
Sixth Floor Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-7080
Attorneys for Appellee &
Cross-Appellant

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COURT OF APPEALS

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ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING SHOULTZ'S EXPERT WITNESSES.

Should this Court reverse the trial court's ruling which granted Charles Shoultz's ("Shoultz") motion for J.N.O.V. and alternative motion for a new trial, then Shoultz is entitled to a new trial because the trial court abused its discretion in excluding Shoultz's expert witnesses. The trial court excluded Shoultz's expert testimony for two reasons: (1) Shoultz failed to designate any witnesses as experts prior to trial; and (2) the experts could not "give opinions as to what took place, with them not being there, and they're not being [sic] able to say what took place." (R. 341-42, 433, 441-42). Both reasons given by the trial court for the exclusion of Shoultz's witnesses amounted to an abuse of discretion.

First, the trial court never imposed a deadline for the designation of expert witnesses. Even without such a judicial deadline, Gary Ricci ("Ricci") possessed notice over six weeks prior to trial that Shoultz planned on calling Snowbird employees as witnesses. The trial was held on March 11, 12 and 13, 1996. (R. 150-51, 209). On January 30, 1996, Shoultz's counsel mailed Ricci's counsel a letter in which the Snowbird employees were identified as witnesses. (See Correspondence of counsel attached in addendum). That notice gave Ricci's counsel an opportunity to depose the Snowbird employees, particularly Kenneth Bonar ("Bonar"). Those depositions occurred on February 20, 1996, nearly three weeks after Shoultz's counsel identified the Snowbird employees as witnesses. (See R. 120-29; 329-34). At the depositions Bonar testified in detail concerning the Skier's Responsibility Code. He opined that Ricci failed to

adhere to the code, and that his failure to do so caused the accident. (R. 333-34). Ricci had ample notice pertaining to Shoultz's attempt to elicit expert testimony at trial from the Snowbird employees.

Second, under the Utah Rules of Evidence, the witnesses did not need to *see* the skiing accident in order to testify about the application and interpretation of the Skier's Responsibility Code to the facts of the case. Utah R. Evid. 703 (1997). Instead, Shoultz's expert witnesses could have offered testimony as to the application and interpretation of the code based on the respective version of events presented by both Ricci and Shoultz at trial. Utah R. Evid. 702-705 (1997). As explained in further detail below, because the trial court's abuse of discretion pertaining to the exclusion of Shoultz's expert witnesses did not amount to harmless error, Shoultz is entitled to a new trial.

A. THE TRIAL COURT ABUSED ITS DISCRETION UNDER A "CASE MANAGEMENT" ANALYSIS.

A trial court may not exceed its procedural authority in making case management decisions governed by the rules of civil procedure. Berrett v. Denver & Rio Grande W. R.R., 830 P.2d 291, 296-97 (Utah App. 1992), cert. denied, 836 P.2d 1383 (Utah 1992). In making those decisions with respect to the exclusion of witnesses, this Court has recognized that a trial court must be cautious. The exclusion of a witness from testifying is "extreme in nature and should be employed only with caution and restraint." Id. at 293 (quoting Plonkey v. Superior, 475 P.2d 492, 494 (Ariz. 1970). Accordingly, this Court has held that absent a specific order which creates a judicially imposed deadline for the designation of witnesses, a court abuses its

discretion when it excludes expert testimony on the basis that a party did not designate such. Id. at 296.

In other words, the trial court's decision to exclude Shoultz's expert witnesses was a case management decision. That decision was governed by the rules of procedure. However, the trial court exceeded its procedural authority granted by the rules when it excluded Shoultz's witnesses when no scheduling order was in place which created "a specific deadline for the disclosure of the final witness list." Id. at 296-97.

The parties do not dispute that the trial court never imposed a deadline for the designation of expert witnesses. (See Reply Br. of Appellee at 21). The trial court excluded Shoultz's expert witnesses, in part, because Shoultz failed to designate the Snowbird employees as experts. (R. 433). Likewise, the court stated that Ricci "was entitled to have notice of expert witnesses, and entitled to find his own experts if he chose to do so, . . . " (R. 433). The record shows, however, that Ricci possessed notice over six weeks prior to the trial that Shoultz planned on proffering expert testimony. (See R. 120-129; 329-34; Correspondence of counsel attached as addendum).

The deposition of Kenneth Bonar ("Bonar") was taken on February 20, 1996. Bonar's deposition was taken by Ricci three weeks after Shoultz identified him as a witness to be called at trial. (Correspondence of counsel attached as addendum). Bonar is the Mountain Manager at Snowbird and is responsible for the overall operation of the ski resort. (R. 789). At his deposition, Bonar was asked whether he had formulated any opinions as to the cause of the

accident and whether the parties had violated the Skier's Responsibility Code. (R. 331-32). Bonar testified in depth concerning the Skier's Responsibility Code. He opined that Ricci failed to adhere to the code, and that his failure to do so caused the accident. (R. 333-34). That is, Ricci failed to (1) "[s]ki under control and in such a manner that [he could] stop or avoid other skiers . . . ."; and (2) as the uphill or overtaking skier, Ricci had a duty to avoid Shoultz who was below Ricci. Id. These opinions, of course, represent expert testimony.

Two weeks later, on March 8, 1996, Ricci filed a motion in limine to exclude Shoultz's expert testimony. (R. 120-29). No where in that motion or accompanying memorandum did Ricci claim that he would not have a chance to retain and prepare his own expert for trial purposes. Instead, Ricci argued that the expert testimony should be excluded for evidentiary purposes, not because of any lack of notice. (R. 120-29). Shoultz identified the Snowbird employees as witnesses on January 30, 1996. That identification gave Ricci ample opportunity to depose the Snowbird employees concerning their opinions as to the cause of the accident and the applicability of the Skiers Responsibility Code. Ricci cannot claim any surprise by Shoultz attempting to elicit expert testimony from the Snowbird employees, particularly Bonar. (See Reply Br. of Appellee at 21; R. 433).

The trial court abused its discretion in excluding Bonar's expert testimony under a case management decision, which was governed by the rules of procedure. No express deadline was set as to the designation of expert witnesses. Even without an express deadline, Ricci

possessed notice prior to trial that Shoultz would elicit expert opinion pertaining to the Skier's Responsibility Code and its application to the respective versions of the accident in this case.

B. THE TRIAL COURT ABUSED ITS DISCRETION UNDER AN EVIDENTIARY RULING ANALYSIS.

The trial court abused its discretion when it excluded the expert testimony on the basis that Shoultz could not lay appropriate foundation. Prior to trial and pursuant to Rule 103 of the Utah Rules of Evidence[1], Shoultz made a proffer as to Bonar's expert testimony. (R. 432-34). Shoultz indicated that Bonar would be qualified as an expert because of Bonar's knowledge, training and experience. (R. 432-435); see also Randle v. Allen, 862 P.2d 1329, 1327 (Utah 1993)("formal training or education is not a prerequisite to giving expert opinion, and a witness may qualify as an expert by virtue of his experience or training."). Bonar was Snowbird's Mountain Manager. Prior to that, he was employed as the ski patrol director and assistant mountain manager. (R. 789-90). As such, Bonar was extremely well qualified to render an opinion as to the enforcement, interpretation and application of the code to the facts of the ski accident.

In his proffer, Shoultz also indicated that Bonar, because of his training and experience, would testify that there are generally accepted rules of conduct in skiing. Those rules of conduct are embodied in written form and published by the skiing industry as the Skier's

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[1] Ricci's assertion in his Reply Brief that Shoultz made no proffer of the subject testimony is clearly incorrect. The "substantial right" requirement of Rule 103 will be discussed infra Point II of this brief.

Responsibility Code. (R. 434). Shoultz indicated that a ski accident is not the same situation as an automobile accident, where the jury may be expected to be familiar with the rules as far as operating motor vehicles. Accordingly, Bonar would have been able to testify about the accepted standard of care and how that standard was breached under the facts of this case. That testimony would have been helpful in assisting the jury reach a verdict on the ultimate issue which was whether Ricci or Shoultz was negligent. (R. 434-35).

Ricci argues that expert testimony pertaining to the application of the Skier's Responsibility Code would not have been "helpful" to the jury. (Reply Br. of Appellee at 22). However, the scope of Rule 702 is broad. Prior to the enactment of the rules of evidence, some courts rejected expert testimony unless it related to an issue "not within the common knowledge of the average layman." JACK B. WEINSTEIN, WEINSTEIN'S EVIDENCE MANUAL § 13.02[2] (1991). Such an interpretation, however, is incompatible with the helpfulness standard of Rule 702. Id. There is no bright line separating issues within the comprehension of jurors from those that are not. Therefore, experts may be able to "add specialized knowledge that would be helpful" even when jurors are well equipped to make judgments based on their common experience. Id.

Ricci also argues that the expert testimony would not have been "helpful" because the experts never "saw Ricci before the accident, and none saw the accident." (Reply Br. of Appellee at 22). The trial court, as part of its ruling, erroneously relied upon that argument. However, Bonar did not need to *see* the skiing accident in order to testify about the application and interpretation of the Skier's Responsibility Code to the facts of the case. Utah R. of Evid.

703-705 (1997); Cf. Shurtleff v. Jay Tuft & Co., 622 P.2d 1168 (Utah 1980)(expert who previously worked on backhoe could testify that backhoe had been maintained in a proper condition by defendant even though the expert never observed, nor did he have personal knowledge of, any specific acts by defendant that would constitute improper maintenance).

Here, Bonar could have testified that Ricci, as the "uphill" skier, had a duty to avoid the downhill skier, and Ricci's failure to do so was the cause of the accident. Bonar's testimony could have assisted the jury in helping them determine what it means to be the "uphill" skier. Likewise, he could have assisted the jury in helping them determine what it means, according to the code, to "ski in control" and in such a manner so as to avoid other downhill skiers. Moreover, Bonar could have offered testimony as to the application of the code based upon the two versions of events presented *at trial* by both Ricci and Shoultz. In such a manner, his testimony would have added specialized knowledge that would be "helpful" although some of the jurors may have been well equipped to make judgments based on their common experience of skiing. Again, however, skiing represents a sport in which not all jurors will be familiar, even in Utah. The testimony would have been relevant to the ultimate issue and helpful to the jury in making its determination.

In turn, Rule 703 of the Utah Rules of Evidence indicate that the facts upon which an expert bases an opinion may be "made known to the expert at or before the hearing." So long as the facts are "of a type reasonably relied upon by experts in the particular field" the facts or data need not be admissible in evidence. Utah R. Evid. 703 (1997). Thus, although Bonar's

opinions could have been elicited through the use of hypothetical questions, See Utah Dept. of Trans. v. 6200 South Associates, 872 P.2d 462 (Utah App. 1994) cert denied, 890 P.2d 1034 (Utah 1994), such procedure would not have been mandatory. Further, it may not have been necessary for Bonar to even give the reasons for his opinions or inferences. The reasons for his opinion could have been explored by Ricci on cross-examination. Utah R. Evid. 705 (1997); see also CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE & PROCEDURE, § 6272 (West 1997)(In the name of efficiency, Rules 703 and 705 shift the burden to the cross-examiner to reveal the bases of an expert's opinion and the deficiencies therein). Any deficiencies that Ricci may have perceived would have gone to the weight of the evidence, so long as Bonar's opinions pertaining to the Skier's Responsibility Code were reliable. See Utah R. of Evid. 702 (1997).

Finally, Ricci argues that the expert testimony would not have been "helpful" because Bonar's testimony would merely "tell the jury what result to reach." (Reply Br. of Appellee at 23). Rule 704 of the Utah Rules of Evidence clearly provides that testimony in the form of opinion or inference "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Utah R. Evid. 704 (1997). In this respect, the Utah Supreme Court has stated:

> The old shibboleth that an expert should not be permitted to invade the province of the jury has been largely displaced by recognition that opinions, if based on an adequate foundation, are helpful and that the powerful tool of cross-examination and the jury's good judgment are sufficient to place the opinion in proper perspective.

Edwards v. Didericksen, 597 P.2d 1328, 1330 (Utah 1979). Unfortunately, the jury here was never able to place the expert opinion in the "proper perspective."

Of course, "an expert cannot give an opinion as to whether an individual was 'negligent' because such an opinion would require a legal conclusion." Davidson v. Prince, 813 P.2d 1225, 1231 (Utah App. 1991) , cert denied, 826 P2d 681 (Utah 1991) (the excluded testimony was an answer to a *specific question* which would appear on the verdict form). However, "there is no bright line between permissible questions under Rule 704 and those that call for over-broad legal responses." Id.

In this case, Bonar would have testified that, in his expert opinion, Ricci failed to adhere to the Skier's Responsibility Code. That proposed testimony is significantly different from the scenario embraced by this Court in Davidson and State v. Tenney, 913 P.2d 750 (Utah App. 1996), cert denied, 923 P.2d 693 (Utah 1996) (expert testified that *under Utah law*, defendant's actions were impermissible). In this case, both parties recognize that violation of the Skier's Responsibility Code would not have been conclusive on the standard of care. (Reply Br. of Appellee at 18 n. 5). The jury instructions, too, indicated that the code was evidence of the "care an ordinary, prudent person would use under the circumstances." (R. 232). Thus, Bonar could have testified that Ricci breached the ski industry's accepted standard of care as promulgated in the Skier's Responsibility Code. Such testimony, although embracing an ultimate issue, would not have merely told the jury what result to reach. It would have been proper under Rule 704 of the Utah Rules of Evidence. Godesky v. Provo City Corp., 690 P.2d

541 (Utah 1984)(experts testified that defendant violated four provisions of National Electric Safety Code; violation of such was evidence of negligence); Intermountain Farmers Ass'n v. Fitzgerald, 574 P.2d 1162 (Utah 1978)(violation of statute is evidence of negligence); Hall v. Archer-Daniel-Midland Co. 491 N.E.2d 879 (Ill. App. 1986), rev'd on other grnds., 524 N.E.2d 586 (Ill. 1988)(expert properly permitted to testify that defendants violated a duty to plaintiff under OSHA regulations).

II. THE TRIAL COURT'S RULING PREJUDICED SHOULTZ

This Court has recognized that it is not easy to tell when an error should be regarded as prejudicial. Berrett 830 P.2d at 293. This Court has, however, reasoned that "if we cannot, with any degree of assurance, affirm that the use of such evidence would not have been helpful to the [defendant], the doubt should be resolved in favor of allowing him to have a full and fair presentation of his cause to the jury." Id. Although not determinative[2], some indication of the prejudicial effect of the trial court's exclusion of expert testimony must "be found in the fact that counsel thought the matter of sufficient consequence that he objected to the admission of the evidence." Berrett, 830 P.2d at 297 (quoting Joseph v. W.H. Groves Latter-Day Saints Hosp., 318 P.2d 330, 334 (Utah 1957)); (See R. 120, 427, 791).

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[2] See Macris & Associates Inc. v. Images & Attitudes, Inc., 941 P.2d 636, 643 (Utah App. 1997)

One thing is clear from the record: The jury was not able to hear Bonar's ultimate conclusion that Ricci violated important skiing rules as published in the Skier's Responsibility Code. The exclusion of such expert opinion invited "misunderstanding [and] confusion in the jurors' minds that may not be detectable or correctable . . . ." Edwards, 597 P.2d at 1330. The jury was allowed to speculate in an area in which it was not as knowledgeable as an expert. See id. The jury never heard expert opinion testimony concerning the Skier's Responsibility Code's application to a "downhill skier" as opposed to an "uphill skier." (R. 793-94). The jury never heard expert testimony concerning the code provision with respect to "loss of control," or that "loss of control" does not mean merely falling while skiing.[3] In other words, the jury had to interpret and apply the "rules" of the sport without the aid of an expert who was extremely knowledgeable regarding to the application and interpretation of those rules. Skiing is not a sport in which all jurors have a common knowledge. The jury, therefore, was left to speculate on whether "loss of control" meant merely falling while skiing rather than skiing out-of-control or recklessly. See Edwards, 597 P.2d at 1330.

In his Reply Brief, Ricci argues that Shoultz could have argued his interpretation of the code to the jury in closing arguments. (Reply Br. of Appellee at 24 n. 11). Such an assertion is incorrect. Shoultz's arguments concerning any interpretation of the code to the facts of the

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[3] In his Reply Brief, Ricci claims that Shoultz did not fall. However, the record clearly indicates that, according to Ricci's version, Shoultz "caught an edge," veered to his left and began to fall. (R. 589). Ricci testified, "It seemed like it was only one second. It was fast. He just had trouble and **he was going down**." Id. For purposes of this Reply Brief and Shoultz's original brief, beginning to fall, and actually falling, are the same thing.

case would have been objectionable because such an interpretation was not in evidence. (See R. 214). In other words, the trial court's ruling which excluded expert testimony regarding the application of the Skier's Responsibility Code to the facts of this case precluded Shoultz's counsel from arguing his interpretation to the jury. In sum, accurate fact-finding was not enhanced by the exclusion of Shoultz's expert testimony. Because this Court cannot, "with any degree of assurance," affirm that the use of expert testimony would not have been helpful to Shoultz's case, the doubt should be resolved in favor of allowing him to have a "full and fair presentation of his cause to the jury." Berrett, 830 P.2d at 297.

CONCLUSION

Shoultz was prejudiced by the trial court's ruling which excluded expert testimony concerning the application and interpretation of the Skier's Responsibility Code. Such testimony would have been helpful in assisting the jury to reach its ultimate conclusion. Therefore, if this Court reverses the trial court's ruling on Shoultz's motion for J.N.O.V. or alternative new trial, Shoultz respectfully requests that this Court order a new trial because the trial court abused its discretion in excluding expert testimony and Shoultz was prejudiced by that erroneous ruling.

DATED this 23 day of February, 1998.

STRONG & HANNI

By

Paul M. Belnap
Robert L. Janicki
Darren K. Nelson
Attorneys for Appellee & Cross-Appellant

ADDENDUM

LIAPIS, GRAY & STEGALL, L.C.
ATTORNEYS AT LAW
175 WEST 200 SOUTH, SUITE 2004
SALT LAKE CITY, UTAH 84101
TELEPHONE (801)532-6996

PAUL H. LIAPIS
DEAN L. GRAY
WILLIAM A. STEGALL, JR.

TELECOPIER
(801)532-7394

January 30, 1996

Jeffrey D. Eisenberg
WILCOX, DEWSNUP & KING
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, UT 84111

RE: *Gary Ricci v. Charles Shoultz, M.D.*
Civil No. 940930267PI
Fireman's Fund Claim No. B790L94022888

Dear Jeff:

At the direction of Dr. Shoultz' insurance carrier, Fireman's Fund, I have filed with the court an offer of judgment in the amount of $3,000. A copy of the offer is enclosed.

I request that you provide responses or supplemental responses with regard to the following discovery requests:

1. Defendant's interrogatory 4(d) requested information concerning Mr. Ricci's claimed medical expenses. In his answers dated August 10, 1994, he responded that "plaintiff is not in possession of bills at this time and reserves the right to supplement this answer to interrogatory. It is my understanding from Mr. Ricci's testimony at his continued deposition on January 24, 1996, that he has not had any medical treatment related to the claimed injuries for several months. Accordingly, he should be in possession of any and all bills relating to treatment of the injuries he claims to have suffered in this accident. Please furnish copies of all such bills to me as soon as possible.

2. Defendant's interrogatory 7 related to Mr. Ricci's gross income as reported for federal income tax purposes for the years 1989 through 1993. At Mr. Ricci's deposition on February 14, 1995, you stated you would provide to me copies of the tax return for 1989 through 1993. (Ricci depo. page 15, line 23, 24.) At the continued deposition, you indicated you would provide a copy of Mr. Ricci's 1994 tax return to me. Please furnish copies of all of the requested tax returns as soon as possible. Additionally, if Mr. Ricci intends to claim any loss of income in 1995, I would appreciate receiving documentation concerning his income in that year.

3. Defendant's interrogatory 14 asked whether you had hired "any experts to determine the cause of the incident or to reconstruct the incident." You objected to the interrogatory as work-product, but, without waiving the objection, stated "none at this time." Please advise me as to whether your response to interrogatory 14 remains accurate.

Following Mr. Ricci's deposition, you requested that we each identify our trial witnesses by February 7, 1996. I presently anticipate that I will, or may, call the following:

1. Plaintiff.

2. Defendant.

3. Jennifer Ricci.

4. Gary Pinnell.

5. Patrick Kenny.

6. Karl Boyer.

7. Bob Bonar.

8. J. K. Etheridge, defendant's treating orthopedic surgeon.

9. Stephen J. Nicolatus, an economist, to address plaintiff's lost earnings/earning capacity claims.

10. Any individual who provided medical/health care treatment to plaintiff on and after April 12, 1994.

I have attempted to make the foregoing list of trial witnesses as complete as possible, but there may be changes once Mr. Ricci responds to the discovery requests.

Very truly yours,

William A. Stegall, Jr.

WAS/tt
cc: Richard K. Rediger
Charles Shoultz, M.D.
Vance Dunnam

WILCOX, DEWSNUP & KING
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
2020 BENEFICIAL LIFE TOWER
36 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

TELEPHONE
(801) 533-0400
FACSIMILE
(801) 363-4218

W. BRENT WILCOX
RALPH L. DEWSNUP
COLIN P. KING
DAVID R. OLSEN
EDWARD B. HAVAS
JEFFREY D. EISENBERG
RUTH LYBBERT
ALAN W. MORTENSEN*

*ALSO ADMITTED IN WYOMING AND COLORADO

February 2, 1996

William Stegall, Esq.
Liapis, Gray & Stegall
175 West 200 South #2004
Salt Lake City, Utah 84101

RE: *Ricci v. Shoultz*

Dear Bill:

Thanks for your letter of January 30, 1996 which contained your witness list. I attempted to located J.K. Ethridge in the Salt Lake physicians directory and could not locate him. I am assuming he is someone who treated your client for his alleged injuries in Texas.

To begin with, I would like to know what relevant testimony Mr. Ethridge has to offer. Your client has not made a claim for damages in this case. If you believe that the type and location of your client's injuries is relevant to determining the cause of the accident, I have no difficulty with your client putting that evidence in and in fact, I probably would not object to introduction of medical records to substantiate that. However, if Mr. Ethridge is going to opine on how the accident happened, I certainly want the opportunity to take his deposition and voir dire him. I think it would be very unlikely he could ever be qualified to testify concerning the cause of the accident. In any event, please clarify your intentions and make arrangements to give me the opportunity to depose Mr. Ethridge at a convenient time prior to trial.

Very truly yours,

Jeffrey D. Eisenberg

JDE:sk

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 1998, a true and correct copy of the foregoing Reply Brief of Appellee & Cross-Appellant was mailed, first-class postage prepaid, to:

Jeffrey D. Eisenberg
WILCOX, DEWSNUP & KING
Attorneys for Plaintiff and Appellant
36 South State, #2020
Salt Lake City, Utah 84111

Darren K. Nelson