

1997

# Stephanie McKay v. Smith's Food Store, et al. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STEPHANIE MCKAY,	)	
	)	Appellate No. 970312-CA
Plaintiff/Appellant,	)	
	)	
vs.	)	
	)	Priority No. 15
SMITH'S FOOD STORE, ET AL.,	)	
	)	
Defendant/Respondent.	)	

APPELLEE R&O CONSTRUCTION COMPANY'S BRIEF

APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS  
THE HONORABLE GORDON J. LOW  
FIRST DISTRICT COURT, CIVIL NO. 94-025-PI

UTAH COURT OF APPEALS  
BRIEF

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970312-CA

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**FILED**

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COURT OF APPEALS



**PARTIES TO THE PROCEEDING IN THE FIRST DISTRICT COURT**

1. Stephanie McKay, plaintiff.
2. Smith's Food Store and Drug Centers, Inc., defendant.
3. James Chamberlain, defendant.
4. Crittenden Glass Company and Crittenden Paint and Glass Company, defendants.
5. R&O Construction Co., defendant.
6. United States Aluminum Corp. and its parent company, International Aluminum Corp., defendants.

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## JURISDICTION

This appeal was filed in the Utah Court of Appeals on December 24, 1996. The Court of Appeals, on its own motion, transferred the case to the Utah Supreme Court pursuant to Rule 44, Utah Rules of Appellate Procedure, because the appeal was taken from an order, judgment or decree of a district court in a civil case not involving domestic relations, and was not within the original appellate jurisdiction of the Utah Court of Appeals, as set forth in Utah Code Ann. § 78-2a-3(2)(h) (Supp. 1996). In accordance with Utah Code Ann. § 78-2-2(4), the Utah Supreme Court assigned this case to the Court of Appeals on May 16, 1997. The Court of Appeals has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j).

## ISSUES PRESENTED FOR REVIEW

**ISSUE 1. Did plaintiff preserve for appeal any issues which relate to R&O Construction?**

Citation to the Record. McKay, in her appellate brief, has no citation to the record showing that any issues have been preserved as against R&O Construction. See also, "Citation to the Record," below, with respect to Issues 3 through 5.

Standard of Review. An appellate court, as a general rule, will not consider an issue that has not been preserved for appeal. Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982); LeBaron & Assoc., Inc. v. Rebel Enter., Inc., 823 P.2d 479, 482-483 (Utah Ct. App. 1991). Issues raised for the first time on appeal will only be addressed by the appellate court if the trial court committed "plain error." "Plain error" exists only where the appellate court finds that the error should have been obvious to the trial court. See, e.g., State v. Olsen, 860



P.2d 332, 333 (Utah 1993). The appellate court determines, as a matter of law, whether an appellant has preserved an issue for appeal by properly raising and litigating the issue before the trial court and/or by making specific and timely objections before the trial court. In re Estate of Russell, 852 P.2d 997, 999-1000 (Utah 1993).

**ISSUE 2. Has plaintiff failed to comply with the briefing requirements of Rule 24(a), Utah Rules of Appellate Procedure thereby allowing this Court to decline to reach the merits of plaintiff's claims?**

Citation to the Record. Plaintiff's appellate brief fails to comply with the briefing requirements of Utah R. App. P. 24 because it contains no citation to the record as to where any substantive issue against R&O Construction has been preserved.

Standard of Review. Where the appellant's brief fails to meet the briefing requirements of Utah R. App. P. 24, the appellate court may decline to address issues raised by the appellant and, consequently, assumes the correctness of the trial court's judgment below. Koulis v. Standard Oil Co., 746 P.2d 1182, 1184-1185 (Utah Ct. App. 1987); Burns v. Summerhays, 927 P.2d 197, 198-199 (Utah Ct. App. 1996); Phillips v. Hatfield, 904 P.2d 1108, 1109 (Utah Ct. App. 1995).

Defendant R&O Construction is not entirely sure what plaintiff's substantive issues are on appeal--at least with respect to R&O Construction. This is because the issues have not been appropriately framed by plaintiff Stephanie McKay (sometimes hereinafter "McKay"), and plaintiff has failed to realize that the

same issues do not apply across the board to all defendants. For example, plaintiff urges that the appropriate standard of care is the standard set forth in Canfield v. Albertsons, Inc., 841 P.2d 1224 (Utah Ct. App. 1992), a standard which applies to business owners, not to general contractors. The correct standard of care with respect to general contractors is set forth in Benson v. Ames, 604 P.2d 927 (Utah 1979).

R&O Construction submits that the following issues are relevant to plaintiff's substantive claims against R&O Construction should this Court reach the substantive issues:

**ISSUE 3. Did the trial court err in holding that no genuine issues of material fact exist which would preclude summary judgment in favor of R&O Construction?**

Citation to the Record. McKay, in her appellate brief, has no citation to the record showing that this issue was preserved in the trial court as required by Utah R. App. P. 24(a)(5)(A). This issue--at least with respect to R&O Construction--was not preserved and, indeed, was never raised.<sup>1</sup> R&O Construction filed a Motion for Summary Judgment on April 1, 1996 (R. 656-663), but McKay never filed an opposing memorandum. Instead, she filed an "Objection"

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<sup>1</sup> Plaintiff, in her various memoranda filed in opposition to Motions for Summary Judgment brought by other defendants, raises no issues of material fact with respect to her claims against R&O Construction. (See eq., Plaintiff's Memorandum in Opposition to Defendant Smith's Food Store and Drug Center's, Inc.'s Motion for Summary Judgment, R. 667); Plaintiff's Memorandum in Opposition to Defendant Crittenden Paint and Glass Company's Motion for Summary Judgment, R. 392-394. Neither of these memoranda comports with the requirement of Rule 4-501(2)(b), Code of Judicial Administration, by setting forth "a concise statement of material facts as to which the party contends a genuine issue exists." Plaintiff never filed a memorandum in opposition to U.S. Aluminum's Motion for Summary Judgment (R. 627-628).

(R. 817-821) which did not contend that genuine issues of material fact existed. Indeed, plaintiff states:

This Plaintiff will not object to the dismissal from the complaint of R&O Construction and the other co-Defendants so long as the jury verdict form does not leave open allocations of liability as to Plaintiff's claim against Smith's.

R. 819.

Standard of Review. Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ron Case Roofing & Asphalt Paving, Inc. v. Bloomquist, 773 P.2d 1382, 1385 (Utah 1989). An appellate court "accord[s] no deference to the trial court's conclusion that the facts are not in dispute nor the court's legal conclusions based on those facts." Kitchen v. Cal-Gas Co., Inc., 821 P.2d 458, 460 (Utah Ct. App. 1991), cert. denied, 832 P.2d 476 (Utah 1992). All relevant facts are reviewed in a light most favorable to the losing party. Id.

**ISSUE 4. Did the trial court use the appropriate standard of care in determining whether R&O Construction was negligent?**

**ISSUE 5. Was the sliding glass door system called for in the specifications of Logan's Smith's Store so obviously dangerous that no reasonable general contractor would have installed it?**

Citation to the Record. With respect to both the fourth and fifth issues, McKay has again failed to provide any citation to the record showing that these issues were preserved below and/or that grounds exist for seeking review even though the issues were not preserved. As noted above, plaintiff never filed a memorandum in

opposition to R&O Construction's Motion for Summary Judgment and, consequently, did not preserve either issue for review.

Standard of Review. If Issues 4 and 5 were properly before this Court, the standard of review would be "correctness" as to the trial court's interpretation of common law. The appellate court affords no deference to the lower court's legal conclusions. State Farm Fire & Casualty Co. v. Geary, 869 P.2d 952, 954 (Utah Ct. App. 1994); C.T. v. Martinez, 845 P.2d 246, 247 (Utah 1992).

**CONSTITUTIONAL PROVISIONS, STATUTES,  
ORDINANCES, RULES OR REGULATIONS**

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of this appeal.

**STATEMENT OF THE CASE**

A. Nature of the Case.

This is a personal injury action brought by a customer who tripped and fell when entering Smith's Food Store in Logan, Utah. Plaintiff allegedly caught her foot on a floor track that is part of the sliding glass door system located at the entrance to Smith's. Plaintiff asserted seven separate causes of action against Smith's Food Store and Drug Centers, Inc. ("Smith's"), United States Aluminum Corp. ("U.S. Aluminum") (the manufacturer of the sliding glass door system), James Chamberlain ("Chamberlain") (the architect retained by Smith's to design the store), and Crittenden Glass Company and Crittenden Paint and Glass Company ("Crittenden") (the company which installed the sliding glass door system). The causes of action include: (1) negligence against Smith's; (2) creation of an ultra-hazardous condition against U.S.

Aluminum, Crittenden and/or Chamberlain; (3) breach of warranty against U.S. Aluminum; (4) negligence in the design of the sliding glass door system against U.S. Aluminum; (5) and (6) negligence against Chamberlain in providing architectural services; and (7) negligence against Crittenden in installing the sliding glass door system. R&O Construction was later named as an additional defendant in plaintiff's Second Amended Complaint wherein plaintiff alleged a separate and eighth cause of action against R&O Construction for negligence as the general contractor.

**B. Course of Proceedings and Disposition in the Court Below.**

1. Plaintiff filed a Complaint against Smith's on February 14, 1994, seeking damages for injuries sustained when she entered Smith's Food Store No. 87 located in Logan, Utah (R. 1-4).

2. Smith's filed a Third-Party Complaint on or about March 29, 1994 against Chamberlain, Crittenden and U.S. Aluminum and/or International Aluminum Corp., claiming a right to indemnification. Contrary to plaintiff's assertion, R&O Construction was not brought in as a third-party defendant at this time. (R. 11-27.)

3. On or about April 26, 1994, Chamberlain filed an Answer and Cross-Claim against U.S. Aluminum and/or International Aluminum Corp. and Crittenden (R. 72-76).

4. On or about July 7, 1994, U.S. Aluminum's parent corporation, International Aluminum Corp., filed a Motion to Dismiss (R. 131-138). The Motion to Dismiss was granted in a Memorandum Decision dated August 12, 1994 (R. 204-207).

5. McKay filed a Second Amended Complaint on June 8, 1995, naming R&O Construction as an additional defendant<sup>2</sup> (R. 252-263).

6. Three of the defendants filed the following Motions for Summary Judgment:

(a) Crittenden's Motion for Summary Judgment filed on August 16, 1995, asking that all claims by all parties against it be dismissed; (R. 333-391);

(b) U.S. Aluminum's Motion for Summary Judgment, filed on or about January 16, 1996 (R. 434-465); and

(c) Smith's Motion for Summary Judgment, filed on or about March 2, 1996 (R. 525-593).

7. The three Motions for Summary Judgment were argued at a hearing before the trial court on March 25, 1996, and the court allowed additional time for filing supplemental memoranda and affidavits (R. 928-1056).

8. R&O Construction filed a Motion for Summary Judgment on April 1, 1996 (R. 656-663).<sup>3</sup> Plaintiff never filed a memorandum in opposition to R&O Construction's Motion for Summary Judgment. She did, however, file an "objection" (R. 817-821).<sup>4</sup>

9. In a Memorandum Decision entered on May 7, 1996, the trial court granted summary judgment on the three motions argued at the March 25, 1996 hearing, that is, the motions submitted by Smith's, U.S. Aluminum and Crittenden. The trial court also

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<sup>2</sup> The third party defendants had already been named as defendants by plaintiff in her Amended Complaint (R. 52-64).

<sup>3</sup> Addendum 1.

<sup>4</sup> Addendum 2.

granted R&O Construction's Motion for Summary Judgment (R. 825-835).<sup>5 6</sup>

10. An Order and Judgment was entered on May 23, 1996 in favor of Smith's, U.S. Aluminum, Crittenden and R&O Construction and against plaintiff (R. 836-839).<sup>7</sup>

11. Plaintiff filed a Notice of Appeal on June 5, 1996 appealing the Order entered on May 23, 1996 (R. 848).

12. On or about October 18, 1995, Chamberlain filed a Motion for Summary Judgment (R. 854-895). No opposing memoranda were filed. In a Memorandum Decision dated December 9, 1996, the trial court granted Chamberlain's Motion for Summary Judgment and directed counsel for Chamberlain to prepare a formal order (R. 898-899). The Order dismissing Chamberlain was entered on December 23, 1996 (R. 900-901).<sup>8</sup>

13. Plaintiff filed her second Notice of Appeal on December 24, 1996.

C. Statement of Facts.

1. Plaintiff was injured on April 18, 1992, when she tripped and fell while crossing the threshold of the entrance to Smith's Food and Drug Center located in Logan, Utah (R. 252-254).

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<sup>5</sup> An earlier Memorandum Decision was filed on April 3, 1996, but was set aside so that the trial court could consider supplemental pleadings (R. 743-747). The May 7, 1996 Memorandum Decision reaffirmed the trial court's earlier April 3 Memorandum Decision.

<sup>6</sup> See, Addendum 9 to Plaintiff's Brief.

<sup>7</sup> Addendum 3.

<sup>8</sup> Addendum 4.

2. Plaintiff allegedly tripped on or caught her shoe on a stainless steel cap which forms part of the aluminum runner for the sliding glass door system at the entranceway to Smith's.

3. The sliding glass door system at the entranceway to Smith's was manufactured and sold by U.S. Aluminum (R. 438).

4. Specifications for Smith's Logan store were given by Smith's to architect Chamberlain. These included a specification book and a set of SCPIAs (reproducible drawings) from a store in Arizona. (R. 1353-1355.) The specifications for construction of the Smith's store in Logan were prepared by defendant/architect Chamberlain (R. 856-857; see also, Deposition of James O. Chamberlain ("Chamberlain Depo.") R. 1351, 1353-1354).

5. By written contract, R&O Construction was hired as the general contractor for the construction of Smith's Logan Store (Chamberlain Depo. R. 1386-1387).

6. R&O Construction entered into a subcontract agreement with Crittenden for the storefront sliding glass door system. This sliding glass door system was specified in the plans given to Chamberlain by Smith's and were approved by Chamberlain. (Deposition of E. M. Whitmeyer ("Whitmeyer Depo."), R. 1584-1586, 1632-1635.)

7. The plans and specifications specified Kawneer 1010 sliding glass doors or their equivalent (R. 1463-1469).

8. The sliding glass door system provided by Crittenden and manufactured by U.S. Aluminum was equivalent to the Kawneer 1010 and met the specification requirements of the architect, Chamberlain (Chamberlain Depo., R. 1376).



9. R&O Construction did not know that the sliding glass door system approved by the architect and installed by Crittenden was designed by U.S. Aluminum for interior use only, or for exterior use if certain conditions did not exist (Whitmeyer Depo., R. 1593-1595).

10. The completed store was accepted by Smith's (Chamberlain Depo., R. 1426).

11. The acceptance of the work followed a final inspection by the architect and by Smith's representatives. The inspection included an inspection of the sliding glass door system (Chamberlain Depo., R. 1425).

12. At the March 25, 1996 hearing on Motions for Summary Judgment brought by Smith's, Crittenden and U.S. Aluminum, counsel for Crittenden argued that the standard of care for a contractor who complies with specifications is that the specifications must be so obviously dangerous that no reasonable general contractor would have installed the sliding glass door system called for in the specifications (R. 1004-1006). Counsel for plaintiff did not challenge this standard and did not point out any genuine issues of material fact with respect to Crittenden's or to R&O Construction's purported negligence (R. 1006-1013). Indeed, when the trial court asked "but absent any evidence isn't Crittenden [and by implication, R&O Construction] then entitled to summary judgment disposition in this case as against them?" Plaintiff's counsel's response was "I expect." (R. 1013, 1029.)

13. In the trial court's May 7, 1996 Memorandum Decision, the trial court granted Crittenden's and R&O Construction's Motions for Summary Judgment on the basis that no genuine issues of material

fact were in dispute and on the basis of the trial court's legal conclusion that the door track called for in the specifications of Smith's Logan Store was not so obviously dangerous that no reasonable person would have installed the door and track system (R. 834).

#### **SUMMARY OF ARGUMENT**

This Court should affirm the trial court's decision granting summary judgment in favor of R&O Construction and against plaintiff. Plaintiff not only failed to comply with the briefing requirements of Utah R. App. P. 24 but, more importantly, plaintiff failed to preserve for appeal any issues which relate to her claims against R&O Construction. On these bases alone, this Court should decline to reach the merits of plaintiff's claims. But even if the Court decides to address the substantive issues, plaintiff has failed to identify a single issue of material fact regarding any purported negligence on the part of R&O Construction. Moreover, plaintiff never addressed, in any of her briefs or in oral argument before the trial court, the fact that R&O Construction, as contractor for Smith's Logan Store, is held to a different standard of care than Smith's. The appropriate standard of care with respect to a contractor is whether the specifications for Smith's Logan Store were so obviously dangerous that no reasonable general contractor would have installed the sliding glass door system. Not only has plaintiff failed to recognize that this is the appropriate standard of care, but she has failed to raise any genuine issues of fact which show that R&O Construction breached this standard of care.

**ARGUMENT**

**POINT I**

**PLAINTIFF FAILED TO PRESERVE FOR APPEAL  
ANY ISSUES WHICH RELATE TO R&O CONSTRUCTION**

As this Court stated in LeBaron & Assoc., Inc. v. Rebel Enter., Inc., 823 P.2d 479, 482 (Utah Ct. App. 1991):

To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issues' merits. . . . Further, the mere mention of an issue in the pleadings, when no supporting evidence or relevant legal authority is introduced at trial in support of the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal.

Citations omitted. See also, Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah Ct. App. 1989) ("issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal.")

In the instant case, McKay has not preserved any issues against R&O Construction. Nowhere in the record are there any facts which even arguably raise an issue of fact as to R&O Construction's negligence. Furthermore, although the standard of care to be applied to a construction company (as opposed to a store owner) was briefly discussed at the hearing in the context of Crittenden's standard of care, neither that standard nor any other standard of care was argued by plaintiff with respect to R&O Construction during the hearing. Plaintiff also failed to file a responsive memorandum to R&O Construction's Motion for Summary Judgment wherein R&O Construction argued that the appropriate standard of care for determining whether R&O Construction had been

negligent was whether the specifications for the sliding glass door system in Smith's Logan Store were so obviously dangerous that no reasonable general contractor would have installed it. The trial court was never given the opportunity to address any factual or legal issues with respect to R&O Construction. This Court should hold, accordingly, that plaintiff failed to preserve for appeal any issues which relate to R&O Construction and that this Court will not consider any such issues as against R&O Construction on appeal.

**POINT II**

**THIS COURT SHOULD DECLINE TO REACH THE MERITS OF PLAINTIFF'S CLAIMS BECAUSE PLAINTIFF HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 24, UTAH RULES OF APPELLATE PROCEDURE**

Utah R. App. P. 24 requires that the appellant's brief contain:

- [a] statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and
  - (A) citation to the record showing that the issue was preserved in the trial court; or
  - (B) a statement of grounds for seeking review of an issue not preserved in the trial court.

Utah R. App. P. 24(a)(5).

This Court, as well as the Utah Supreme Court, has frequently declined to consider issues not adequately briefed on appeal. See, e.g., Burns v. Summerhays, 927 P.2d 197 (Utah Ct. App. 1996); State v. Yates, 834 P.2d 599, 602 (Utah Ct. App. 1992), citing, State v. Price, 827 P.2d 247, 248 (Utah Ct. App. 1992). In Burns, the appellant's brief did not contain citations to the record showing that each of the issues raised had been preserved for appeal in the court below. This Court stated:

Because . . . [appellant's] appellate brief fails to comply with the briefing requirements of Rule 24 of the Utah Rules of Appellate Procedure, we decline to reach the merits of these claims, and we affirm the trial court's rulings. See, English v. Standard Optical Co., 814 P.2d 613, 619 (Utah App. 1991) ("due to non-compliance with our briefing rule, we decline to address this issue and assume the correctness of the judgment below.") Christensen v. Munns, 812 P.2d 69, 72-73 (Utah App. 1991) (declining to address issue and assuming correctness of trial court's judgment where appellants' brief had no citations to record, no legal authorities and no analysis); . . .

Burns v. Summerhays, 927 P.2d at 198.

A review of McKay's appellant's brief plainly shows that no citations exist within the sections labeled "Issues Presented for Review," "Standard of Review," or "Statement of the Case," which refer or relate in any way to R&O Construction's purported negligence. The "Issues Presented for Review" section (Appellant's Brief at 1-2) does not set forth a single issue which relates to R&O Construction's purported negligence. Moreover the "Statement of Facts" (Appellant's Brief at 4-13) merely notes that Crittenden received the plans for Smith's Logan Store from R&O Construction (Appellant's Brief ¶ 13, at 7) and that the manager of R&O Construction testified that Crittenden was the subcontractor who provided the sliding glass door system (Appellant's Brief ¶ 14, at 8). The "Statement of Facts" contains no additional facts about R&O Construction, including any facts whatsoever which might go to R&O Construction's purported negligence.

Furthermore, Point II of McKay's appellant's brief (Appellant's Brief at 24-29) contains no mention at all of R&O Construction. This section of McKay's brief, entitled "The Trial Court Erred by Granting Summary Judgment to Defendant Because

Genuine Issues of Material Fact Remain," does not present a single fact about R&O Construction, except that Smith's retained R&O Construction. Point II also contains no citations to the record showing where facts might exist which go to R&O Construction's purported negligence.

Because plaintiff has failed to comply with the requirements of Utah R. App. P. 24 by pointing to a single place in the record where plaintiff has preserved any factual issue relating to plaintiff's claim against R&O Construction for negligence, this Court should decline to reach the merits of plaintiff's claim with respect to R&O Construction.

### POINT III

#### **EVEN IF THIS COURT REACHES THE SUBSTANTIVE ISSUES, PLAINTIFF HAS FAILED TO IDENTIFY ANY GENUINE ISSUE OF MATERIAL FACT AS TO ANY NEGLIGENCE ON THE PART OF R&O CONSTRUCTION**

McKay's Statement of Facts (Appellant's Brief at 4-13) contains 35 numbered paragraphs, only two of which refer to R&O Construction. Paragraph 13 states that, "[d]efendant Crittenden Paint and Glass Company received the plans for the Smith's Logan store from the general contractor, R&O Construction, and reviewed those plans in preparing its bid." Paragraph 14 merely contains a quote from the deposition of E. N. Whitmeyer, R&O Construction's manager, who testified that Crittenden was the subcontractor who provided the sliding glass door system.

Moreover, plaintiff's argument in Point II of her brief (Appellant's Brief at 24-29), wherein plaintiff contends that summary judgment should not have been granted because genuine issues of material fact exist, says nothing whatsoever about R&O

Construction except that Smith's conceded it retained the services of R&O Construction as the general contractor (Appellant's Brief at 25). This reference does not, by any stretch of the imagination, raise any genuine issue of material fact which supports McKay's claim that R&O Construction was negligent.

Given the complete lack of facts in the record or in appellant's brief which refer in any way to R&O Construction or its purported negligence, this Court should hold, as a matter of law, that no genuine issues of material fact exist with respect to R&O Construction, and that the trial court properly dismissed R&O Construction.

#### POINT IV

**ASSUMING THAT THE SUBSTANTIVE ISSUES ARE BEFORE THIS COURT ON APPEAL, THE TRIAL COURT USED THE APPROPRIATE STANDARD OF CARE IN HOLDING THAT R&O CONSTRUCTION WAS NOT NEGLIGENT**

Plaintiff, in her brief (Appellant's Brief at 14-23), argues that the standard of care applicable to all defendants is the standard set forth in Canfield v. Albertson's, Inc., 841 P.2d 1224 (Utah Ct. App. 1992), a standard of care which applies (1) to the owner and operator of premises who directly or impliedly invites others to enter its premises for profit purposes and/or (2) to anyone who assumes control over premises. This standard of care-- whether it is the appropriate standard with respect to store owners or not--is certainly not the appropriate standard of care which a contractor must meet. As argued in R&O Construction's Memorandum in Support of Motion for Summary Judgment (R. 659-663), unless plans and specifications provided to the contractor are so obviously dangerous that no reasonable contractor would follow

them, a contractor is not liable for damages that result from following such plans and specifications. This standard of care is set forth in Benson v. Ames, 604 P.2d 927 (Utah 1979), where the Utah Supreme Court stated:

As a general rule, a construction contractor who adequately follows an effective set of plans submitted to him by the owner of the property is not liable to third persons injured as a result of the defect, unless the plans submitted by the owner were so obviously dangerous that under the circumstances no reasonable contractor would have followed them. This rule is merely a specific application of the general standard of care incumbent upon all members of society pursuant to their interactions one with another: that of a reasonable man under like circumstances.

Id. at 929. See also, Leininger v. Stearns-Roger Mfg. Co., 404 P.2d 33, 17 Utah 2d 37 (1965) (contractor who was entirely subject to using the owner's choice of ventilating fans, who did not exercise independent judgment in the selection of such fans and who received the fans in a fully assembled condition requiring no more than routine placement, was not liable because the fans functioned to the complete satisfaction of the owner and were without visible defects). The trial court, in granting R&O Construction's Motion for Summary Judgment, adopted this standard of care, stating that "the facts are not in dispute and the sole issue of law to be determined by the court is whether the door track called for in the specifications of Logan's Smith's store was so obviously dangerous that no reasonable person would have installed it." (R. 834.)

The trial court adopted the appropriate standard of care when determining R&O Construction's liability. This standard of care was never questioned or opposed by plaintiff. This Court should hold, accordingly, that the appropriate standard of care is whether



the door tracks/sliding glass door system called for in the specifications of the Smith's Logan Store was so obviously dangerous that no reasonable general contractor would have installed it.

**POINT V**

**R&O CONSTRUCTION IS NOT LIABLE FOR DAMAGES SUFFERED BY PLAINTIFF  
BECAUSE THE PLANS AND SPECIFICATIONS WERE NOT SO OBVIOUSLY  
DANGEROUS THAT A REASONABLE CONTRACTOR WOULD REFUSE TO FOLLOW THEM**

Unless plans and specifications are so obviously dangerous that no reasonable contractor would follow them, a contractor is not liable for damages that result from following such plans. See, Benson v. Ames, 604 P.2d 927 (Utah 1979), cited above in Point IV.

It is undisputed that Smith's Logan Store was constructed by R&O Construction in accordance with the plans and specifications provided by Smith's and its architect, Chamberlain. By the express terms of its contract with Smith's, R&O Construction was obligated to complete the store in accordance with those plans and specifications. There is no evidence that R&O Construction deviated from its contractual obligations to Smith's and, more importantly, there is no evidence that R&O Construction knew or should have known that the plans and specifications may have designated an inappropriate sliding glass door system.

Moreover, because the store was inspected and accepted by Smith's, R&O Construction was relieved of all liability for damages resulting from work done in accordance with the contract. Berg v. Otis Elevator Co., 231 P. 832, 64 Utah 518 (1924) ("To render an independent contractor liable for damages after the work has been accepted by the contractee, the contractor must be guilty of

something more than mere negligence. In addition to negligence, the contractor must have knowledge of the imminence of danger.").

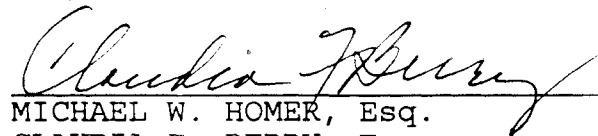
Based on the foregoing, this Court should uphold the trial court's summary judgment decision in favor of R&O Construction.

**CONCLUSION**

Based on the foregoing arguments, this Court should either decline to reach the merits of plaintiff's claims with respect to R&O Construction because plaintiff did not preserve for appeal any issues which relate to R&O Construction and did not comply with the briefing requirements of Utah R. App. P. 24. Alternatively, if this Court reaches the substantive issues with respect to R&O Construction, it should affirm the trial court's decision granting summary judgment in favor of R&O Construction and against plaintiff.

DATED this 3rd day of November, 1997.

SUITTER AXLAND



MICHAEL W. HOMER, Esq.

CLAUDIA F. BERRY, Esq.

H. MICHAEL DRAKE, Esq.

Attorneys for Defendant/Respondent  
R&O Construction

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of November, 1997,  
I caused two true and correct copies of the foregoing Appellee's  
Brief to be mailed, postage prepaid thereon, to the following:

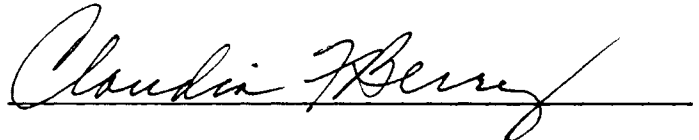
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Karra J. Porter, Esq.  
CHRISTENSEN JENSEN & POWELL  
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Salt Lake City, Utah 84101  
Attorney for Crittenden

A handwritten signature in cursive script, reading "Claudia Berry", is written over a horizontal line.

Tab 1

LOCAL DISTRICT

APR 1 2 05 PM '92

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Telephone: 801/532-7300  
Facsimile: 801/532-7355

Attorneys for Defendant R & O Construction Company

---

IN THE FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY  
STATE OF UTAH

---

STEPHANIE McKAY,

Plaintiff,

v.

SMITH'S FOOD STORE AND  
DRUG CENTERS, INC., UNITED  
STATES ALUMINUM CORPORATION,  
JAMES O. CHAMBERLAIN,  
CRITTENDEN GLASS COMPANY,  
CRITTENDEN PAINT & GLASS  
COMPANY, and R & O  
CONSTRUCTION COMPANY,

Defendants.

MOTION FOR SUMMARY JUDGMENT

Civil No. 940000025 PI

---

94-025  
#101  
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R&O Construction Company, through its counsel, moves the Court for summary judgment in its favor and against the Plaintiff. There are no crossclaims or third-party complaints against R&O Construction.

This motion is supported by a Memorandum of Points and Authorities filed in accordance with Rule 4-501 of the Utah Code of Judicial Administration.

DATED this 29<sup>th</sup> day of March, 1996,

SUITTER AXLAND & HANSON  
Attorneys for Defendant R & O Construction  
Company



---

Michael W. Homer, Esq.  
H. Michael Drake, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of March, 1996, a true and correct copy of the foregoing **Motion for Summary Judgment** was deposited in the United States mail, first class, postage prepaid, to:

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LOCAL DISTRICT

APR 1 2 05 PM '94

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Attorneys for Defendant R & O Construction Company

---

IN THE FIRST JUDICIAL DISTRICT COURT FOR CACHE COUNTY

STATE OF UTAH

---

STEPHANIE McKAY, :  
 :  
 :  
 Plaintiff, :  
 :  
 v. :  
 :  
 SMITH'S FOOD STORE AND :  
 DRUG CENTERS, INC., UNITED :  
 STATES ALUMINUM CORPORATION, :  
 JAMES O. CHAMBERLAIN, :  
 CRITTENDEN GLASS COMPANY, :  
 CRITTENDEN PAINT & GLASS :  
 COMPANY, and R & O :  
 CONSTRUCTION COMPANY, :  
 :  
 Defendants. :

R&O CONSTRUCTION COMPANY'S  
MEMORANDUM IN SUPPORT  
OF MOTION FOR  
SUMMARY JUDGMENT

Civil No. 940000025 PI

94-025  
CRIT #102  
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R&O Construction Company respectfully submits this Memorandum of Points and Authorities in support of its Motion for Summary Judgment.

**STATEMENT OF UNDISPUTED FACTS**

1. By written contract, R&O Construction was hired as the general contractor for the construction of the Smith's grocery store in Logan, Utah. (Deposition of James O. Chamberlain, pp. 40-41; Second Amended Complaint, ¶ 50.)

2. R&O Construction entered into a subcontract agreement with Crittenden Paint & Glass for storefront sliding glass doors as specified in the plans and specifications prepared by the architect, James Chamberlain. (Deposition of E.M. Whitmeyer, pp. 10-12.)

3. The plans and specifications specified Kawneer 1010 sliding glass doors, or their equivalent. ("Plans and Specifications")

4. The sliding glass door provided by Crittenden and manufactured by U.S. Aluminum met the specification required by the architect. (Deposition of James O. Chamberlain, p. 30.)

5. R&O Construction Company did not know that the sliding glass doors approved by the architect and installed by Crittenden were designated by U. S. Aluminum to be for interior application only. (Deposition of E.M. Whitmeyer, pp. 19-21.)

6. The completed store built done by R&O Construction was accepted by Smith's. (Deposition of James Chamberlain, p. 80.)

7. The acceptance of the work followed a final inspection by the architect and Smith's, which included an inspection of the sliding doors. (Deposition of James Chamberlain, p. 79.)

### ARGUMENT

#### R&O CONSTRUCTION IS FREE OF NEGLIGENCE

The Logan Smith's store was constructed by R&O Construction in accordance with the plans and specifications provided by Smith's and its architect, James Chamberlain. By the express terms of its contract with Smith's, R&O Construction was obligated to complete the store in accordance with the plans and specifications. A contractor is required to follow the plans and specifications, and when he does so, he cannot be held to guarantee that the work will be free from defects. *Puget Sound National Bank of Tacoma v. C.B. Lauch Construction Company*, 245 P.2d 800, 805 (Idaho 1952).

There is no evidence that R&O Construction deviated from its contractual obligations to Smith's. Of equal importance, there is no evidence that R&O Construction knew or should have known that the plans and specifications may have designated improper storefront doors.

Unless plans and specifications are so obviously dangerous that no reasonable contractor would follow them, a contractor is not liable for damages that result from following

Unless plans and specifications are so obviously dangerous that no reasonable contractor would follow them, a contractor is not liable for damages that result from following such plans. This legal premise is well stated in the case of *Benson v. Ames*, 604 P.2d 927, 929 (Utah 1979):

As a general rule, a construction contractor who adequately follows an effective set of plans submitted to him by the owner of the property is not liable to third persons injured as a result of the defect, unless the plans submitted by the owner were so obviously dangerous that under the circumstances no reasonable contractor would have followed them. This rule is merely a specific application of the general standard of care incumbent upon all members of society, pursuant to their interactions one with another: that of a reasonable man under like circumstances.

Accord, *Leininger v. Stearns-Roger Manufacturing Company*, 404 P.2d 33, 17 Ut.2d 37 (1965)

(The contractor was entirely subject to the owner's choice of ventilating fans; contractor did not exercise independent judgment in the selection of such fans; and contractor received the fans in a fully assembled condition requiring no more than routine placement in designated locations. There was nothing to indicate that the fans were inherently dangerous since they were delivered without visible defects, and they functioned to the complete satisfaction of the owner. There was nothing to impose a duty upon the contractor to dismantle the fans and analyze their component parts.) *See also, Andrus v. State*, 541 P.2d 1117 (Utah 1975) (Plans not so obviously dangerous that a reasonable contractor would refuse to follow them.)


Additionally, because the work was wholly accepted by Smith's, R&O was relieved of all liability for damages resulting from work done in accordance with the contract. *Berg v. Otis Elevator Company*, 231 P. 832, 64 Utah 518 (1924) ("To render an independent contractor liable for damages after the work has been accepted by the contractee, the contractor must be guilty of something more than mere negligence. In addition to negligence, the contractor must have knowledge of the imminence of danger.")

### CONCLUSION

There are no material issues of fact that would preclude summary judgment in favor of R&O Construction.

DATED this 29th day of March, 1996,

SUITTER AXLAND & HANSON  
Attorneys for Defendant R & O Construction  
Company

  
\_\_\_\_\_  
Michael W. Homer, Esq.  
H. Michael Drake, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of March, 1996, a true and correct copy of the foregoing **R&O Construction Company's Memorandum in Support of Motion for Summary Judgment** was deposited in the United States mail, first class, postage prepaid, to:

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FIRST DISTRICT COURT  
CACHE COUNTY

IN THE FIRST JUDICIAL DISTRICT COURT <sup>1996</sup> APR 16 11:6  
IN AND FOR CACHE COUNTY, STATE OF UTAH

STEPHANIE MCKAY,  
Plaintiff,

vs.

SMITH'S FOOD STORE &  
DRUG CENTERS, INC., AND  
JOHN DOES 1 THRU V,  
Defendants.

OBJECTION TO MOTION FOR  
SUMMARY JUDGMENT

Civil No. 94 025PI

Judge Gordon J. Low

SMITH'S FOOD STORE &  
DRUG CENTERS, INC.,  
Third-Party Plaintiff,

vs.

UNITED STATES ALUMINUM  
CORPORATION, INTERNATIONAL  
ALUMINUM CORPORATION, JAMES  
O. CHAMBERLIN, CRITTENDEN  
GLASS COMPANY and CRITTENDEN  
PAINT AND GLASS COMPANY,  
Third Party Defendants,

COMES NOW counsel for Plaintiff in the above-entitled matter and objects to the Motion for Summary Judgment filed by R & O Construction. This objection is supported by a memorandum of points and authorities filed in accordance with Rule 4-501 of the Utah Code of Judicial Administration.

94-025-  
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April 23, 1996  
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DATED this 16<sup>th</sup> day of April, 1996.

HILLYARD, ANDERSON & OLSEN



Herm Olsen  
Attorney for Plaintiff

LAW OFFICES, HILLYARD, ANDERSON & OLSEN, 175 EAST FIRST NORTH, LOGAN, UTAH 84321



CERTIFICATE OF SERVICE

On this 16<sup>th</sup> day of April, 1996, I caused to be served a true copy of Plaintiff's Objection to Motion for Summary Judgment to all counsel of record, by placing same in the U.S. Mail, postage prepaid, and in self-addressed envelopes to the following:

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Attorney at Law  
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175 South West Temple, Suite 510  
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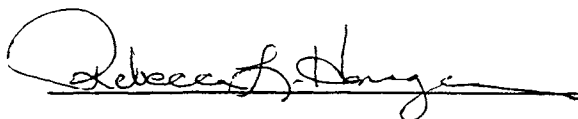
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Mike Homer  
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SUITTER, AXLAND, ARMSTRONG & HANSEN  
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DATED this 16<sup>th</sup> day of April, 1996

HILLYARD, ANDERSON & OLSEN, P.C.



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FIRST DISTRICT COURT  
 CACHE COUNTY

'96 APR 16 11:06

IN THE FIRST JUDICIAL DISTRICT COURT  
 IN AND FOR CACHE COUNTY, STATE OF UTAH

STEPHANIE MCKAY,	:	
	:	MEMORANDUM IN OPPOSITION
Plaintiff,	:	TO MOTION FOR SUMMARY
	:	JUDGMENT
	:	
vs.	:	
	:	
SMITH'S FOOD STORE &	:	
DRUG CENTERS, INC., AND	:	
JOHN DOES 1 THRU V,	:	Civil No. 94 025PI
	:	
Defendants.	:	Judge Gordon J. Low

SMITH'S FOOD STORE &  
 DRUG CENTERS, INC.,  
 Third-Party Plaintiff,  
 vs.  
 UNITED STATES ALUMINUM  
 CORPORATION, INTERNATIONAL  
 ALUMINUM CORPORATION, JAMES  
 O. CHAMBERLIN, CRITTENDEN  
 GLASS COMPANY and CRITTENDEN  
 PAINT AND GLASS COMPANY,  
 Third Party Defendants,

COMES NOW counsel for Plaintiff in the above-entitled matter and files this Memorandum in Objection to the Motion for Summary Judgment filed by R & O Construction as follows:

94-025-  
 # 117  
 April 23, 1996  
 JH

In its "Statement of Undisputed Facts", Defendant R & O Construction represents that it entered into an agreement with Crittenden to provide the sliding glass doors "... as specified in the plans and specifications prepared by the architect, James Chamberlin." (See page 2 of Memorandum in Support of Motion for Summary Judgment.)

It is the contention of Mr. Chamberlin that the plans and specifications were actually prepared by an agent for Smith's Food, and presented to him as essentially a completed set of plans which he was not authorized to substantially alter. It was a "cookie-cutter" project, essentially identical to multiple other projects which Smith's likewise supplied to contract architects without an expectation that those architects would significantly modify or challenge any of the contents of the plans and specifications.

R & O Construction argues that:

- (a) because it built the Smith's store according to the plans and specifications provided by Smith's and its architect;
- (b) that Smith's and the architect accepted the work without reservations relative to the type of doors installed; and
- (c) because it was ignorant of the interior only application of the doors, that it should be released from liability.

As to this co-Defendant, and other co-Defendants who have previously filed motions for summary judgment (Crittenden and U.S. Aluminum), Plaintiff responds that said Defendants may have no liability directly to the Plaintiff, but very likely have some further accountability to the owner (Smith's) for negligence alleged in Smith's cross-complaint.

This Plaintiff will not object to the dismissal from the complaint of R & O Construction and the other co-Defendants so long as the jury verdict form does not leave open allocations of liability as to Plaintiff's claim against Smith's.

It would be inappropriate to release the Defendants with summary judgment from Stephanie McKay's claim while at the same time allowing Smith's to use the "empty chair" defense by arguing that the cumulative negligence of the released co-defendants somehow absolves Smith's of its duties and responsibilities to the Plaintiff.

All of the co-Defendants besides Smith's may be entitled to summary judgment as against Plaintiff, but certainly would not be so entitled as against Smith's. So long as they are required to be accountable for their own negligence to Smith's, and Smith's accountable for the cumulative negligence of any of its agents to Mrs. McKay, then this Plaintiff has no objection to R & O's motion for that limited purpose.

DATED this 16<sup>th</sup> day of April, 1996.

HILLYARD, ANDERSON & OLSEN



Herm Olsen  
Attorney for Plaintiff

LAW OFFICES, HILLYARD, ANDERSON & OLSEN, 175 EAST FIRST NORTH, LOGAN, UTAH 84321

**CERTIFICATE OF SERVICE**

On this 16<sup>th</sup> day of April, 1996, I caused to be served a true copy of Plaintiff's Memorandum in Opposition to Motion for Summary Judgment to all counsel of record, by placing same in the U.S. Mail, postage prepaid, and in self-addressed envelopes to the following:

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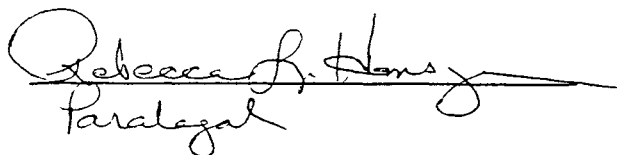
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Mike Homer  
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175 South West Temple  
Salt Lake City, UT 84101

DATED this 16<sup>th</sup> day of April, 1996

HILLYARD, ANDERSON & OLSEN, P.C.

  
Paralegal

LAW OFFICES, HILLYARD, ANDERSON & OLSEN, 175 EAST FIRST NORTH, LOGAN, UTAH 84321

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---

IN THE FIRST JUDICIAL DISTRICT COURT  
CACHE COUNTY, STATE OF UTAH

---

STEPHANIE McKAY, :  
 :  
 Plaintiff, : ORDER AND JUDGMENT  
 :  
 vs. :  
 :  
 SMITH'S FOOD STORE & DRUG :  
 CENTERS, INC., UNITED STATES :  
 ALUMINUM CORPORATION, :  
 JAMES O. CHAMBERLIN, :  
 CRITTENDEN GLASS COMPANY, :  
 CRITTENDEN PAINT AND GLASS : Civil No. 94000025 PI  
 COMPANY, and R&O CONSTRUCTION :  
 COMPANY, : Judge Gordon J. Low  
 Defendants, :

---

The motions for summary judgment filed by Defendant Smith's Food and Drug Centers, Inc., Defendant United States Aluminum Corporation, Defendant Crittenden Paint and Glass Company and Crittenden Glass Company, and Defendant R&O Construction Company were submitted for decision. Oral argument was heard on the motions filed by Defendants Smith's,

CASE NO. 94-25  
#120  
MAY 23 1996  
By lan



United States Aluminum, and Crittenden Paint & Glass on March 25, 1996. No oral argument was requested on R&O Construction Company's motion for summary judgment.

Having considered the memoranda submitted by the parties, and the oral arguments of counsel, and good cause appearing therefore, it is hereby ORDERED that:

1. Defendant Smith's Food and Drug Center's Motion for Summary Judgment is granted on the grounds stated in the Court's May 7, 1996, Memorandum Decision and April 2, 1996, Memorandum Decision.
2. Defendant United States Aluminum Corporation's Motion for Summary Judgment is granted on the grounds stated its memorandum and in the Court's May 7, 1996, Memorandum Decision and April 2, 1996, Memorandum Decision.
3. Defendant Crittenden Paint & Glass's Motion for Summary Judgment is granted on the grounds stated its memorandum and in the Court's May 7, 1996, Memorandum Decision and April 2, 1996, Memorandum Decision.
4. Defendant R&O Construction Company's Motion for Summary Judgment is granted on the grounds stated its memorandum and in the Court's May 7, 1996, Memorandum Decision and April 2, 1996, Memorandum Decision.

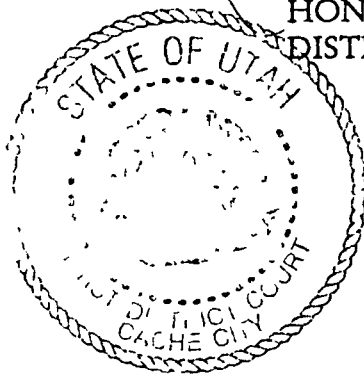
Judgement is hereby entered in favor of Defendants Smith's Food and Drug Centers, Inc., United States Aluminum Corporation, Crittenden Paint and Glass Company, Crittenden Glass Company, and R&O Construction Company.

DATED this 22<sup>nd</sup> day of May, 1996.

BY THE COURT,



HONORABLE GORDON LOW  
DISTRICT COURT JUDGE



I, CERTIFY THAT THE FOREGOING  
IS A TRUE AND CORRECT COPY  
OF THE ORIGINAL FILED IN FIRST  
JUDICIAL DISTRICT COURTS.

DATE

5-23-97  
A. Lundberg  
DEPUTY CLERK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of May, 1996, I served a copy of the foregoing by mailing said copy, first-class mail, postage prepaid, to the following:

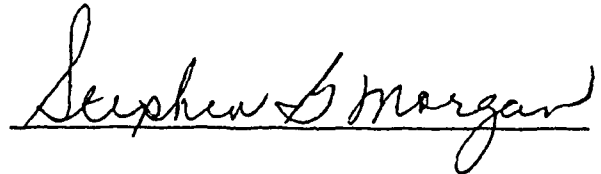
Robert G. Gilchrist  
RICHARDS BRANDT MILLER NELSON  
Key Bank Tower, 7th Floor  
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P.O. Box 2465  
Salt Lake City, Utah 84110-2465

Lee C. Henning  
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Richard R. Medsker  
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JENSEN, MEDSKER & PERKINS  
205 26th Street, Suite 34  
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Herm Olsen  
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175 East First North  
Logan, Utah 84321

Michael H. Drake  
SUITTER, AXLAND & HANSON  
175 South West Temple, Suite #700  
Salt Lake City, Utah 84101

A handwritten signature in cursive script, reading "Stephen B. Morgan", is written over a horizontal line.

Tab 4

FARR, KAUFMAN, SULLIVAN,  
GORMAN, JENSEN, MEDSKER, NICHOLS & PERKINS  
ATTORNEYS AT LAW  
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OGDEN, UTAH 84401

LOGAN DISTRICT

RICHARD R. MEDSKER (#2231) of  
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Attorneys for Defendant Chamberlin  
Bamberger Square Building  
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Ogden, Utah 84401  
Telephone: (801) 394-5526

DEC 15 2 48 PM '96

IN THE FIRST JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH  
CACHE COUNTY

STEPHANIE MCKAY,

Plaintiff,

VS.

SMITH'S FOOD STORE AND DRUG  
CENTERS, INC., UNITED STATES  
ALUMINUM CORPORATION,  
JAMES O. CHAMBERLIN,  
CRITTENDEN PAINT & GLASS  
COMPANY, and R&O CONSTRUCTION  
COMPANY,

Defendants.

ORDER DISMISSING DEFENDANT  
JAMES O. CHAMBERLIN

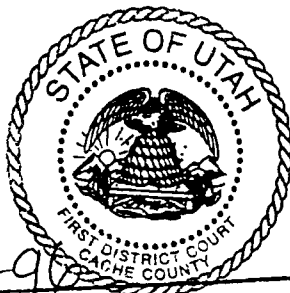
Civil No. 94000025PI

Said Defendant's Motion for Summary Judgment having come on regularly for decision by the Court, Plaintiff having filed no response, and good cause appearing;

IT IS HEREBY ORDERED that the cause of action herein against said Defendant is dismissed.

DATED this 23<sup>rd</sup> day of December, 1996.

BY THE COURT:



GORDON J. LOW  
District Court Judge

MICRO FILMED

DATE: 12-26-96

ROLL NUMBER: 66

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FILE 94-025  
DEC 23 1996 #133  
BY D.W.

900

McKAY V. SMITH's et al. - Civil No. 940000025PI  
Order of Dismissal

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Order Dismissing Defendant James O. Chamberlin (unexecuted) to the following, postage prepaid this 12 day of December, 1996:

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Risa Gaudin  
Secretary

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