

1997

Monica Robles v. William L. Bolton, Janice Bolton Dent, and James E. Bolton : Brief of Appellant

Utah Court of Appeals

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Stephen J. Trayner; Strong and Hanni; Attorneys for Appellee.

Thor B. Roundy; Attorney for Appellant.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 970627-CA

IN THE UTAH COURT OF APPEALS

MONICA ROBLES,)	BRIEF OF THE APPELLANT
)	
Plaintiff and Appellant,)	
	)	Appellate Court No. 970627-CA
)	
	)	Argument Priority
WILLIAM L. BOLTON, JANICE	)	Classification No. 15
BOLTON DENT, and JAMES E.)	
BOLTON,	)	Appeal from the Third
)	Judicial District Court,
Defendant and Appellee.)	Judge Wilkinson

FILED

1998

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PEALS

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STATUTES

None.

OTHER AUTHORITIES

Restatement Second of the law of Agency, section 354 ... 8, 9, 12

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to Section 78-2-2(3)(j), Utah Code Ann. (1953, as amended).

STATEMENT OF THE ISSUES

I. Whether or not the trial court erred in holding that children who voluntarily assume responsibility for renting and managing the home of a mentally incompetent parent have no duty to maintain the premises in a safe condition.

The issue presents a mixed question of law and fact. The standard of review on summary judgment requires that all facts and inferences be construed in favor of the party against whom summary judgment was entered. Utah Rules of Civil Procedure, Rule 56; Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982); Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982); Beehive Brick Co. v. Robinson Brick Co., 780 P.2d 827, 831 (Utah App. 1988). Questions of law are reviewed for correctness and the trial court's rulings are accorded no deference. Mountain Fuel Supply v. Salt Lake City, 752 P.2d 884, 887 (Utah 1988). [Opposition to Motion for Summary Judgment, dated April 15, 1997; Transcript of hearing on motion for summary judgment, dated May 12, 1997, p. 15.] [Record, pp. 583-92, 731.]

II. Whether or not the trial court erred in finding on summary judgment that the defendants could not have discovered

through ordinary care the defective condition of the window in question.

The standard of review on summary judgment requires that all facts and inferences be construed in favor of the party against whom summary judgment was entered. Utah Rules of Civil Procedure, Rule 56; Jackson v. Dabney, supra; Bowen v. Riverton City, supra; Beehive Brick Co. v. Robinson Brick Co., supra. [Opposition to Motion for Summary Judgment, dated April 15, 1997; Transcript of hearing on motion for summary judgment, dated May 12, 1997, p. 15.] [Record, pp. 583-92, 731.]

STATUTES, ORDINANCES AND RULES

Utah Rules of Civil Procedure, Rule 56. (A copy of Rule 56 is attached as Addendum, Exhibit "C.")

STATEMENT OF THE CASE

Monica Robles was injured at the premises located at 728 North Redwood Road, Salt Lake City Utah (the "Premises"). The injury occurred when Mrs. Robles attempted to open a window (the "Window in Question") at the Premises. Due to the deteriorated condition of the Window in Question, the glass in the Window in Question shattered when Mrs. Robles tried to open it.

The deteriorated condition of the Window in Question, making it difficult or impossible to open, was a hazardous condition at the Premises which was easily detectable upon inspection. Thus,

the defendants Janice Dent and James Bolton should have easily discovered and addressed the dangerous condition.

Janice Dent and James Bolton exercised full responsibility for the Premises. They rented the home, performed maintenance and repairs, and conducted all other business with respect to the house. They made all decisions and took all action without ever consulting with their mother Evelyn Bolton, whom they had placed in a full-time care situation due to her mental impairment.

Pursuant to defendants' motion for summary judgment, this matter was heard by the Trial Court on May 12, 1997. Summary judgment was granted as against plaintiff.

STATEMENT OF FACTS

The disputed and undisputed material facts presented to the trial on defendant's motion for summary judgment, and which are relevant to this appeal, consisted of the following:

1. Commencing in 1990, defendants James Bolton and Janice Dent moved their mother into a full-time care situation due to her mental impairment. Thereafter, James Bolton and Janice Dent exercised all control over the Premises. [Opposition to Defendants' Motion for Summary Judgment, dated April 15, 1997 (hereinafter "Opposition"), pp. 3-4; Defendants' Responses to Requests for Admissions (hereinafter "Admissions"), nos. 2-67; Deposition of James Bolton; Deposition of Janice Dent.] [Record, pp. 530-56, 585-86, 589-614.]

2. Monica Robles was injured on October 1, 1993. [Defendants' Memorandum in Support of Motion for Summary Judgment, dated April 4, 1997, pp. 3, 7; Opposition, p. 3.] [Record, pp. 472, 476, 585.]

3. James Bolton and Janice Dent maintained exclusive responsibility and control of the Premises. [Opposition, pp. 3-4; Admissions, nos. 2-67; Deposition of James Bolton; Deposition of Janice Dent.] [Record, pp. 530-56, 585-86, 589-614.] They managed all aspects of the Premises and never consulted with their mother with respect thereto. [Opposition, pp. 3-4; Admissions, nos. 2-18, 26-27; Deposition of James Bolton; Deposition of Janice Dent.] [Record, pp. 530-56, 585-86, 589-606.] It is doubtful that their mother ever knew anything concerning the rental of the Premises. [Opposition, pp. 3-4; Admissions, nos. 2-18, 26-27; Deposition of James Bolton; Deposition of Janice Dent.] [Record, pp. 530-56, 585-86, 589-606.]

4. Monica Robles was injured when she attempted to open the Window in Question. She was able to open the Window in Question slightly. However, on further effort, the glass in the Window in Question shattered, causing her injury. No one had ever indicated to her that she should not open the Window in Question or that there was any reason she could not open the Window in Question. [Opposition, pp. 4-5; Deposition of Monica Robles, pp. 36-41] [Record, pp. 562-63, 586-87.]

5. The condition of the Window in Question constituted a dangerous condition. The Window in Question was old and rotted and difficult or impossible to open. [Opposition, p. 5; Deposition of Monica Robles, pp. 36-41; Deposition of Adolfo Robles, pp. 53-64.] [Record, pp. 562-63, 587¹.] In addition to the testimony of Mr. and Mrs. Robles, who were eye witnesses to the dangerous condition of the window, plaintiffs advised the Court of their intention to use an expert witness at trial to further illuminate the problem. [Transcript of hearing on motion for summary judgment, dated May 12, 1997, p. 18.] [Record, p. 734.]

6. James Bolton and Janice Dent could have easily known of the problem with the Window in Question. James Bolton testified that he did not remember ever inspecting the Window in Question or trying to open the Window in Question before the accident. He only remembers opening the Window in Question after it was repaired by Mr. Robles. Notwithstanding, there was an obvious problem with the Window in Question prior to the accident.

¹ The deposition of Adolfo Robles was taken April 7, 1997. The transcript was not received by plaintiff until after plaintiff's Opposition to Defendants' Motion for Summary Judgment was filed. Defendants indicated in their brief that they intended to file the transcript. However, since the transcript was not filed and is not part of the official record, a copy has instead been attached hereto as an exhibit for the convenience of this Court. The testimony of Mr. Robles was proffered to the Trial Court in oral argument. See Transcript of hearing on motion for summary judgment, dated May 12, 1997, p. 18. [Record, p. 734.]

[Defendants' Responses to Requests for Admissions, nos. 45-46; Deposition of James Bolton, pp. 29, 58-60; Deposition of Adolfo Robles, pp. 53-64; Transcript of hearing on motion for summary judgment, dated May 12, 1997, p. 18.] [Record, pp. 562-63, 587, 734.]

SUMMARY OF THE ARGUMENT

The Trial Court made two improper findings as the basis for granting summary judgment. First, the Trial Court determined that the defendants did not have a duty to maintain the Premises in a safe condition. It could be said that the facts constituted a matter for the jury. However, in this case it was actually undisputed by the defendants that they were the sole persons taking full responsibility for every aspect of the rental of the Premises. Contrary to the legal authorities, the Trial Court determined that since the defendants "voluntarily" assumed that responsibility, that for some reason they had no liability for their actions.

Summary judgment must be reversed and the case remanded for trial. The evidence clearly establishes that the defendants were the landlords of this property. No other potentially liable party had even an awareness of the rental of the property. Under the facts, the law places a duty upon these defendants to maintain the Premises in a safe condition.

Second, the Trial Court found that the defendants did not know of the defect in question and that they had no reason to know. Contrary to the Court's finding, the correct standard is whether or not the landlord could have discovered that a dangerous condition existed in the exercise of due care. Again, this is a factual matter for the jury. Mr. and Mrs. Robles, both eyewitnesses to the condition of the Window in Question, both testified as to sufficient facts as to permit the jury to determine that the defendants could have discovered the defect in the exercise of due care. The facts would have been further illuminated by expert witness testimony at trial.

Again, summary judgment must be reversed and the case remanded for trial. Construed in the light most favorable to plaintiff, Mrs. Robles clearly has the opportunity to prevail in her action.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT CHILDREN WHO VOLUNTARILY ASSUME RESPONSIBILITY FOR RENTING AND MANAGING THE HOME OF A MENTALLY INCOMPETENT PARENT HAVE NO DUTY TO MAINTAIN THE PREMISES IN A SAFE CONDITION.

Defendants owed a duty to maintain the Premises in a safe condition. The facts of the case were that James Bolton and Janice Dent were the individuals who exercised all control over the Premises, as set forth in the Statement of Facts, above.

Plaintiff presented two doctrines of law establishing the duty of defendants under the facts.

First, both plaintiff and defendants cited case law to establish that a person who has assumed day to day authority for control of property owes a duty to maintain the premises in a safe condition, and that when a party has taken responsibility from the owner for day to day control, the duty of the owner ceases. See Tisdale v. U.S., 838 F.Supp. 592 (N.D. Ga 1993); Harris v. U.S., 424 F.Supp. 627 (D.Mass. 1976); McFeely v. U.S., 700 F.Supp. 414 (S.D.Ind. 1988); Miller v. Zep. Mfg. Co., 815 P.2d 506 (Kan. 1991). [Record, pp. 489-490, 589.]

Second, plaintiff cited authority to establish that an agent is responsible for his own negligence, regardless of the co-liability of his master. Holmstead v. Abbott G.M. Diesel, Inc., 27 Utah 2d 109, 493 P.2d 625, 627 (1972) (master and agent both liable for negligence of agent); Krukewicz v. Draper, 725 P.2d 1349 (Utah 1986). [Record, pp. 589-590.] The Restatement Second of the law of Agency, section 354, provides:

An agent who, by promise or otherwise, undertakes to act for his principal under such circumstances that some action is necessary for the protection of the person or tangible things of another, is subject to liability to the other for physical harm to him or to his things caused by the reliance of the principal or of the other upon his undertaking and his subsequent unexcused failure to act, if such failure creates an unreasonable risk of harm to him and the agent should so realize.

Comment a. provides in part, "by undertaking a job a person prevents others from undertaking it, since the principal relies upon him to perform it." Illustration no. 2 to comment b. even includes an example of an agent who negligently failed to inspect or repair a window! [Record, p. 590.]

Neither plaintiff nor defendant proffered any argument for the premise upon which the trial court based its ruling. Plaintiff is unaware of any authority that could be used to establish that if children voluntarily undertake to act on behalf of a mentally incompetent parent in renting and managing her property, then the children do not owe a duty of care equal to the duty of care which would be owed by anyone else who had undertaken full responsibility for such property management or was otherwise acting as an agent with responsibility therefore.

Based on the undisputed facts, and particularly when the facts are construed in the light most favorable to plaintiff, the evidence firmly established that the defendants James Bolton and Janice Dent exercised exclusive control over the Premises. [For references to the Record, see Statement of Facts, paragraph nos. 1 and 3, above.]

It was undisputed that Evelyn Bolton was moved into a full-time care situation by James Bolton and Janice Dent due to her mental impairment. [See Statement of Facts, paragraph no. 1, above.] She never knew anything concerning the rental of the

Premises. [See Statement of Facts, paragraph no. 3, above.] James Bolton and Janice Dent assumed exclusive control of the Premises when they placed their mother into a full-time care situation due to her mental condition. [See Statement of Facts, paragraph nos. 1 and 3, above.] Thereafter, they rented the Premises and assumed all authority and responsibility for the Premises. [See Statement of Facts, paragraph nos. 1 and 3, above.] With respect to all rentals, James Bolton and Janice Dent did not consult with or report to their mother. [See Statement of Facts, paragraph no. 3, above.] They have no recollection of even a single discussion with their mother concerning the rental of the Premises. [See Statement of Facts, paragraph nos. 1 and 3, above.]

No one other than James Bolton and Janice Dent exercised any authority to control the Premises. [See Statement of Facts, paragraph nos. 1 and 3, above.] James Bolton and Janice Dent rented the Premises and made all decisions with respect thereto without reporting to anyone. [See Statement of Facts, paragraph nos. 1 and 3, above.]

As between plaintiff and defendants, the law was undisputed. If the facts were construed such that defendants had assumed control for the day to day management of the Premises, then defendants would owe a duty of care in the present circumstances. [Record, p. 489.]

Based on the additional authority cited by plaintiff, defendants would also owe a duty of care if the facts revealed that they acted as the agent of the owner of the Premises.

Construed in the light most favorable to plaintiffs, the facts establish such liability. James Bolton and Janice Dent must be held to be the parties with responsibility for the Premises. To find otherwise would mean that no one was responsible for the Premises.

As a matter of law, all facts and reasonable inferences must be construed in favor of plaintiff. Utah Rules of Civil Procedure, Rule 56; Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982); Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982); Beehive Brick Co. v. Robinson Brick Co., 780 P.2d 827, 831 (Utah App. 1988). [Record, p. 54-55.]

Therefore, the trial court erred in finding that James Bolton and Janice Dent had voluntarily assumed management and control of the Premises for their mentally incompetent mother and in holding on that basis that defendants owed no duty of care.

**II. THE TRIAL COURT ERRED IN FINDING
ON SUMMARY JUDGMENT THAT THE DEFENDANTS
COULD NOT HAVE DISCOVERED THROUGH ORDINARY CARE
THE DEFECTIVE CONDITION OF THE WINDOW IN QUESTION.**

Utah law imposes upon the person responsible for rental property a burden of maintaining the property in safe condition. See Kleinert v. Kimball Elevator Co., 854 P.2d 1025, 1027 (Utah

App. 1993); Krukewicz v. Draper, 725 P.2d 1349, supra; Williams v. Melby, 699 P.2d 723 (Utah 1985). [Record, pp. 488, 591.]

Negligence is imposed when the "landlord" knew or in the exercise of ordinary care should have known that a dangerous condition existed and failed to take corrective action. Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89 (Utah App. 1988); Martin v. Safeway Stores, Inc., 565 P.2d 1139, 1140-41 (Utah 1997). [Record, pp. 493-94, 591.]

A window that will not open properly may be determined to be a dangerous condition as a matter of law. See the Restatement Second of the law of Agency, section 354, comment b., illustration no. 2. At the very least, whether or not a window that will not open properly constitutes a dangerous condition is a question of fact for the jury. See Williams v. Melby, supra, at 727.

In the present case, the Window in Question was extremely difficult to open. [See Statement of Facts, paragraph no. 5, above.] It could be opened slightly and was opened slightly by tenants from time to time due to the humidity caused by the neighboring bathroom shower. [See Statement of Facts, paragraph no. 5, above.] The dangerous condition of the Window in Question was apparent on the basis of a mere cursory inspection. [See Statement of Facts, paragraph no. 5, above.] The dangerous condition was an obvious and patent defect, not a latent defect. Both plaintiff and her former husband Adolfo Robles had provided

deposition testimony and were prepared to provide further testimony. [See Statement of Facts, paragraph no. 5, above.] That testimony, construed in the light most favorable to plaintiffs, would have established that the Window represented a dangerous condition, and that the dangerous condition was easily discoverable upon even a cursory investigation. [See Statement of Facts, paragraph nos. 5 and 6, above.]

In Williams v. Melby, supra, 699 P.2d 723, 728, the Supreme Court stated, "If a reasonably prudent person should have known or could have learned by exercise of reasonable care, that the design or construction of the window constituted a dangerous condition, the landlord could be held liable for not taking adequate safety precautions." The Supreme Court also cited Becker v. IRM Corp., 144 Cal.App.3d 321, 192 Cal.Rptr. 570 (1983) in which, "The difference between tempered glass and untempered glass was discernable only on close inspection. The Court set aside summary judgment because the case presented a factual issue as to whether the landlord could have learned of the defective condition of the property." Id.

Plaintiffs have further evidence that they intend to use at trial, consisting of expert testimony and a video tape of efforts to open the Window. Discovery was not closed at the time that summary judgment was entered, and plaintiffs would have been permitted to introduce this evidence at trial. Plaintiffs alerted

the Court to the existence of the expert witness and the investigation and conclusions of the expert witness. [Transcript of hearing on motion for summary judgment, dated May 12, 1997, p. 18.] [Record, p. 734.]

James Bolton and Janice Dent testified to their basic neglect as to the condition of the Premises. [See Statement of Facts, paragraph no. 6, above.] They knew very well that the home was old and not in good condition. Within the approximately three years prior to the accident, James Bolton and Janice Dent had rented to Premises to five different parties. [Defendants' Supplemental responses to discovery, dated November 17, 1995, response to interrogatory no. 15.] [Record, p. 522.]

Had James Bolton and Janice Dent exercised ordinary care in inspecting and maintaining the Premises, they would have easily discovered the dangerous condition of the Window in Question. Had they done no more than nail the window shut, the accident to Mrs. Robles could have been prevented.

As a matter of law, all facts and reasonable inferences must be construed in favor of plaintiff. Utah Rules of Civil Procedure, Rule 56; Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982); Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982); Beehive Brick Co. v. Robinson Brick Co., 780 P.2d 827, 831 (Utah App. 1988). [Record, p. 54-55.]


Therefore, the trial court erred in finding on summary judgment that the defendants could not have discovered through ordinary care the defective condition of the window in question.

CONCLUSION

Inasmuch as James Bolton and Janice Dent were the only persons managing the premises, they owed a duty of care as a matter of law. The jury must determine whether or not the duty of care was breached. Construed in the light most favorable to plaintiff, James Bolton and Janice Dent were clearly negligent. Plaintiff and Appellant Monica Robles respectfully requests that this Court reverse the summary judgment granted by the Trial Court.

Respectfully submitted.

DATED this 1st day of February, 1998.



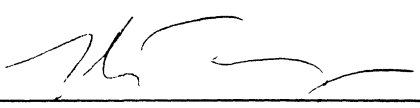
Thor B. Roundy
Attorney for Appellant

CERTIFICATE OF SERVICE BY MAIL

Thor B. Roundy
230 South 500 East, Suite 270
Salt Lake City, Utah 84102
Telephone (801) 364-3229
Bar No. 6435

I, THOR B. ROUNDY, certify that on this 1st day of February, 1998, I served four copies of the attached BRIEF OF THE APPELLANT, Appellate Court No. 970627-CA, upon counsel for the appellee in this matter by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Stephen J. Trayner
Strong & Hanni
Attorneys for Appellee
Boston Building, Sixth Floor
9 Exchange Place
Salt Lake City, UT 84111



Thor B. Roundy
Attorney for Appellant

FILED DISTRICT COURT
Third Judicial District

MAY 30 1997

SALT LAKE COUNTY
By [Signature] Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

MONICA ROBLES, an individual,)	
ADOLFO ROBLES, an individual,)	
and MONICA ROBLES, as guardian)	
ad litem for VICTORIA ROBLES,)	
a minor child,)	
	)	ORDER GRANTING
	)	DEFENDANTS' MOTION FOR
	)	SUMMARY JUDGMENT AND
Plaintiffs,	)	MOTION TO DISMISS
)	
vs.)	
)	
WILLIAM L. BOLTON, an individ-)	
ual, JANICE BOLTON DENT, an)	
individual, and JAMES E. BOLTON,)	
an individual,	)	Civil No. 950901997
)	
Defendants.	)	Judge Homer F. Wilkinson

The Motion for Summary Judgment and the Motion to Dismiss the Claims of Adolfo Robles and Victoria Robles, both motions being filed by defendants, were heard by the court on Monday, May 12, 1997. The plaintiffs were represented by counsel, Thor B. Roundy, who presented oral argument on their behalf, and defendants were represented by counsel, Peter H. Christensen, who

Exhibit "A"

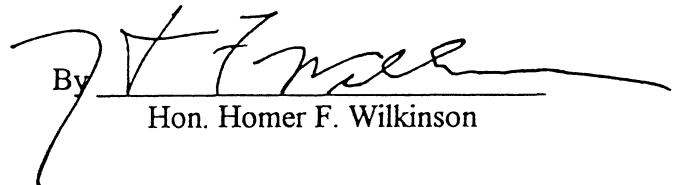
presented oral argument on their behalf. The court also received and considered written memoranda submitted by the parties, and accompanying exhibits and affidavits on both of the aforementioned motions. Having considered the oral arguments, legal memoranda, affidavits and exhibits submitted by all the parties,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants' Motion to Dismiss the Claims of Adolfo Robles and Victoria Robles is granted.
2. Defendants' Motion for Summary Judgment is granted.
3. The trial date of May 27-30, 1997 is hereby stricken.
4. The plaintiffs' claims are dismissed with prejudice

DATED this 30 day of May, 1997.

BY THE COURT:

By 
Hon. Homer F. Wilkinson

1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
2 IN AND FOR SALT LAKE COUNTY, STATE OF UTAH: DIVISION I

4	MONICA ROBLES, AN INDIVIDUAL,)	
	ADOLFO ROBLES, AN INDIVIDUAL,)	REPORTER'S TRANSCRIPT OF
5	AND MONICA ROBLES, AS)	HEARING ON DEFENDANTS'
	GUARDIAN AD LITEM FOR VICTORIA))	RENEWED MOTION FOR
6	ROBLES, A MINOR CHILD,)	SUMMARY JUDGMENT AND
	)	DEFENDANT'S MOTION TO
7	PLAINTIFFS,)	DISMISS CLAIMS OF ADOLFO
	)	<u>AND VICTORIA ROBLES</u>
8	VS.)	
	)	CASE NO. 950901997
9	WILLIAM L. BOLTON, AN)	
	INDIVIDUAL, JANICE BOLTON)	HON. HOMER F. WILKINSON
10	DENT, AN INDIVIDUAL, AND)	
	JAMES E. BOLTON, AN)	
11	INDIVIDUAL,)	
)	
12	DEFENDANTS.)	

13
14 BE IT REMEMBERED, THAT ON THE 12TH DAY OF
15 MAY, 1997, THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN
16 COURTROOM NO. 502 OF THE COURTS BUILDING, METROPOLITAN HALL
17 OF JUSTICE, 240 EAST 400 SOUTH, SALT LAKE CITY, UTAH,
18 BEFORE THE HONORABLE HOMER F. WILKINSON, JUDGE IN THE THIRD
19 JUDICIAL DISTRICT, STATE OF UTAH.

20 A P P E A R A N C E S

21 THOR B. ROUNDY, ATTORNEY-AT-LAW, 230 SOUTH
22 500 EAST, SUITE 270, SALT LAKE CITY, UTAH 84102, TELEPHONE
23 364-3229, APPEARING ON BEHALF OF THE PLAINTIFF.

24 PETER H. CHRISTENSEN, ATTORNEY-AT-LAW,
25 STRONG & HANNI, SIXTH FLOOR, BOSTON BUILDING, SALT LAKE

1 CITY, UTAH 84111, TELEPHONE 532-7080, APPEARING ON BEHALF
2 OF DEFENDANTS.
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1 (WHEREUPON, THE FOLLOWING PROCEEDINGS WERE
2 HAD IN OPEN COURT:)

3 THE COURT: THE MATTER BEFORE THE COURT IS
4 THE CASE OF MONICA ROBLES VERSUS WILLIAM BOLTON. THIS
5 COMES BEFORE THE COURT ON DEFENDANTS' MOTION FOR SUMMARY
6 JUDGMENT, I GUESS A MOTION TO DISMISS ALSO.

7 MR. CHRISTENSEN: CORRECT, YOUR HONOR.

8 THE COURT: YOU MAY PROCEED.

9 MR. CHRISTENSEN: THANK YOU, YOUR HONOR.
10 YOUR HONOR, I AM REPRESENTING DEFENDANTS HERE TODAY. WE
11 HAVE TWO MOTIONS, BOTH FOR DISPOSITION: THE FIRST ONE
12 BEING A MOTION FOR SUMMARY JUDGMENT, AND THE SECOND BEING A
13 MOTION TO DISMISS THE CLAIMS OF ADOLFO AND VICTORIA ROBLES.

14 WE HAVE THREE PARTIES. WE HAVE THREE
15 PLAINTIFFS IN THIS ACTION. ONE IS MONICA ROBLES, WHO IS
16 THE INJURED PARTY. SHE ALLEGEDLY WAS INJURED, INJURED HER
17 HAND, WHEN SHE OPENED A WINDOW AND GLASS BROKE AND INJURED
18 THE HAND.

19 THE OTHER TWO INDIVIDUALS, ADOLFO IS THE EX-
20 HUSBAND OF MONICA ROBLES; AND VICTORIA IS THE MINOR
21 DAUGHTER.

22 IF I COULD FIRST ADDRESS THE MOTION FOR
23 SUMMARY JUDGMENT. THIS, YOUR HONOR, IS THE THIRD TIME THIS
24 HAS BEEN FILED, AND ON TWO PRIOR OCCASIONS, THE COURT
25 ORDERED THAT THE PLAINTIFFS WERE ALLOWED TO DO ADDITIONAL

1 DISCOVERY TO DETERMINE WHETHER THERE WAS SUFFICIENT FACTS
2 TO DENY SUMMARY JUDGMENT. AND THAT DISCOVERY HAS NOT BEEN
3 DONE.

4 THEREFORE, WE BROUGHT THE SUMMARY JUDGMENT
5 BACK TO THE COURT. THIS CASE PRESENTLY IS SET FOR TRIAL
6 FOR THE LAST WEEK OF THIS MONTH IN FRONT OF THE COURT FOR
7 AN ENTIRE WEEK, FOR FOUR DAYS.

8 LET ME FIRST ADDRESS THE MOTION FOR SUMMARY
9 JUDGMENT. THERE ARE THREE ARGUMENTS IN THE MOTION FOR
10 SUMMARY JUDGMENT. FIRST OF ALL, THE DEFENDANT DID NOT OWN
11 THE PROPERTY. SECONDLY, THAT THEY DID NOT POSSESS OR HAVE
12 SUFFICIENT CONTROL OF THE PROPERTY TO BE LIABLE. AND THEN
13 THIRD, THE THIRD ARGUMENT FOR SUMMARY JUDGMENT, IS THAT IF
14 THEY ARE FOUND TO EITHER HAVE OWNED OR HAVE HAD SUFFICIENT
15 CONTROL OVER THE PROPERTY TO BE LIABLE TO THE PLAINTIFF'S,
16 THEN, NO. 3, THERE IS NO EVIDENCE OF DEFECT THAT CAUSED THE
17 INJURY, OR AT LEAST THERE WAS A DEFECT THAT THEY KNEW ABOUT
18 OR REASONABLY SHOULD HAVE KNOWN ABOUT.

19 AND BEFORE I GO FURTHER, I BELIEVE COUNSEL
20 HAS TENTATIVELY STIPULATED THAT ONE OF THE DEFENDANTS,
21 WILLIAM BOLTON, CAN BE LET OUT ON SUMMARY JUDGMENT.

22 MR. ROUNDY: YES, THAT'S FINE WITH US.
23 WE'RE NOT GOING TO PUT A CLAIM AGAINST HIM.

24 MR. CHRISTENSEN: THAT ONLY LEAVES TWO
25 DEFENDANTS, WHO ARE JANICE BOLTON DENT AND JAMES BOLTON.

1 IF I COULD EXPLAIN TO THE COURT WHO THEY
2 ARE. THIS HOUSE, THIS ACCIDENT HAPPENED ON OCTOBER 1,
3 1993. THE PLAINTIFF HAD HER HUSBAND, OR EX-HUSBAND, AND
4 DAUGHTER WERE STAYING WITH SOME PEOPLE CALLED THE
5 ESCALANTES IN A HOME THAT WAS OWNED BY EVELYN BOLTON.

6 NOW EVELYN BOLTON IS THE ELDERLY MOTHER OF
7 JAMES BOLTON AND JANICE BOLTON DENT, AND THEY ARE BROTHER
8 AND SISTER.

9 NOW IT IS ON THE DATE OF OCTOBER 1, 1993,
10 EVELYN BOLTON OWNED THIS HOUSE. SHE DIED IN DECEMBER OF
11 1993, AFTER THE ACCIDENT. AFTER SHE DIED, IT CAME TO THE
12 ATTENTION OF JAMES BOLTON AND JANICE BOLTON DENT THAT A
13 WARRANTY DEED HAD BEEN EXECUTED SOME YEARS BEFORE CONVEYING
14 PROPERTY TO THE CHILDREN, BUT THERE'S BEEN NO EVIDENCE
15 PRODUCED THAT SHOWS THAT THEY KNEW ABOUT THIS WARRANTY
16 DEED, THAT THEY HAD POSSESSION OF THIS WARRANTY DEED ON THE
17 DATE OF THE ACCIDENT, OR BEFORE THEIR MOTHER'S DEATH
18 APPROXIMATELY A MONTH LATER.

19 WE'VE CITED CASE LAW IN OUR BRIEF WHICH
20 ASSERTS THAT A WARRANTY DEED IS NOT EFFECTIVE UNTIL IT'S
21 TRANSFERRED, AND IT'S UNDISPUTED THAT THE TRANSFER DID NOT
22 TAKE PLACE UNTIL DECEMBER OF 1993, AFTER THE ACCIDENT. AND
23 THEREFORE, ON THE DATE OF THE LOSS, NEITHER OF THESE TWO
24 DEFENDANTS OWNED THE PROPERTY.

25 NOW THIS COURT, ON A PRIOR OCCASION, ALLOWED

1 THE PLAINTIFF TO AMEND THEIR COMPLAINT AND BRING A CLAIM
2 AGAINST EVELYN BOLTON. THIS COURT ULTIMATELY RULED THAT
3 THE STATUTE OF LIMITATIONS HAD RUN ON BEING ABLE TO PURSUE
4 THAT CLAIM AGAINST EVELYN BOLTON'S ESTATE. SO EVELYN
5 BOLTON OR HER ESTATE IS NOT A PARTY TO THIS LAWSUIT.

6 NOW IF THEY DIDN'T OWNED THE PROPERTY ON THE
7 DATE OF THE ACCIDENT, YOUR HONOR, THE ONLY WAY THEY COULD
8 BE LIABLE IS IF THEY HAD SUFFICIENT CONTROL OR POSSESSION
9 OF THIS PROPERTY TO MAKE THEM LIABLE.

10 WE'VE CITED CASES IN OUR BRIEF, SPECIFICALLY
11 TISDALVE VS. UNITED STATES OF AMERICA, IT SHOWS THAT AN
12 OWNER IS NO LONGER LIABLE IF IT CONTRACTS THE DAY-TO-DAY
13 MANAGEMENT OF THE PROPERTY TO ANOTHER PARTY. ONCE THAT
14 PARTY ACCEPTS THAT CONTRACT, AND TAKES OVER AS AN
15 INDEPENDENT CONTRACT, THE MANAGEMENT OF THE PROPERTY, THEN
16 AS AN INDEPENDENT CONTRACTOR THEY BECOME LIABLE, IF THEY
17 HAD FULL AUTHORITY AND CONTROL OVER THE PROPERTY.

18 I THINK IT'S SAFE TO SAY, YOUR HONOR, THAT
19 THE FACTS IN THIS CASE SHOW THAT MS. BOLTON WAS QUITE OLD.
20 PRIOR TO THE ACCIDENT SHE HAD MOVED OUT TO WHERE SHE COULD
21 BE IN A PLACE WHERE SHE COULD BE SUFFICIENTLY CARED FOR,
22 AND THAT LEFT AN EMPTY HOME.

23 HER TWO CHILDREN, JANICE DENT BOLTON, WHO
24 LIVED I THINK ESSENTIALLY ACROSS THE STREET, AND JAMES
25 BOLTON, THEY VOLUNTEERED ESSENTIALLY TO--THEY TOOK IT UPON

1 THEMSELVES, WITHOUT REALLY ANY PROOF THAT THIS
2 COMMUNICATION WAS WITH THEIR MOTHER, TO GET PERMISSION TO
3 DO THIS, TO MAINTAIN THE PROPERTY SO THAT IT WOULDN'T BE
4 TAKEN OVER BY VANDALS, SO IT WOULDN'T FALL APART.

5 WHAT THEY DID IS THEY ALLOWED THEIR LOCAL
6 BISHOP TO HAVE PEOPLE MOVE IN WHO NEEDED A PLACE TO STAY.
7 THEY ALLOWED RELATIVES SUCH AS MR. BOLTON'S SON AND ONE OF
8 HIS SON'S FRIENDS TO MOVE IN AND LIVE IN THIS HOUSE.

9 THE RENT THEREFORE--THERE WAS NEVER ANY
10 LANDLORD-TENANT AGREEMENT ENTERED INTO WITH THESE PEOPLE;
11 NEVER ANY FORMAL AGREEMENT ENTERED.

12 THE RENT WENT DIRECTLY TO EVELYN BOLTON'S
13 ACCOUNT. MOST OF THESE TENANTS WOULD PAY THE RENT
14 THEMSELVES DIRECTLY TO THE ACCOUNT.

15 OCCASIONALLY, WHEN THEY WERE LATE OR THEY
16 NEEDED TO, THEY WOULD RUN IT ACROSS THE STREET TO EVELYN--I
17 MEAN TO JANICE BOLTON.

18 AS FAR AS MAINTENANCE, THERE WAS VERY LITTLE
19 MAINTENANCE DONE ON IT.

20 JAMES BOLTON, IT'S BEEN SHOWN THROUGH
21 DISCOVERY, WOULD OCCASIONALLY DO THE MAINTENANCE HIMSELF.
22 I THINK HE CHANGED HEATERS, HE CHANGED A SHOWER, FIXED THE
23 SHOWER. IF THERE WAS SOMETHING SIGNIFICANT, EITHER JAMES
24 OR JANICE, IF THEY WERE ASKED BY THE TENANTS, WOULD HAVE A
25 PROFESSIONAL PLUMBER OR ELECTRICIAN, WHOEVER WAS NEEDED TO

1 COME IN AND DO REPAIRS ON THE PROPERTY.

2 THEY NEVER RECEIVED ANY COMPENSATION FOR
3 THIS. WHEN THEIR DEPOSITIONS WERE TAKEN, I THINK IT WAS
4 CLEAR THAT THEY HAD VERY LITTLE INFORMATION ABOUT THE
5 PEOPLE THAT WERE IN THERE, BECAUSE THEY DIDN'T HAVE MUCH
6 INVOLVEMENT WITH THEM, AND WE DON'T THINK THEIR ACTIONS
7 ROSE TO THE LEVEL OF BEING INDEPENDENT CONTRACTORS WHO HAD
8 FULL AUTHORITY OVER THE DAY-TO-DAY MANAGEMENT OF THIS
9 PROPERTY.

10 I THINK IT'S MORE ALONG THE LINES OF
11 CHILDREN ASSISTING THEIR MOTHER, VOLUNTEERING TO ASSIST
12 THEIR MOTHER AS MUCH AS THEY COULD IN THEIR BUSY SCHEDULES
13 TO TRY TO MAINTAIN THIS PIECE OF PROPERTY.

14 NOW THE PLAINTIFFS ALSO ARGUE THAT THERE'S
15 LIABILITY IF THEY'RE NOT OWNERS, AND THEN THE PLAINTIFF
16 ARGUES THAT THEY HAD SUFFICIENT CONTROL OVER IT TO BE
17 LIABLE OR THEY WERE AGENTS.

18 AND AS AGENTS, YOU'RE LIABLE FOR YOUR OWN
19 ACTIONS AS WELL AS THE PRINCIPAL'S LIABLE FOR THE ACTS OF
20 THE AGENTS.

21 HOWEVER, I THINK IT'S CLEAR UNDER THE
22 CIRCUMSTANCES, YOUR HONOR, THAT THE LAW, ESPECIALLY THE
23 RESTATEMENT, FOR THERE TO BE AGENCY, AN AGENCY
24 RELATIONSHIP, THE PRINCIPAL MUST MANIFEST CONSENT THAT THE
25 AGENT ACTED ON THE PRINCIPAL'S BEHALF.

1 THERE IS NO PROOF OF THAT HERE. THERE IS
2 NO--WE DON'T HAVE ANY EVIDENCE, BECAUSE EVELYN BOLTON'S NO
3 LONGER ALIVE, AS TO WHAT SHE KNEW ABOUT WHAT HER CHILDREN
4 WERE DOING, THAT SHE ASKED HER CHILDREN TO COME IN AND DO
5 THIS FOR HER.

6 THIS REALLY IS A SITUATION WHERE THEY WERE
7 ASSISTING HER, AND THERE IS NO PROOF OF AGENCY
8 RELATIONSHIP, YOUR HONOR, THAT WOULD MAKE THESE CHILDREN
9 LIABLE ON THAT BASIS. THEY WERE VOLUNTEERS.

10 NOW ASSUMING THAT THEY WERE OWNERS, ASSUMING
11 THAT THE COURT FINDS THAT, ASSUMING THAT--OR, THAT THEY HAD
12 SUFFICIENT CONTROL THAT THEY WOULD BE LIABLE FOR INJURY TO
13 MONICA ROBLES, IT STILL HAS TO BE ESTABLISHED BY MONICA
14 ROBLES THAT THERE WAS A DEFECT IN THIS WINDOW; THAT THE
15 DEFENDANT'S TWO CHILDREN KNEW ABOUT THE DEFECT, OR
16 REASONABLY SHOULD HAVE BEEN ABLE TO DISCOVER THE DEFECT.

17 WE CITED IN OUR BRIEF THE CASE OF GREGORY
18 VS. FOURTHWEST. ESSENTIALLY IN THAT CASE THERE WAS AN
19 AWNING OVER SOME PROPERTY THAT HAD SNOW ON IT. THE AWNING
20 BROKE AND INJURED A THIRD PARTY WHO PROCEEDED TO SUE THE
21 OWNER.

22 CERTAINLY THE FACT THAT THERE WAS SNOW ON
23 THE AWNING, AND THAT IT BROKE, WAS FOUND BY JUDGE HANSON
24 NOT TO HAVE CREATED LIABILITY. THERE HAD TO BE PROOF AS TO
25 WHY THE AWNING BROKE, AND NO PROOF WAS PUT FORTH.

1 IN THAT CASE, IT SPECIFICALLY SAID THAT THE
2 PLAINTIFF MUST DEMONSTRATE THAT THE DEFENDANT KNEW, OR IN
3 EXERCISE OF ORDINARY CARE SHOULD HAVE KNOWN, THAT A
4 DANGEROUS CONDITION EXISTED AND SUFFICIENT TIME ELAPSE TO
5 TAKE CORRECTIVE ACTION.

6 IN THIS CASE, WHAT DO WE KNOW ABOUT WHAT
7 HAPPENED? WE KNOW THAT MONICA ROBLES WENT TO THIS WINDOW.
8 SHE PARTICULARLY--NOT EVEN A TENANT IN THE PROPERTY--SHE
9 JUST WAS INVITED IN BY PEOPLE, BY THE ESCALANTES, WHO WERE
10 KNOWN TO BE TENANTS, TO LIVE WITH THEM UNTIL THEY COULD--
11 UNTIL THE ROBLESSES COULD GET ON THEIR FEET. SHE GOES TO
12 THIS WINDOW AND SHE SAID SHE'S OPENING IT FROM BELOW, AND
13 ALL OF A SUDDEN SHE HEARS AN EXPLOSION.

14 SHE DIDN'T KNOW WHAT THE EXPLOSION IS.
15 INITIALLY SHE LOOKS INTO THE NEXT ROOM TO SEE WHERE THE
16 EXPLOSION IS, "IS HER DAUGHTER ALL RIGHT?"

17 THEN SHE SEES BLOOD ON HER HAND. WELL, WE
18 KNOW ULTIMATELY, YOUR HONOR, THAT THE GLASS BROKE. THE
19 PANE BROKE AND CUT HER HAND.

20 WHY IT BROKE, WE DON'T KNOW. THE PLAINTIFF
21 IS TRYING TO ARGUE THAT THE HUSBAND, ADOLFO ROBLES, KNOWS.
22 HE WASN'T THERE. HE FIXED IT A WEEK LATER.

23 IF HE'S NOT THERE, HE CAN'T KNOW WHY THE
24 WINDOW BROKE. HE CAN'T KNOW WHETHER IT BROKE BECAUSE OF
25 THE WAY SHE WAS OPENING IT. I CAN'T KNOW IF IT BROKE

1 EVEN KNOW WHAT THE DEFECT IS, THEN AT THE MINIMUM IT'S A
2 LATENT DEFECT THAT THEY'RE NOT RESPONSIBLE FOR.

3 I CAN FINISH BY GOING TO THE MOTION TO
4 DISMISS. THE MOTION TO DISMISS IS SPECIFICALLY AGAINST
5 ADOLFO AND VICTORIA ROBLES. THERE'S SOME DISPUTE THAT
6 NEITHER OF THOSE TWO PARTIES WERE INJURED IN THIS ACCIDENT.
7 ADOLFO WASN'T PRESENT AT THE HOME. VICTORIA ROBLES, THE
8 MINOR, WAS IN THE NEXT ROOM.

9 NOW HOW CAN THERE BE LIABILITY, HOW CAN THEY
10 HAVE A CLAIM? ONE WAY THEY CAN HAVE A CLAIM IS IN THE
11 THEORY WHICH THE PLAINTIFF HAS CLAIMED WHICH WAS LOSS OF
12 CONSORTIUM, IF THAT THEORY EXISTS IN THE STATE OF UTAH AT
13 THIS TIME, AND IT DIDN'T. THIS OCCURRED IN OCTOBER,
14 OCTOBER 1, 1993.

15 IN THEIR ANSWER TO INTERROGATORIES, THEY ARE
16 SPECIFICALLY ASKED, "WHAT'S THE BASIS OF THE CLAIM OF THESE
17 TWO DEFENDANTS?"

18 AND THE ANSWER WAS, "LOSS OF CONSORTIUM."

19 ADOLFO ROBLES CLAIMED IN HIS DEPOSITION, I
20 ASKED HIM, "WHAT ARE YOUR DAMAGES FROM THIS? WERE YOU
21 INJURED?" "NO."

22 "WHAT ARE YOUR DAMAGES?"

23 "I HAD TO PAY MEDICAL BILLS. MY
24 RELATIONSHIP WITH MY WIFE WAS AFFECTED."

25 "WHAT IS YOUR DAUGHTER'S CLAIM?"

1 "WELL, SHE DIDN'T HAVE A RELATIONSHIP WITH
2 HER MOTHER THAT SHE SHOULD HAVE HAD." THAT IS A LOT OF
3 CONSORTIUM.

4 PACKER V. UTAH POWER & LIGHT, THAT CASE
5 SPECIFICALLY STATES THAT THERE IS NO LOSS OF CONSORTIUM IN
6 THE STATE OF UTAH. YOU CAN'T RECOVER UNDER THAT THEORY.
7 IF I COULD QUOTE:

8 "THERE SHALL BE NO RIGHT OF RECOVERY BY
9 A HUSBAND ON ACCOUNT OF PERSONAL INJURY
10 OR WRONG TO HIS WIFE."

11 NOW IF THERE WAS SUCH A THEORY IN THIS STATE AT THE TIME OF
12 THIS ACCIDENT, THEN I WOULD--THE QUESTION I WOULD ASK IS:
13 WHY DID THE HOUSE OF REPRESENTATIVES JUST RECENTLY PASS
14 HOUSE BILL NO. 320 WHICH SPECIFICALLY GIVES A SPOUSE A
15 CLAIM FOR INJURY.

16 I MEAN--AND EXCUSE ME, GIVES A SPOUSE A
17 CLAIM OF LOSS OF CONSORTIUM FOR ANY INJURY TO THEIR SPOUSE?

18 THEY WOULDN'T HAVE NEEDED TO IF LOSS OF
19 CONSORTIUM EXISTED BEFORE THIS TIME.

20 AS TO VICTORIA, THAT'S A LOSS OF CONSORTIUM
21 CLAIM, TOO. OBVIOUSLY IT'S NOT A SPOUSE, BUT WE CITE IN
22 OUR BRIEF THE DIXIE MEDICAL CENTER CASE WHICH SPECIFICALLY
23 SAYS THAT UTAH LAW DOES NOT SUPPORT THE ADOPTION OF
24 CONSORTIUM. UTAH HAS NOT RECOGNIZED ANY CONSORTIUM CLAIM
25 THAT ALLOWS RECOVERY BECAUSE THE DEFENDANT'S NEGLIGENCE

1 RESULTED IN NON-FATAL INJURIES TO A THIRD PERSON.

2 THE PLAINTIFF RELIES FOR THEIR OPPOSITION ON
3 THE CASE OF MORTON V. MACFARLANE, YOUR HONOR. THAT CASE
4 REALLY HAS NO RELEVANCY AT ALL TO THIS ISSUE. IN THAT
5 CASE, THE HUSBAND AND CHILDREN WERE SUING A DOCTOR FOR
6 INTENTIONAL TORT OF ALIENATION OF AFFECTION AND CRIMINAL
7 CONVERSION, BECAUSE HE ENTERED INTO A RELATIONSHIP WITH THE
8 MOTHER AND WIFE OF THE PLAINTIFFS. THOSE ARE INTENTIONAL
9 TORTS WHICH HAVE EXISTED IN UTAH.

10 NOW THE TRIAL COURT REFUSED TO DISMISS THOSE
11 CLAIMS. ON APPEAL, THE DOCTOR ARGUED THAT IF YOU CAN'T
12 HAVE A LOSS OF CONSORTIUM, THEN YOU SHOULDN'T BE ABLE TO
13 RECOVER FOR INTENTIONAL TORTS OF ALIENATION OF AFFECTION
14 AND CRIMINAL CONVERSION, TO WHICH THE SUPREME COURT CLEARLY
15 MADE THE DISTINCTION BETWEEN THOSE THEORIES.

16 LOSS OF CONSORTIUM IS A NEGLIGENCE CLAIM.
17 LOSS OF CONSORTIUM HAS NOT EXISTED IN UTAH FOR SOME TIME.
18 INTENTIONAL ALIENATION OF AFFECTION IS AN INTENTIONAL TORT
19 WHICH HAS EXISTED.

20 SO, YOUR HONOR, I BELIEVE IT'S CLEAR THAT
21 THERE IS NO LOSS OF CONSORTIUM CLAIM IN UTAH AT THE TIME OF
22 THIS ACCIDENT.

23 THERE WAS AN ARGUMENT THAT THE UTAH
24 CONSTITUTION ALLOWED A MINOR TO RECOVER, AND THAT THE UTAH
25 CONSTITUTION ALLOWS A MINOR TO RECOVER ON THE WRONGFUL

1 DEATH CLAIM, THE DEATH OF THEIR PARENT. THAT POSITION IS
2 NOT EVEN CONTAINED IN THEIR OPPOSITION BRIEF, AND BASED ON
3 THE FOREGOING, I WOULD ASK THE COURT TO DISMISS THE TWO
4 CLAIMS OF THESE TWO DEFENDANTS.

5 MR. ROUNDY: GOOD MORNING, YOUR HONOR. THOR
6 ROUNDY APPEARING FOR THE PLAINTIFFS. I WOULD FIRST LIKE TO
7 MAKE A MOTION FOR SUMMARY JUDGMENT. ANYTHING I HAVE TO SAY
8 ABOUT THE PLAINTIFF'S LOSS OF CONSORTIUM WILL BE BRIEF.

9 FIRST OF ALL, WHAT WE HAVE ON THIS MOTION
10 FOR SUMMARY JUDGMENT IS REALLY A DISCUSSION ABOUT THE
11 FACTS.

12 THESE ARE FACTS THAT ARE REALLY FOR THE JURY
13 TO DECIDE, OR FOR THE TRIER OF FACT. I REALLY DON'T WANT
14 TO SPEND ANY OF THE COURT'S TIME TALKING ABOUT WHETHER THEY
15 OWNED THE PROPERTY. I WANT TO LOOK AT THE THINGS THAT
16 REALLY PREVENT US FROM REACHING ANY POSSIBILITY OF SUMMARY
17 JUDGMENT AT THIS POINT, AND ONE OF THOSE IS THE FACT THAT,
18 AS MR. CHRISTENSEN POINTS OUT, IF THESE PEOPLE EXERCISED
19 SUFFICIENT CONTROL OVER THIS PROPERTY ON A DAY-TO-DAY
20 BASIS, THEN THEY WOULD BE LIABLE AS A LANDLORD FOR ANY
21 DANGEROUS DEFECTIVE CONDITION THAT EXISTED ON THE PROPERTY.

22 THE COURT: THAT EXISTED OR DO YOU SAY THEY
23 DO EXIST? THAT EXISTED OR THAT THEY KNEW EXISTED?

24 MR. ROUNDY: WELL, AS MR. CHRISTENSEN POINTS
25 OUT, THE STANDARD IS: DID THEY KNOW? OR, THROUGH THE

1 EXERCISE OF REASONABLE DILIGENCE, COULD THEY HAVE
2 DISCOVERED IT?

3 AND THAT'S REALLY HIS THIRD POINT. IT WILL
4 BE MY SECOND POINT. HIS SECOND POINT, WHICH IS GOING TO BE
5 MY FIRST ONE, IS THAT THERE IS PLENTY OF EVIDENCE TO SHOW
6 THAT THEY HAD DAY-TO-DAY CONTROL. HERE THEY WERE PEOPLE
7 LIABLE FOR THIS PROPERTY.

8 IF YOU LOOK AT THEIR BRIEF--I HAVE SOME
9 EARMARKS OVER HERE; I DON'T THINK WE NEED TO LOOK AT IT,
10 BUT I THINK MR. CHRISTENSEN MENTIONED THAT THEY MOVED THEIR
11 MOTHER OUT OF THE PROPERTY. SHE HAD ALZHEIMER'S, AND THEY
12 DIDN'T WANT HER WANDERING OUT ON THE STREETS OR THE BUSY
13 ROADS.

14 SHE HAD NO KNOWLEDGE OF THINGS THAT WERE
15 GOING ON, AND HERE THEY MOVED HER OUT. THEY MADE A
16 DECISION, WITHOUT EVERY CONSULTING HER, WITHOUT TELLING
17 HER, "WE ARE RENTING THIS PROPERTY," THEY RENTED THIS
18 PROPERTY OUT OVER AND OVER AGAIN.

19 THEY HAD FIVE TENANTS IN THREE YEARS ON THE
20 PROPERTY, AND THEY DID HAVE A CONTRACT, LANDLORD-TENANT
21 CONTRACT. THERE WAS A VERBAL CONTRACT WITH THESE TENANTS.
22 THEY WOULD SAY, "YOU PAY THIS MUCH RENT."

23 THEY MADE ALL THE ARRANGEMENTS. THEY DID
24 ALL THE TALKING. YOU KNOW, WE TOOK THEIR DEPOSITIONS AFTER
25 THE LAST TIME THERE WAS A MOTION FOR SUMMARY JUDGMENT HERE,

1 AND IT PRODUCED REALLY JUST OVERWHELMING EVIDENCE THAT THE
2 MOTHER KNEW NOTHING ABOUT THIS PROPERTY AND THAT THE KIDS
3 DID HAVE DAY-TO-DAY CONTROL OVER THE PROPERTY, ABSOLUTELY.

4 IF THE KIDS DIDN'T HAVE DAY-TO-DAY CONTROL
5 OVER THE PROPERTY, WHO DID? I MEAN I THINK IF YOU ASK THAT
6 QUESTION, IT PUTS IT IN THE LIGHT THAT THERE WAS NOBODY
7 ELSE OUT THERE. THESE KIDS WERE DOING EVERYTHING. MOM
8 DIDN'T EVEN KNOW THAT THERE WAS A TENANT IN THE PLACE,
9 DIDN'T KNOW WHAT THE RENT WAS, DIDN'T KNOW, YOU KNOW, THE
10 PEOPLE WHO WERE MOVING IN AND OUT. SHE DIDN'T KNOW
11 ANYTHING.

12 AND SO AGAIN--AND THIS IS MY OPINION--THERE
13 IS NO WAY THAT WE CAN FIND TO THE CONTRARY.

14 BUT WHAT WE NEED TO DECIDE HERE TODAY IS:
15 IS THERE ANY OPPORTUNITY FOR A JURY TO FIND IN FAVOR OF THE
16 PLAINTIFF ON THIS POINT? I DON'T THINK THERE IS ANY
17 QUESTION BUT THAT THERE IS AN OPPORTUNITY FOR THE PLAINTIFF
18 TO DECIDE, OR FOR THE JURY TO DECIDE IN FAVOR OF THE
19 PLAINTIFF, AND THEREFORE SUMMARY JUDGMENT IS PRECLUDED.

20 NOW I'LL GO TO THE THIRD POINT, AND THE
21 THIRD POINT IS: DID THEY KNOW OR SHOULD THEY HAVE KNOWN?

22 ONE OF THE THINGS WE TRIED TO DISCOVER IN
23 THIS CASE IS WE TRIED TO GET--AND THE RECORD IN THIS CASE
24 WAS THAT THEY DID KNOW, BECAUSE THE TENANTS WHO WERE LIVING
25 THERE AT THE TIME HAD TOLD US THAT THEY KNEW.

1 BUT THOSE PEOPLE ARE IN ARGENTINA, AND WE
2 GET THEM UP TO TESTIFY. BUT WE DO HAVE AN EXPERT WHO'S
3 GOING TO TESTIFY AT THE TRIAL IN THIS CASE ABOUT THE
4 DEFECTIVE CONDITION AND WHAT THE CAUSE WAS AND THESE KINDS
5 OF THINGS. AND THERE IS REALLY NOT ANY QUESTION THAT IF
6 THEY, IN THE COURSE OF THREE YEARS, WHILE RENTING TO FIVE
7 TENANTS, IF THEY HAD STOPPED BY THAT PROPERTY, THEY WOULD
8 HAVE SEEN A WINDOW THAT WASN'T CLOSING ALL THE WAY, A
9 WINDOW OPEN, AND THE ROT.

10 AND THEY HAD LIVED IN THE PROPERTY A NUMBER
11 OF YEARS THEMSELVES. THEY KNEW THAT THERE WAS A BATHROOM
12 RIGHT NEXT TO THIS WINDOW, AND THE HUMIDITY IS COMING OUT,
13 AND ADOLFO ROBLES TESTIFIED THAT BEFORE THE ACCIDENT HE
14 EXAMINED THE WINDOW AND THAT THE OTHER TENANT WHO WAS
15 LIVING THERE WAS TRYING TO OPEN IT, WOULD GET IT OPEN ABOUT
16 THIS FAR, AND WOULD TRY TO GET SOME VENTILATION OR
17 WHATEVER, AND THAT FOR TWO DAYS WHILE THEY WERE THERE
18 BEFORE THE ACCIDENT OCCURRED, THAT WINDOW BASICALLY MOVED
19 UP AND DOWN ABOUT THIS FAR.

20 AND THIS WAS BECAUSE THEY WERE TRYING TO GET
21 IT OPEN, AND IT WAS VERY DIFFICULT TO OPEN, AND THEY WOULD
22 CLOSE IT AT NIGHT, YOU KNOW. BUT THAT WAS--IT WAS AN
23 OBVIOUS PROBLEM WITH THE WINDOW. IT WOULDN'T SHUT ALL THE
24 WAY. IT WAS OLD, YOU KNOW; TO HAVE A PIECE OF WINDOW
25 BREAKING OFF OF IT.

1 AND WE'VE GOT A BROKEN WINDOW. THIS LADY
2 TRIED TO OPEN THE WINDOW, AND IT BROKE. I THINK ALL THIS
3 EVIDENCE GIVES THE JURY THE OPPORTUNITY TO DECIDE WHETHER
4 OR NOT THIS IS A DEFECTIVE CONDITION THAT SOMEBODY WOULD
5 HAVE NOTICED IF THEY HAD JUST DONE A REASONABLE JOB OF
6 LOOKING AT THIS PROPERTY, MAYBE EVEN JUST ONCE EVERY TIME
7 THE TENANT CHANGED, EVEN IF THEY WOULD HAVE COME IN TO LOOK
8 TO SEE IF THE PLACE HAD BEEN CLEANED OUT.

9 EVEN IF THEY HADN'T TRIED TO OPEN THAT
10 WINDOW, THEY COULD HAVE SEEN THAT THE WINDOW WOULDN'T SHUT
11 ALL THE WAY. THEY COULD'VE SEEN ALL THESE DIFFERENT
12 PROBLEMS.

13 WITH JUST REASONABLE AND ORDINARY CARE,
14 THESE PEOPLE COULD HAVE KNOWN ABOUT THAT PROBLEM, BECAUSE
15 THERE IS AN OPPORTUNITY FOR THE JURY TO DECIDE THAT. AND
16 FOR THAT REASON, I THINK SUMMARY JUDGMENT IS PRECLUDED.
17 THE JURY HAS TO DECIDE AS TO REASONABLE CARE.

18 THE COURT: THESE PEOPLE, WHAT WAS THE
19 STATUS OF THE ROBLESES IN THE PROPERTY?

20 MR. ROUNDY: THE ROBLESES WERE GUESTS OF THE
21 TENANTS.

22 THE COURT: GUESTS?

23 MR. ROUNDY: YES, THAT'S RIGHT.

24 THE COURT: IS THERE A LESSER STANDARD OF
25 CARE TOWARD GUESTS THAN TENANTS?

1 MR. ROUNDY: NOT THAT I'M AWARE OF. FOR ONE
2 THING, THERE WAS--WELL, I HAD ANOTHER THOUGHT, BUT I MEAN
3 BASICALLY IF IT'S A DANGEROUS CONDITION, THAT THEY SHOULD
4 HAVE REPAIRED, I DON'T KNOW THAT IT MAKES A DIFFERENCE
5 WHETHER IT'S AN INVITEE OR A TENANT WHO'S INJURED.

6 IF THERE HAS BEEN A VIOLATION, A BREACH OF
7 THE DUTY OF STANDARD OF CARE, THAT CAUSES THE INJURY, I
8 THINK THAT'S A CASE OF NEGLIGENCE THAT WE'RE TALKING ABOUT.
9 IN THIS CASE, THAT'S CERTAINLY NEGLIGENCE.

10 IN ANY EVENT, I WILL BE BRIEF NOW WITH THE
11 MOTION TO DISMISS. THE CASE THAT THE PLAINTIFF IS RELYING
12 ON IS THE BOUCHER CASE. COUNSEL REFERRED TO IN THE BOUCHER
13 CASE THAT THERE WAS A 21-YEAR-OLD ADULT WHO WAS ASKING FOR
14 LOSS OF CONSORTIUM.

15 THE SUPREME COURT SAID THAT THIS WAS A CASE
16 OF FIRST IMPRESSION, AND THAT, "WHAT WE'RE NOT GOING TO DO
17 IS WE'RE NOT GOING TO DECIDE WHETHER A MINOR CHILD"--IN
18 THIS CASE WE HAVE A DAUGHTER WHO I THINK IS ONE OR TWO
19 YEARS OLD WHEN INJURED--"WE'RE NOT GOING TO DECIDE THAT
20 ONE." THEY LEFT IT AT THAT.

21 I TALKED TO MY CLIENTS ABOUT THIS. I'VE
22 SAID, "HEY, THIS IS A LONG SHOT, BUT YOU HAVE A RIGHT TO AT
23 LEAST BE HEARD, OR WE OUGHT TO AT LEAST THROW IT IN THERE
24 AND LET THE COURT DECIDE WHAT IT WANTS TO DO WITH IT,
25 BECAUSE THE UTAH SUPREME COURT SAID THAT 'WE HAVEN'T REACH

1 A DECISION YET.'"

2 I THINK THAT WE DO RECOGNIZE LOST CONSORTIUM
3 IN WRONGFUL DEATH CASES, AND THAT THAT MEANS THAT WE HAVE--
4 THE SUPREME COURT DOESN'T SAY, "IN THE CASE OF WRONGFUL
5 DEATH, YOU HAVE A RIGHT OF LOSS OF CONSORTIUM," THEY SAY
6 THAT IN THE WRONGFUL DEATH CASE, YOU SHOULDN'T ELIMINATE
7 PEOPLE'S CLAIMS BY STATUTE.

8 SO I THINK SINCE WE'VE RECOGNIZED FILIAL
9 LOSS OF CONSORTIUM, THERE IS COMMON LAW OUT THERE THAT SAYS
10 THAT A CHILD HAS A RIGHT TO A CLAIM OF LOSS OF CONSORTIUM.

11 WE RECOGNIZE THOSE DAMAGES, AND THAT'S WHAT
12 THE COMMON LAW THAT HAS DEVELOPED IN WRONGFUL DEATH CASES
13 SAYS. WE KNOW THAT EXISTS IN THE CASE OF A SPOUSE, AND WE
14 HAVE THE HACKFORD OPINION, AND I'LL TALK ABOUT THAT IN ONE
15 SECOND VERY BRIEFLY, BUT WHERE WE HAVE A STATUTE THAT'S
16 GOING TO APPLY TO A SPOUSE.

17 BUT IN THE CASE OF A CHILD, THERE IS NO
18 STATUTE AT ALL THAT WOULD ELIMINATE LOSS OF CONSORTIUM
19 CLAIMS. SO I THINK THAT THE 20-YEAR-OLD'S CLAIM AT THIS
20 POINT OUGHT TO BE RECOGNIZED IN THE UTAH LAW, BUT WE'LL NOT
21 MAKE ANY ARGUMENT BEYOND THAT AT THIS POINT AS TO HER
22 CLAIM.

23 BECAUSE LIKE I SAY, WE ACKNOWLEDGE THAT THIS
24 IS A LONG SHOT, PERHAPS, AS A CLAIM FOR HER, BUT I THINK
25 THAT IT'S FAIR AND IT'S A RIGHT, AND I THINK OF THE

1 INJURIES THAT SHE SUFFERED ARE PERSONAL TO HER, AND THEY
2 ARE NOT CLAIMS THAT BELONG TO HER MOTHER.

3 I THINK THE SAME IS TRUE--I'LL BRIEFLY
4 ADDRESS THE HACKFORD DECISION--WITH RESPECT TO THE SPOUSE.
5 THESE ARE CLAIMS PERSONAL TO HIM. THE TWO DISSENTING
6 JUSTICES IN HACKFORD EXPRESSED VERY QUERISOME REASONS WHY
7 THERE SHOULD BE A LOSS OF CONSORTIUM CLAIM FOR A SPOUSE.

8 HACKFORD WAS A PLURALITY DECISION, JUSTICE
9 ZIMMERMAN BEING THE ONLY ONE WHO WENT INTO A DESCRIPTION OF
10 HOW THE STATUTE PRECLUDED THIS LOSS OF CONSORTIUM CLAIM.

11 I THINK COUNSEL MENTIONED WITH THE NEW
12 STATUTE WE HAVE OUT, I THINK WITH A LOOK AT THE
13 CIRCUMSTANCES OF THIS CASE WHERE THERE IS A DIVORCE AND THE
14 HUSBAND DOES NOT HAVE AN OPPORTUNITY TO RECOVER FOR LOSS OF
15 CONSORTIUM THROUGH THE CLAIMS OF THE WIFE, THAT THAT IS
16 SOMETHING--AND AGAIN, I HAVE TOLD HIM THAT THIS IS A LONG
17 SHOT--BUT THAT WE OUGHT TO AT LEAST PRESENT IT, TO HAVE AN
18 OPPORTUNITY TO PRESENT IT.

19 WE WILL LET THE JUDGE DECIDE WHAT HE WANTS
20 TO DO WITH IT. I THINK THAT THERE IS--I TOLD MY CLIENTS
21 THAT, "AS LONG AS WE--WE OUGHT TO GIVE YOU THE RIGHT TO
22 MAKE AN ARGUMENT, IF YOU WOULD LIKE TO DO THAT, THAT SINCE
23 YOU CAN'T RECOVER THROUGH YOUR SPOUSE, THAT THE SUPREME
24 COURT IS GOING TO LOOK AT THE SITUATION OF YOUR RIGHTS,
25 THAT THERE ARE GOING TO BE SITUATIONS WHERE YOU CAN RECOVER

1 THROUGH YOUR SPOUSE AS A PERSONAL CLAIM," TO MR. ROBLES,
2 AND AS A CONCLUSION, WE'LL LEAVE THAT CONSORTIUM ISSUE IN
3 THE COURT'S HANDS. THANK YOU.

4 REBUTTAL ARGUMENT

5 BY MR. CHRISTENSEN:

6 LET ME WORK BACKWARDS AND START WITH THE
7 MOTION TO DISMISS. ESSENTIALLY WHAT MR. ROUNDY IS ASKING
8 THIS COURT TO DO IS TO IGNORE HACKFORD, BECAUSE IT HAS SOME
9 DISSENTING OPINIONS, AND TO FIND THAT THERE SHOULD BE A
10 LOSS OF CONSORTIUM CLAIM HERE FOR MR. ROBLES.

11 ESSENTIALLY HE'S ASKING YOU TO MAKE NEW LAW,
12 AND I DON'T THINK THAT'S WHAT TRIAL COURTS WANT TO BE
13 DOING. HACKFORD IS CLEAR THAT THERE IS NO LOSS OF
14 CONSORTIUM SPOUSE-TO-SPOUSE IN THE STATE OF UTAH IN 1993.

15 SECONDLY, AS TO THE MINOR CHILD, BOUCHER WAS
16 VERY CLEAR WHEN IT SAID THAT UTAH LAW DOES NOT SUPPORT THE
17 ADOPTION OF LOSS OF FILIAL CONSORTIUM. AND IT GOES ON TO
18 SAY THAT THE SUPREME COURT OF UTAH, HOWEVER, HAS NOT
19 RECOGNIZED ANY--IT SAYS ANY CONSORTIUM CLAIM THAT ALLOWS
20 RECOVERY BECAUSE THE DEFENDANT'S NEGLIGENCE RESULTED IN THE
21 NON-FATAL INJURIES OF A THIRD PERSON.

22 IT CAN'T GET ANY CLEARER THAN THAT, YOUR
23 HONOR. NOW MR. ROUNDY WOULD LIKE THE COURT TO ADOPT THE
24 ARGUMENT THAT, "WELL, BECAUSE YOU MAY BE ABLE TO GET LOSS
25 OF CONSORTIUM IN A WRONGFUL DEATH CLAIM, THEN YOU SHOULD BE

1 ABLE TO DO THE SAME THING."

2 THIS ISN'T A WRONGFUL DEATH CLAIM. WE HAVE
3 A SPECIFIC STATUTE THAT GIVES HEIRS THE RIGHT TO PURSUE
4 CLAIMS AGAINST THE TORTIOUS THIRD PARTY WHO KILLS, YOU
5 KNOW, THE PRINCIPAL WHO HAS BEEN KILLED.

6 WHY DO YOU BRING A WRONGFUL DEATH CLAIM?
7 BECAUSE YOU LOST THAT PERSON. THAT'S THE VERY ABSENCE, I
8 GUESS, OF LOSS OF CONSORTIUM. OF COURSE THE HEIR WASN'T
9 INJURED, BUT THAT'S NOT THE CASE.

10 THAT'S A SEPARATE LEGAL THEORY. WRONGFUL
11 DEATH IS A SEPARATE LEGAL THEORY. THIS IS A CASE WHERE
12 MONICA ROBLES' PARENT AND EX-WIFE WERE STILL ALIVE. SHE IS
13 STILL ALIVE. SHE IS STILL ALIVE. SHE WAS INJURED. THERE
14 IS NO LOSS OF CONSORTIUM THAT EITHER OF THESE TWO PEOPLE
15 SUFFERED.

16 IF I COULD GO TO THE MOTION FOR SUMMARY
17 JUDGMENT--WELL, THE OTHER QUESTION ON THAT PARTICULAR
18 MOTION? IF YOU DO, I'LL BE HAPPY TO RESPOND.

19 THE COURT: I THINK THERE ARE TWO ISSUES:
20 THE QUESTION OF CONTROL OVER THE PROPERTY, AND THE QUESTION
21 OF KNOWLEDGE OF THE DEFECT, AND THE STATUS OF A TENANT OR
22 GUEST, IF THERE'S A DIFFERENT STANDARD OF PROOF.

23 MR. CHRISTENSEN: LET ME TAKE THE LAST
24 QUESTION, YOUR HONOR. I HAVEN'T LOOKED INTO THAT TOO
25 CLOSELY. I WASN'T TRYING TO RAISE A NEW ARGUMENT THERE. I

1 WANTED THE COURT TO BE AWARE THAT IT'S MY UNDERSTANDING
2 THAT IF THEY'RE GUESTS IN THE PROPERTY, THAT IT WOULD BE--I
3 DON'T KNOW THAT IT WOULD BE THE SAME STANDARD. I'M NOT
4 AWARE OF ANY INSTRUCTIONS THAT WERE GIVEN WHERE YOU'RE NOT
5 ALLOWED TO HAVE SOMEBODY ELSE COME IN AND STAY WITH YOU.

6 BUT WHY I WAS MAKING THAT POINT GOES TO THE
7 SECOND ISSUE, WHICH IS: DO THEY KNOW ABOUT THE DEFECT?

8 FIRST OF ALL, LET ME ADDRESS HIS POINT THAT
9 THEY NOW HAVE AN EXPERT. THIS IS THE FIRST TIME I HAVE
10 HEARD ABOUT THIS. UP UNTIL NOW WE HAVE NEVER KNOWN WHAT
11 THE DEFECT WAS. ALL WE KNEW WAS THAT THERE WAS A BROKEN
12 WINDOW.

13 THE COURT: IS THERE ANY EVIDENCE OF WHAT HE
14 SAYS AS FAR AS WHAT THE DEFECT IS?

15 MR. CHRISTENSEN: NONE. IN HIS OPPOSITION
16 BRIEF, THERE IS--IF YOU LOOK AT IT, THERE IS NOT ONE WORD
17 ABOUT ACCIDENT OR IN ANY WAY ABOUT WHAT THE DEFECT WAS. IF
18 HE'S SUGGESTING HE'S GOING TO PUT FORTH AN EXPERT HERE,
19 HERE WE ARE TWO WEEKS BEFORE TRIAL, YOUR HONOR.

20 THAT'S WHY WE FILED THIS DISPOSITIVE MOTION.
21 HE HAD NO EXPERTS. THEN HE JUST STANDS UP HERE AND BLANKLY
22 SAYS, "I HAVE AN EXPERT."

23 WE DON'T KNOW WHAT HE'S GOING TO SAY. SOME
24 TIME AGO, YOUR HONOR, GOING ALL THE WAY BACK TO JUNE OF
25 1995, WE HAD DISCOVERY RESPONSES RECEIVED FROM THE

1 PLAINTIFF.

2 THE VERY QUESTION WAS ASKED FOR HIM TO LIST
3 ANY EXPERT--THIS IS UNDER NO. 42--ANY EXPERT OR OTHER
4 PERSON WHOM YOU WILL RELY ON IN--WELL, EXCUSE ME, THAT IS
5 ON THE INJURY CLAIM. I DON'T HAVE IT IN FRONT OF ME. WE
6 ASKED OUR DISCOVERY, A REQUEST FOR THEM TO LIST EXPERTS, AS
7 IS TYPICALLY DONE, AND IT WAS MY RECOLLECTION THAT THEIR
8 RESPONSE WAS, "WE DON'T KNOW YET."

9 AND I'LL REPRESENT TO THE COURT THIS IS THE
10 FIRST TIME I HAVE HEARD OF AN EXPERT. I DON'T THINK
11 COUNSEL WOULD DISAGREE. HAVE YOU EVER TOLD US ABOUT
12 YOUR--.

13 THE COURT: COUNSEL, COUNSEL. ADDRESS THE
14 COURT.

15 MR. CHRISTENSEN: I APOLOGIZE. ON APRIL THE
16 18TH, 1997, I SENT COUNSEL A LETTER ASKING FOR A LIST OF
17 HIS WITNESSES. I HAVEN'T RECEIVED THEM, YOUR HONOR.

18 IF HE'S GOING TO PUT FORWARD EVIDENCE THAT
19 THERE WAS A DEFECT DUE TO THIS, AND WE'VE GET AN EXPERT TO
20 TALK ABOUT IT, HE SHOULD HAVE DONE IT IN HIS OPPOSITION
21 BRIEF. THAT HASN'T BEEN DONE. I THINK THE ISSUE IS
22 CLEARLY BEFORE THE COURT.

23 THE ISSUE IS: THERE WAS NO DEFECT. HE
24 CAN'T RELY UPON SOME EXPERT THAT WE KNOW NOTHING ABOUT AT
25 ALL TO CREATE AN ISSUE OF FACT.

1 NOW LET ME FINISH ON THE ISSUE ON THE AMOUNT
2 OF CONTROL. THERE IS NO EVIDENCE PUT FORTH BY HIM THAT MY
3 CLIENTS WERE EVER COMPENSATED. HE'S NEVER CHALLENGED THE
4 CASE LAW THAT WE CITED THAT SAYS YOU DON'T BECOME
5 ESSENTIALLY A LANDLORD UNLESS YOU'RE AN INDEPENDENT
6 CONTRACTOR, THAT THIS IS THE ONLY PROPERTY, THAT YOU EITHER
7 OWN IT OR ARE AN INDEPENDENT CONTRACTOR.

8 WHAT WE HAVE IS VOLUNTEERS HERE. HE SAID,
9 "WELL," AND HAS JUST POSED THE QUESTION OF WHO CONTROLLED
10 THE DAY-TO-DAY, THE DAY-TO-DAY MANAGEMENT OF THE PROPERTY
11 IF THE MOTHER WAS INCAPACITATED?

12 WELL, PERHAPS NOBODY EVEN CONTROLLED IT. IS
13 THAT MY CLIENT'S FAULT? NO, THEIR MOTHER BECOMES
14 INCAPACITATED, THEY HELP OUT AS BEST THEY CAN BECAUSE THE
15 OWNER DIDN'T MAKE PRIOR ARRANGEMENTS TO HAVE SOME SORT OF A
16 MANAGEMENT COMPANY COME IN AND SELL THE HOUSE OR DO SOME
17 MANAGEMENT OF IT. THAT'S NOT OUR CLIENT'S FAULT.

18 BECAUSE THERE WAS A LACK OF CONTROL OVER
19 THIS PROPERTY DOES NOT MAKE OUR CLIENTS LIABLE AS
20 VOLUNTEERS WHO DO THIS. I'LL SUBMIT IT.

21 THE COURT: IF THEY BECOME AGENTS, IS THE
22 AGENT LIABLE AS THE PRINCIPAL?

23 MR. CHRISTENSEN: AS I STATED BEFORE, YOUR
24 HONOR, THE RESTATEMENT OF TORTS, SPECIFICALLY SAYS--AND I
25 QUOTE IT HERE IN MY BRIEF--FOR THERE TO BE AGENCY, AN

1 AGENCY RELATIONSHIP, THERE MUST BE MANIFEST CONSENT BETWEEN
2 THE PRINCIPAL AND THE AGENT. SO IF THE COURT, FOR EXAMPLE
3 IN THIS CASE, THEY HAVE TO PROVE THAT THE MOTHER ASKED THE
4 CHILDREN TO ACT ON HER BEHALF AS HER AGENT AND MANAGE THIS
5 PROPERTY.

6 YOU LOOK AT ALL THE CASES THAT WE'VE CITED,
7 AND IT'S THE SAME TYPE OF DEAL. YOU HAVE AN OWNER ASKING A
8 MANAGEMENT COMPANY TO COME IN AND ACT ON THEIR BEHALF. THE
9 MANAGEMENT COMPANY COMES IN AND TAKES OVER COMPLETE CONTROL
10 OF THIS PROPERTY, THE DAY-TO-DAY MANAGEMENT OF IT. THAT
11 MAKES THEM LIABLE.

12 IN THIS CASE, WE HAVE NO EVIDENCE, JUST THAT
13 EVELYN BOLTON'S DEAD. WE HAVE NO EVIDENCE OF HER GIVING
14 CONSENT TO THEM TO TAKE CARE OF THE PROPERTY FOR HER,
15 ASSIST HER IN MAINTAINING THE PROPERTY; NONE OF IT.

16 MY TWO CLIENTS HAVE SAID THAT THEY INITIALLY
17 TOOK IT UPON THEMSELVES, THEY HAD AN INCAPACITATED MOTHER,
18 "WE HAD PROPERTY, WE WOULD"--.

19 THE COURT: DID THEY HAVE AN IMPLIED AGENCY?

20 MR. CHRISTENSEN: WELL, I HAVEN'T RESEARCHED
21 THAT, YOUR HONOR. HE DIDN'T ARGUE IT. HE SAID, "WE HAVE
22 AN AGENCY RELATIONSHIP." SO I DON'T HAVE AN ANSWER TO
23 THAT.

24 THE COURT: WELL, COUNSEL, FIRST OF ALL, AS
25 FAR AS THE MOTION TO DISMISS, THE COURT WOULD GRANT THE

1 DEFENDANT'S MOTION TO DISMISS. I DON'T THINK UTAH DOES
2 REPRESENT, OR DID RECOGNIZE AT THAT TIME, ANY LOSS OF
3 CONSORTIUM AS FAR AS A HUSBAND OR AS FAR AS A DAUGHTER WAS
4 CONCERNED, AND THE COURT WOULD GRANT THAT MOTION.

5 THE COURT WOULD ALSO FIND THAT THE DEFENDANT
6 DID NOT OWN THE PROPERTY AT THE TIME OF THE ACCIDENT. IT
7 WAS STILL OWNED BY THE MOTHER; EVEN THOUGH A DEED HAD BEEN
8 PREPARED, IT HAD NOT BEEN DELIVERED, AND WITHOUT DELIVERY
9 OF A DEED, OWNERSHIP WOULD NOT HAVE CHANGED.

10 NOW TWO QUESTIONS WHICH THE COURT HAS ASKED,
11 WHICH HAVE CONCERNED THE COURT, ARE THE QUESTION ABOUT
12 CONTROL OVER THE PROPERTY BY THE DEFENDANT AND KNOWLEDGE OF
13 DEFECTS, OR SHOULD THEY HAVE KNOWN OF A DANGEROUS
14 CONDITION?

15 I HAVE ASKED QUESTIONS AS FAR AS AGENCY
16 RELATIONSHIP. I HAVE QUESTIONS AS FAR AS GUESTS ARE
17 CONCERNED. THE COURT IS NOT ABSOLUTELY SURE ON SOME OF
18 THESE, BUT I DO NOT THINK THAT THE DEFENDANT BECAME AN
19 AGENT OF THE MOTHER IN CONTROLLING THAT PROPERTY.

20 I THINK THAT THEY WERE VOLUNTARILY PLACED IN
21 THAT POSITION TO LOOK AFTER THE PROPERTY AS THEIR MOTHER
22 WAS IN A REST HOME, APPARENTLY SENILE; THAT THEY DID ASSUME
23 THAT RESPONSIBILITY.

24 I THINK THAT ANY DAMAGE THAT MAY HAVE
25 RESULTED WOULD BE A CAUSE OF ACTION AGAINST THE MOTHER OR

1 AGAINST HER ESTATE.

2 NOW THE QUESTION AS FAR AS THE KNOWLEDGE OF
3 THE DEFECT, COUNSEL'S ARGUED THAT HE HAS AN EXPERT THAT'S
4 GOING TO TELL WHAT THE DEFECT IS. I'VE SEEN NOTHING IN ANY
5 OF THE PLEADINGS THAT ARE BEFORE THE COURT NOW, AND THAT'S
6 THE ONLY THING THE COURT CAN RULE ON, BUT ANY EXPERT SAYS
7 ANYTHING AS TO WHAT THE DEFECT OF THAT WINDOW WAS, WHETHER
8 THERE WAS ANY KNOWN BY THE DEFENDANTS, WHETHER IT WAS
9 APPARENT AS A DEFECT, EXCEPT THAT IT WAS AN OLD HOME AND
10 THE WINDOWS DIDN'T OPERATE AS SMOOTHLY AS NEW WINDOWS
11 SHOULD HAVE, OR THEY WOULD HAVE LIKED THEM TO HAVE
12 OPERATED, OR THAT THIS WAS SOMETHING UNUSUAL AS FAR AS AN
13 OLD HOME SHOULD BE CONCERNED.

14 THE COURT IS OF THE OPINION, AND I SO RULE,
15 THAT THE DEFENDANT HAD NO KNOWLEDGE OF THE DEFECT, THAT NO
16 COMPLAINTS OR KNOWLEDGE HAD BEEN IMPARTED TO THEM OF ANY
17 DEFECT, AND THEY HAD NO REASON TO KNOW THAT THIS PARTICULAR
18 WINDOW WAS DEFECTIVE. THEY KNEW THE HOUSE WAS OLD, THAT
19 EVERYTHING WAS OLD IN THE HOME, AND THEY'D HAVE NO
20 KNOWLEDGE AS TO THIS PARTICULAR WINDOW BEING IN ANY
21 DEFECTIVE CONDITION.

22 NOW I'M NOT SURE OF THIS, BUT MY BEST
23 RECOLLECTION OF THE LAW IS THAT ALSO THE STANDARD IS NOT AS
24 HIGH TOWARD GUESTS AS IT WOULD BE TOWARD A TENANT, BUT I'M
25 NOT MAKING A RULING ON THAT. IN FACT I PROBABLY SHOULDN'T

1 EVEN HAVE STATED IT. I WON'T WANT ANYTHING IN THE FINDINGS
2 ABOUT THAT BECAUSE I'M NOT SURE.

3 BUT I WOULD BASE THE ORDER ON WHAT I HAVE
4 SAID. I WOULD GRANT THE DEFENDANT'S MOTION TO DISMISS. I
5 WOULD ALSO GRANT THE DEFENDANT'S MOTION FOR SUMMARY
6 JUDGMENT. ANYTHING FURTHER?

7 MR. CHRISTENSEN: YOUR HONOR, MAY I PREPARE
8 THE ORDER?

9 THE COURT: YOU MAY. AND THIS WILL STRIKE
10 THE TRIAL DATE. THANK YOU.


11 (WHEREUPON, AT THE HOUR OF 9:45 A.M., THE
12 PROCEEDINGS CAME TO A CLOSE.)
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REPORTER'S CERTIFICATE

I, EDWARD P. MIDGLEY, RPR, CM, OFFICIAL
COURT REPORTER IN THE THIRD JUDICIAL DISTRICT, STATE OF
UTAH, DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING
PROCEEDINGS WERE BY ME STENOGRAPHICALLY REPORTED AT THE
TIMES AND PLACES HEREIN SET FORTH; THAT SAID REPORT WAS, BY
ME, SUBSEQUENTLY CAUSED TO BE REDUCED TO PRINTED FORM,
CONSISTING OF THE ENUMERATED PAGES HEREINBEFORE APPEARING;
AND THAT SAID REPORT, SO TRANSCRIBED, CONSTITUTES A TRUE
AND CORRECT TRANSCRIPTION OF TESTIMONY GIVEN, EVIDENCE
ADDUCED, AND/OR PROCEEDINGS HAD AS AT THE INSTANT
PROCEEDINGS HEREINABOVE REFERENCED.

TO WHICH CERTIFICATION I HEREBY SET MY HAND
THIS 9th DAY OF AUGUST, 1997 AT SALT LAKE CITY, UTAH.


EDWARD P. MIDGLEY, RPR, CM
UTAH CSR NO. 133

from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

(Amended effective January 1, 1985.)

Rule 55. Default.

(a) Default.

(1) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default.

(2) **Notice to party in default.** After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party.

(b) **Judgment.** Judgment by default may be entered as follows:

(1) **By the clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) **By the court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) **Setting aside default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment against the state or officer or agency thereof.** No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(Amended effective Sept. 4, 1985.)

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expi-

ration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party em-

Exhibit "C"

ploying them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to Chapter 33 of Title 78, U.C.A. 1953, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Rule 58A. Entry.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

Rule 58B. Satisfaction of judgment.

(a) **Satisfaction by owner or attorney.** A judgment may be satisfied, in whole or in part, as to any or all of the judgment debtors, by the owner thereof, or by the attorney of record of the judgment creditor where no assignment of the judgment has been filed and such attorney executes such satisfaction within eight years after the entry of the judgment, in the following manner: (1) by written instrument, duly acknowledged by such owner or attorney; or (2) by acknowledgment of such satisfaction signed by the owner or attorney and entered on the docket of the judgment in the county where first docketed, with the date affixed and witnessed by the clerk. Every satisfaction of a part of the judgment, or as to one or more of the judgment debtors, shall state the amount paid thereon or for the release of such debtors, naming them.

(b) **Satisfaction by order of court.** When a judgment shall have been fully paid and not satisfied of record, or when the satisfaction of judgment shall have been lost, the court in which such judgment was recovered may, upon motion and satisfactory proof, authorize the attorney of the judgment creditor to satisfy the same, or may enter an order declaring the same satisfied and direct satisfaction to be entered upon the docket.

(c) **Entry by clerk.** Upon receipt of a satisfaction of judgment, duly executed and acknowledged, the clerk shall file the same with the papers in the case, and enter it on the register of actions. He shall also enter a brief statement of the substance thereof, including the amount paid, on the margin of the judgment docket, with the date of filing of such satisfaction.

(d) **Effect of satisfaction.** When a judgment shall have been satisfied, in whole or in part, or as to any judgment debtor, and such satisfaction entered upon the docket by the clerk, such judgment shall, to the extent of such satisfaction, be discharged and cease to be a lien. In case of partial satisfaction, if any execution shall thereafter be issued on the judgment, such execution shall be endorsed with a memorandum of such partial satisfaction and shall direct the officer to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(e) **Filing transcript of satisfaction in other counties.** When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or

EXAMINATION BY MR. CHRISTENSEN

1 Q Now, this window, did it have handles on
2 the bottom of it?

3 A No.

4 Q Okay. Did she tell you whether the bottom
5 frame of the window when she tried to open it,
6 whether it initially had been depressed down into the
7 wood casing?

8 A I don't know.

9 Q Okay. Did you have any discussion with her
10 as to how she got her hands underneath this wood
11 frame, if in fact the frame had been depressed down
12 into the casing?

13 A I don't recall.

14 Q Okay. Now, you were about to tell me that
15 at some point, you took a look at this window. And
16 you made some observations, correct?

17 A I was the one who changed the glass.

18 Q Okay.

19 A After it was broken.

20 Q When was that?

21 A The day after the accident.

22 Q At that time, what did you observe, what
23 did you do with the window? Other than change the
24 glass?

25 A Well, I observed that it was a very old

EXAMINATION BY MR. CHRISTENSEN

1 window. And it was rotten.

2 Q What was rotten?

3 A The frame. The window frame. Not the
4 window case but the window frame.

5 Q How was it rotten?

6 A I don't understand your question.

7 Q You said it was rotten. What do you mean?

8 A It was rotten. Like -- looks like to me
9 that probably the humidity from the inside and water
10 from the outside, maybe because of the rain, caused
11 that thing. Caused the wood was going to -- rotten.

12 Q Was it falling apart?

13 A A little bit.

14 Q How so?

15 A I -- well --

16 Q Did any of the wood fall off the frame?

17 A Yes. Actually, yes. From the -- from the
18 very --

19 Q How --

20 A From the very corners of the window.

21 Q Of the frame or the casing?

22 A The frame.

23 Q How much wood fell off?

24 A After the accident?

25 Q Yes.

EXAMINATION BY MR. CHRISTENSEN

1 A Probably this window -- this thing fell off
2 before.

3 Q Okay. What did you see that had fallen off
4 the frame?

5 A For example, when I try to -- when I had
6 removed the pieces of glasses from the accident --
7 after the accident, I tried to level the window a
8 little bit more, you know, for me to work to get the
9 window, the whole window. When I pulled my hands, I
10 remember that a little bit of the window came out of
11 the -- of the wood came out.

12 Q Okay. How much is a little bit? Like a
13 sliver?

14 A No. More than that.

15 Q Was it actual paint?

16 A One-eighth of a piece of wood. One-eighth
17 of an inch of wood. Like this.

18 Q You're pointing out a piece of wood that's
19 what, about how long? You tell me how long it was.

20 A The thickness I think it was. The
21 thickness was like one-eighth.

22 Q And an eighth of an inch thick by how long?

23 A Maybe -- maybe half an inch.

24 Q So a piece of wood an eighth of an inch
25 thick and half an inch long came off the bottom of

EXAMINATION BY MR. CHRISTENSEN

1 the wood frame when you were trying to repair the
2 glass, correct?

3 A I think so.

4 Q Okay. Anything else come off that frame?

5 A Well, looks to me that -- looked to me that
6 in the past, the window used to have kind of a -- is
7 it caulk?

8 Q Caulking?

9 A Caulking. Because -- I say this because
10 there was only a little bit that was totally dry.
11 And it was coming apart from there. And the window
12 was only being -- being held by some nails.

13 Q The glass, you mean?

14 A The glass. The glass was only held by some
15 piece of nail.

16 Q Let's take this caulking. Was the caulking
17 around the outside edge of the frame of the window?

18 A No. From the inside of the window.

19 Q The caulking was around the glass?

20 A Yes.

21 Q Okay.

22 A Apparently, it was there. I mean --

23 Q Okay. Anything else that you observed?

24 A Well, it was also hard for me to open it --
25 the window. And then close it.

EXAMINATION BY MR. CHRISTENSEN

1 Q Okay.

2 A It was hard to --

3 Q But you were able to open and close it?

4 A Yes. After much effort, I did.

5 Q Now, this window, was it an interior
6 window, then there was a window on the other side?
7 On the outside?

8 A No.

9 Q So if you opened up this window, you had
10 access to the outside?

11 A Outside.

12 Q Okay. As you tried to open and shut --
13 close this window, how much effort did you have to
14 exert?

15 A A lot.

16 Q Okay. Did you have to shake the window as
17 you were opening?

18 A Yes.

19 Q Okay. Do you know what caused that glass
20 to break?

21 A I don't know.

22 Q Okay. Had you ever seen your wife try to
23 open a window in that house before?

24 A No.

25 Q Had you seen anybody try to open a window

EXAMINATION BY MR. CHRISTENSEN

1 in that house before?

2 A Yes.

3 Q Who?

4 A Mr. Escalante.

5 Q When was that?

6 A Before the accident.

7 Q Which window was that?

8 A The same window that Monica had the
9 accident.

10 Q What date was that?

11 A I don't know.

12 Q So he actually opened that particular
13 window that she had opened?

14 A Yes.

15 Q Why was he doing that?

16 A Because it was too hot in the house. In
17 that particular area of the house, there's no air.
18 It doesn't go -- the air doesn't circulate. And --
19 but the -- the windows is also -- I guess it was also
20 a problem with the windows in the front of the house
21 in the kitchen. Because it couldn't be opened
22 either. So --

23 Q You tried to open these windows?

24 A Never.

25 Q How did you know there was a problem?

EXAMINATION BY MR. CHRISTENSEN

1 A Because I guess they -- they told me that
2 those windows could not be opened, because it was
3 kind of a -- hard to open. The only one they could
4 actually open, one was -- Mr. Escalante was the only
5 one who could open the one to the side.

6 Q I thought you told me before this accident,
7 you hadn't had a discussion with the Escalantes about
8 the windows.

9 A I didn't have. About that window, didn't
10 have a discussion.

11 Q Had you had a discussion about other
12 windows with the Escalantes?

13 A They mentioned to me the only windows they
14 couldn't open was the front -- the front window. The
15 front door window.

16 Q When was that that they said that to you?

17 A After the accident.

18 Q After the accident, Mr. Escalante said to
19 you, "You can't open the front windows"?

20 A Yes.

21 Q But before this accident, you're telling me
22 that you saw Mr. Escalante open that particular
23 window, the one in question?

24 A Yes.

25 Q The one that injured your wife?

EXAMINATION BY MR. CHRISTENSEN

1 A It was a little bit open.

2 Q Pardon?

3 A It was a little bit open.

4 Q Did you see him open it, or you saw it
5 open?

6 A I saw it open.

7 Q You did not see Mr. Escalante or anybody
8 else open it?

9 A I saw Mr. Escalante open the window, yes, I
10 did.

11 Q He was able to open it?

12 A With a lot of effort, yes.

13 Q What do you mean?

14 A Well, he had to play with the window,
15 trying to pull up again.

16 Q Okay.

17 A Is that understandable?

18 Q Yes. How many days before the accident did
19 you see this?

20 A Maybe it was two days before the accident
21 happened.

22 Q But the window held? Nothing broke?

23 A No. Nothing broke.

24 Q Okay.

25 A But it was just a tiny bit open. It was

EXAMINATION BY MR. CHRISTENSEN

1 not a lot open.

2 Q Okay.

3 A Just maybe an inch open. From -- one inch
4 from one side. Because it was like this.

5 Q When you say like this, you're pointing at
6 an angle?

7 A At an angle, yes. I guess the -- the
8 bottom -- the bottom right angle was -- can I say
9 more open than the left. Because it got stuck every
10 time you tried to open the window.

11 Q How do you know that? You didn't try to
12 open it before the accident, right?

13 A I never tried to open. I --

14 Q You're guessing before this accident, it
15 would get stuck as it was opened, correct?

16 A I was guessing? I am guessing? Is that
17 what you mean?

18 Q You never tried to open this window before
19 the accident; is that right?

20 A I actually tried to open, yes.

21 Q You tried to open this window before the
22 accident?

23 A Yes.

24 Q Okay.

25 A But I --

EXAMINATION BY MR. CHRISTENSEN

1 Q When was that?

2 A I couldn't open.

3 Q When was that before the accident you tried
4 to open it?

5 A I guess the following day after I saw the
6 window open. In the morning.

7 Q So it had been shut again?

8 A It was shut.

9 Q Okay. So the day after you saw Mr.
10 Escalante open it an inch or so, you went back to the
11 window, and it was shut, correct?

12 A Yes.

13 Q Then you tried to open it; is that right?

14 A Yes. Because it was so hot inside, yes.

15 Q What time of day was this?

16 A Maybe 8, 9. After everybody took a shower
17 and left.

18 Q Okay. How did you open it?

19 A I -- with a lot of effort. But I was
20 not -- since I couldn't open it, because it was stuck
21 again, I left it there.

22 Q Well, you just described for me that the
23 wood frame was depressed down into the wood casing,
24 correct? It wasn't open at all?

25 A When?

EXAMINATION BY MR. CHRISTENSEN

1 Q When you tried to open it.

2 A I guess. I don't -- I don't know.

3 Q In other words, you couldn't -- there was
4 no opening at the bottom of the wood frame?

5 A It was a little bit, yes. That's the
6 reason I was able to open. Because the day before,
7 Mrs. Escalante opened the door. When tried to shut
8 it, shut completely, it couldn't. So next day when I
9 try also to open a window, I saw the light there.
10 You can put my hands through. So I left it up a
11 little bit.

12 Q I thought you said you couldn't open it at
13 all. You were able to open it a little bit?

14 A A little bit more than it was before. The
15 night before.

16 Q Did you ultimately close it again?

17 A I left it there. I don't know.

18 Q Okay. At that time, did you think there
19 was a problem with the window?

20 A Of course.

21 Q Did you tell anybody about it?

22 A Yes.

23 Q Who?

24 A I think I told Juan.

25 Q You think?

EXAMINATION BY MR. CHRISTENSEN

1 A Yes.

2 Q Did you, or didn't you?

3 A I think I make a comment with him.

4 Q What did you say to him?

5 A Well, eventually I said to him it was very
6 hard to open that window.

7 Q How old was Juan?

8 A Again?

9 Q How old was Juan?

10 A How old was he?

11 Q Yes.

12 A I think he was like 34, 35.

13 Q Is this one of the children, Escalante
14 children?

15 A No. I was talking to the father.

16 Q His name was Juan?

17 A Juan too.

18 Q Okay. What exactly did you say to him?

19 A I don't recall what exactly I told him.
20 But I think I told him that it was hard to open that
21 window.

22 Q What did he say?

23 A He agreed.

24 Q Okay. Did either of you try to contact
25 Evelyn Bolton about the problem with the window?