

2009

Jennifer Ottens v. Nickolas Coleman and Dan McNeil : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JENNIFER OTTENS,

Plaintiff and Appellant,

VS.

NICKOLAS COLEMAN and DAN MCNEIL,

Defendant and Appellee.

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Case No.050911123

20090231

BRIEF OF APPELLANT

AN APPEAL FROM JUDGMENT FROM A DIRECTED VERDICT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES	1
FIRST ISSUE ON APPEAL	1
SECOND ISSUE ON APPEAL	2
THIRD ISSUE ON APPEAL	2
FOURTH ISSUE ON APPEAL	2
FIFTH ISSUE ON APPEAL	3
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	3
STATEMENTS OF THE CASE/SUMMARY OF PROCEEDINGS BELOW	4
STATEMENT OF FACTS	5
SUMMARY OF ARGUMENTS	17
ARGUMENT	19
I. WHETHER TRIAL COMMITTED LEGAL ERROR IN GRANTING DEFENDANT’S MOTION FOR A DIRECTED VERDICT IN SPITE OF EVIDENCE OF DAN MCNEIL’S FAILURE TO SECURE HIS PERSONAL PROPERTY.....	19
II. WHETHER TRIAL COURT ABUSED ITS DISCRETION BY DENYING PLAINTIFF’S MOTION TO JOIN JAKE MCNIEL AS A PARTY AFTER DAN MCNEIL HAD DECEIVED LAW ENFORCEMENT REGARDING THE DRIVER OF THE VEHICLE	32
III. WHETHER THE TRIAL COURT COMMITTED LEGAL ERROR IN ALLOWING DAN TO ASSERT HIS CORPORATE SHIELD DEFENSE AND	

DENYING PLAINTIFF’S MOTION TO ADD D & K AS A PARTY DEFENDANT	42
--	----

IV. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING FROM EVIDENCE THE FACT THAT DAN HAD BEEN ISSUED A CITATION IN THE CASE FOR FAILURE TO SECURE HIS LOAD AND PLED GUILTY AND PAID THE CITATION	44
--	----

V. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING INTO EVIDENCE INFORMATION REGARDING WHEN PLAINTIFF HIRED AN ATTORNEY	45
---	----

CONCLUSION	46
------------------	----

ADDENDUM	47
----------------	----

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

<i>Acton v. J.B. Deliran</i> , 737 P.2d 996, 999 (Utah 1987) (quoting <i>Kinkella v. Baugh</i> , 660 P.2d 233, 236 (Utah 1983))	36
<i>Armed Forces Ins. Exch. v. Harrison</i> , 2003 UT 14, ¶ 19, 70 P.3d 35	30
<i>Bennett v. Huish</i> , 155 P.3d 917, 931, 932 (UT 2007)	30
<i>Beaver County v. Tax Commission</i> , 2006 P.3d 6, 12 (Utah 2006)	34
<i>Conder v. Hunt</i> , 2000 UT App 105, ¶ 9, 1 P.3d 558	42
<i>Hansen</i> , 852 P.2d 977, 978, 979 (Utah 1993)	2
<i>James Constructors, Inc. v. Salt Lake City Corp.</i> , 888 P.2d 665, 669 (Utah Ct.App.1994)	42
<i>Jensen v. IHC Hosps., Inc.</i> , 2003 UT 51, ¶ 57, 82 P.3d 1076 (quoting <i>State v. Hamilton</i> , 827 P.2d 232, 239-40 (Utah 1992))	44

<i>Lee v. Lee</i> , 744 P.2d 1378, 1380 (Utah Ct.App. 1987)	36
<i>Magana v. DRC, & ABM Crane Rental</i> , 2009 UT 45, No. 2008629 (Utah 2009)	17, 25-28
<i>Merino v. Albertsons, Inc.</i> , 1999 UT 14, ¶ 3, 975 P.2d 467	2
<i>Nunez v. Albo</i> , 2002 UT	39-44
<i>Penrose v. Ross</i> , 71 P.3d 63 (Ut. App. 2003)	37-39, 41-43
<i>Russell Packard Development, Inc. v. Carson</i> , 2005 P.3d 741 (Utah 2005)	35
<i>State v. Vargas</i> , 2001 UT 5, ¶ 51, 20 P.3d 271 (quoting <i>State v. DeCorso</i> , 1999 UT 57, ¶ 48, 993 P.2d 837)	45
<i>State v. Whittle</i> , 1999 UT 96, ¶ 20, 989 P.2d 52	3, 44
<i>Sulzen v. Williams</i> , 977 P.2d 497 (Utah 1992)	2
<i>Utah Supreme Court in Western Casualty & Sur. Co. v. Marchant</i> , 615 P.2d 423, 426 (Utah 1980)	29

CONSTITUTIONAL STATUTES, PROVISIONS, AND RULES

URAP Rule 4a	1
URCP Rule 9 (l)	4, 12, 18, 19, 31
URCP Rule 12	4, 18, 31
URCP Rule 15	2, 3, 18, 42
URE 401	46

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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This appeal is pursuant to URAP Rule 4a. At a trial, the Trial Court granted Defendants' Motion for Directed Verdict. Exhibit A. Final Judgment was entered on February 13, 2009. Plaintiff filed her Notice of Appeal on March 11, 2009. TR 986.

**STATEMENT OF THE ISSUES, STANDARD OF REVIEW
AND CITATION PRESERVING ISSUE FOR APPEAL**

I. FIRST ISSUE ON APPEAL

In spite of evidence of his failure to secure his personal property and in directing the loading thereof, did the Trial Court err in granting Defendant, Dan McNeil's (hereafter, Dan) Motion for a Directed Verdict and thereby dismissing Plaintiff's causes of action against Dan based upon a). direct liability and b). vicarious liability?

A directed verdict is only sustained if after “examining all evidence in a light most favorable to the non-moving party, there is no competent evidence that would support a verdict in the non-moving party’s favor.” *Merino v. Albertsons, Inc.*, 1999 UT 14, ¶ 3, 975 P.2d 467. Issue I was preserved for appeal at TR 984-986.

II. SECOND ISSUE ON APPEAL

Did the Trial Court abuse its discretion by denying Plaintiff’s motion to join Dan’s son, Jake, as a party when evidence indicated that Dan had potentially mislead law enforcement that he was the driver of the vehicle? ““The standard of review of a denial to amend pleadings is abuse of discretion”” *Sulzen v. Williams*, 977 P.2d 497 (Utah 1992). Issue II was preserved for review at TR 115-123, 131-175.

III. THIRD ISSUE ON APPEAL

Did the Trial Court err when it allowed Dan to assert his Corporate Shield defense at trial and denied Plaintiff’s Motion to add D & K as a party defendant? As a legal determination, the Standard of Review is for Correctness. When the court’s analysis involves a legal determination, such determination will be reviewed “for correctness.” *Hansen*, 852 P.2d 977, 978, 979 (Utah 1993). Issue III was preserved for review at 881 (Counsel argued plaintiff’s motion to preclude this defense and in the alternative, under Rule 15(b) to amend the complaint to add D & K as a party), 928, 929, TT 7-10, 17:14-25.

IV. FOURTH ISSUE ON APPEAL

Did the Trial Court err when it granted Dan's motion to exclude evidence that he had been issued a traffic citation for failure to secure his load and had pled guilty thereto and paid the fine thereon? The trial court is granted broad discretion to admit or exclude evidence, and its decision thereon will only be disturbed if there is an abuse of discretion. *State v. Whittle*, 1999 UT 96, ¶ 20, 989 P.2d 52. Issue IV was preserved for review at 558-567, 769-791, 882-883, 858.

V. FIFTH ISSUE ON APPEAL

Did the Court Err when it denied Plaintiff's fourth motion to exclude evidence regarding when Plaintiff had retained an attorney? The trial court is granted broad discretion to admit or exclude evidence, and its decision thereon will only be disturbed if there is an abuse of discretion. *State v. Whittle*, 1999 UT 96, ¶ 20, 989 P.2d 52. Issue V was preserved for review at 884, 764A-765, 804-808, 820-831.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The second and third issues in this case is governed by URCP Rule 15(a) & (b) that states:

Rule 15 (a) . . . A party may amend his pleading . . . only by leave of court . . . ; and leave shall be freely given when justice so requires . . .

(b) Amendments to conform to the evidence. When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended

when the presentation of the merits of the action will be subverted thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

The third issue in this case is governed by URCP Rule 12 and 9(l) that states:

Rule 12 (a) . . . Unless otherwise provided by statute or order of the court, a defendant shall serve an answer . . .

(b) . . . Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto . . .

. . . .

(h) Waiver of defenses. A party waives all defenses and objections not presented either by motion or by answer or reply. . .

Rule 9 (l)(1) A party seeking to allocate fault to a non-party . . . shall file:

(l)(1)(A) a description of the factual and legal basis on which fault can be allocated; and

(l)(1)(B) information known or reasonably available to the party identifying the non-party, including name, address, telephone number and employer. If the identity of the non-party is unknown, the party shall so state.

(l)(2) The information specified in subsection (l)(1) must be included in the party's responsive pleading if then known or must be included in a supplemental notice filed within a reasonable time after the party discovers the factual and legal basis on which fault can be allocated but no later than the deadline specified in the discovery plan under Rule 26(f). The court, upon motion and for good cause shown, may permit a party to file the information specified in subsection (l)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial.

(l)(3) A party may not seek to allocate fault to another except by compliance with this rule.

STATEMENTS OF THE CASE/SUMMARY OF PROCEEDINGS BELOW

After initial discovery and the depositions of Dan and his son, Jacob McNeil (Dan's son, referred to as Jake herein) were taken in this case, Plaintiff, Jen Ottens, moved to add Jake as a party defendant. The Trial Court denied this motion because the statute of limitations had passed. The matter then proceeded to trial against Dan in December 2008. After two days of testimony, the Trial Court granted Defendant's Motion for Directed Verdict.

STATEMENT OF FACTS

A. FACTS RELEVANT TO TRIAL COURT'S DIRECTED VERDICT

1. After a trial in the above matter between December 15-16, 2008, the Defendant moved for a directed verdict. On February 13, 2009, the Trial Court entered a Directed Verdict against Plaintiff. The Trial Court held:

1. Plaintiff's oral motion to admit into evidence a statement offered by unknown individuals but alleged by plaintiff to be partially by Dan McNeil is denied. The court . . . allowed counsel for plaintiff to freely question Dan McNeil regarding this statement and allowed this evidence to go to the jury. The statement contains references to insurance which are contrary to this court's prior order in limine and is of unknown authorship and does not appear to be inherently reliable.

. . . .

3. The Court, having carefully considered Dan McNeil's motion for directed verdict, hereby grants the same. The court finds that there is no evidence upon which a reasonable juror could conclude that Jake McNeil was acting as an employee of or in the course and scope of employment with Dan McNeil personally. The court finds there is no basis from which vicarious liability would lie on the part of Dan McNeil for the actions of Jake McNeil.

4. The Court further finds that there is no credible evidence upon which a juror could conclude that Dan McNeil breached a duty owed to the plaintiff

to secure the load in the truck owned by an driven by Jake McNeil. TR 984-986.

2. On March 29, 2002, Dan P. McNeil was moving his property from his house in Bluffdale to his condo on Fort Union Boulevard at approximately 1300 East. Dan P. McNeil Trial Transcript (Dan TT) 3:11-14.

3. Dan testified that his son, Jake, his daughter and somebody else were there to assist him in the move. Dan TT 3:15-17.

4. Dan was moving due to “the last deal with [him] and [his] wife, which included [his] ‘office’ and some of his ‘personal stuff . . .’” Dan TT 3:18-21.

5. Dan moved his personal things from the Bluffdale residence during this particular move, including his clothing and personal hygiene items. Dan TT 36: 9-15.

6. Dan however, during this move, did not move from the Bluffdale residence, “boxes of tax returns, miscellaneous stuff, tools, all [his] office, because [he] was still using the office.” Dan TT 36:23-25; 37:1.

7. Jake testified at trial that a divorce between his father, Dan, and Kim McNeil precipitated the move, and that Jake helped his father, Dan, move his personal belongings and his office out of his residence in Bluffdale, Utah to Dan’s condo. Jake TT 7:10-25, 8:14-20, 9:11-24.

8. Jake further testified at trial that in his truck he moved “some kitchen chairs,” “a large wooden desk,” “a dresser and probably a filing cabinet, [and] some boxes . . .” Jake TT 7:10-25, 8:14-20, 9:11-24.

9. As was pointed out at trial, at his deposition prior to trial, and contrary to his trial testimony, when Jake was asked what he moved for his father, Dan, he only indicated he moved a “kitchen table and chairs and some boxes.” Jake **did not mention** any office equipment nor mention the word “office.” Jake TT 8:21-25, 9:1-10.

10. As was further pointed out at trial, at no time in his deposition prior to trial did Jake ever indicate that Dan and Jake were moving D & K Office equipment on the day of the accident. Jake TT 28:15-25, 29:1-10.

11. To transport the property, Dan testified that two trucks were backed up to the residence’s porch and that he, “helped load both of them,” and he also helped “secure the property in the vehicles.” To secure the loads Dan helped his son, Jake, weave a rope by, “just throwing ropes back and forth and hooking them in the eye hooks.” TT 7:19-25, 8:1, 7-16, 9:6-14.

12. Dan did not use any tarps to secure the load. Moreover Dan did not inspect the loads to ensure they were secure. TT 7:19-25, 8:1, 7-16, 9:6-14.

13. Jake testified that Dan was “directing the move,” and that Dan “was supervising the loading of his possessions.” Jake TT 24:8-10, 29:8-10.

14. Regarding the chair that caused the accident, Jake’s personal opinion was that the chair “probably got missed when the ropes were getting looped through everything.” Jake TT 19:1-20.

15. Dan does not remember what was packed in either his or in Jake’s truck. Dan

TT 23: 12-19.

16. Dan recalls paying his son some, “gas money or something.” Dan acknowledged at trial that in his deposition, he had testified that he had not given his son a check. Dan TT 8:2-6, 9:15-19, 10:12-15. Jake, however, remembers getting paid through the D & K payroll for moving Dan’s personal property. Jacob TT 14:3-25.

17. At trial only, and not before, Dan’s legal position was that his son, Jake, was working for D & K when he moved Dan’s property and furniture. Dan TT 25:24-25; 26:1-5.

18. Dan’s business was D & K Finish Carpentry (D & K), which did finish work in houses. It was not a moving company. Dan TT 3:22-25, 4:1-3.

19. Jake, Dan’s son, has worked for D& K multiple times throughout his life. At trial, Jake was asked during what time periods he was employed by D& K. After Jake was admonished by the Trial Judge, not to “guess” or “pull things out of the air,” Jake indicated that he did work for D & K, “probably between 1992 and ‘94 and then again probably ‘95 or ‘96 through maybe 2001.” Jake TT 3:15-25, 4:1-17. As noted above at ¶ 2, the move and accident occurred on March 29, 2002, and therefore, the accident occurred after Jake worked for D & K.

20. According to Dan’s trial and deposition testimony (which was presented at trial), after the trucks were fully loaded, Jake and a companion left first and then, approximately 15 minutes to 30 minutes after, Dan followed his son, Jake, with his loaded

vehicle. Dan TT 9:20-22, 10:4-11, 16-25, 11: 1.

21. On his way to his new apartment, Dan testified that he, “got almost there,” and he, “called Jake on the cell phone, because [Dan] thought [he] recognized one of [his] black chairs on the side of the road.” He saw the kitchen chair after 106th South around Costco. He told Jake that, “It looks like you’re missing one,” and that Dan would be there in a minute. The kitchen chair “was sitting on its back . . . on the side of the road by . . . a cement embankment . . . It didn’t look damaged.” Dan TT 11:6-25, 12: 1-23.

22. At trial, the following factual assertions made in the **Second** Amended Complaint, filed on August 27, 2007, were pointed out to the jury as follows:

“Jake McNeil was traveling northbound on I-15 at about 11800 South on March 29th, 2002, in a green 1996 Ford truck. At approximately 11:40 a.m. a chair fell from the truck driven by Jake McNeil and landed in the center lane. This chair had been loaded onto the truck under the direction of, on behalf of, and with the assistance of Dan McNeil. Dan McNeil had hired his son Jake McNeil and another unknown white male to assist him in loading and moving his personal property from a rental residence in Bluffdale, Utah to an apartment on 13th East 7200 South. Mr. Dan McNeil paid Jake McNeil to assist him in transporting his personal property. The chair that fell out of the loaded truck was the personal property of Dan McNeil.” Dan TT 27:3-16; 28:13-16; TR 376-382, 429-433.

23. After this was read to the Jury, Dan was asked at trial to read what his Answer was to these factual assertions in the **Second** Amended Complaint. He did so and read the following:

“The defendant admits that a chair fell from the truck owned and driven by Jake McNeil and that the chair belongs to Dan McNeil, but denies the remainder of the allegations contained in this paragraph.” Dan TT 27:3-16; 28:13-16; TR 422-428.

24. However, contrary to Dan’s position in this lawsuit and at trial, the Highway

Patrol Report (Plaintiff's Exhibit #2) identified Dan as the driver of the vehicle from which the kitchen chair fell that caused the accident in this case.¹ TR 151-153, 155, 157, 992, Plaintiff's proposed trial Exh. 2. Dan was also identified as the driver in "Dan McNeil's Written Statement." TR 151-153, 155, 157, 992, Plaintiff's proposed trial Exh. 2. Although Plaintiff's counsel was allowed to examine Dan regarding this document, as noted above in ¶ 1, the trial judge prohibited its admission into evidence because it mentioned insurance and was hearsay.

25. Nevertheless, in regards to the Highway Patrol Report about the accident, Dan identified the following handwritten notes therein to be similar to his handwriting:

"Registered Owner, D&K Finish Carpentry;" the address Dan was moving out of – *"15400 Pony Express Road, Utah, 84065;"* Dan's phone number – *"801-835-8915;"* **the driver's name** – ***"Dan McNeil;"*** Dan's date of birth – *"11-29-55;"* Dan's age at the time – *"46;"* Years of Dan's driving experience – *"Twenty-nine;"* the Ford truck from which the chair fell – *"1996 Ford blue-green pickup truck."* Dan TT 15:4-25, 16:1-12; 17-19; 20:1-19; TR 922.

26. At in his deposition taken on August 10, 2006, as was pointed out to the jury, Dan asserted that he could not recall talking to any officer about the accident. Dan TT 33:5-8.

¹ Dan cited for failure to secure his load, and in fact pled guilty and paid the ticket. This admission against interest was not allowed to be presented to the jury.

27. Jake testified that he first became aware that there had been an accident when his father, Dan, called him on “a work cell phone,” and asked Jake what he was doing. Jake, “told him that [they] were about, three quarters of the way from unloading all the stuff. And [Dan] asked [Jake] to go count the chairs.” Jake then went upstairs to the condo and counted the kitchen chairs. Jake TT 9:25, 10:1-14.

28. Jake testified that he counted the kitchen chairs and indicated to Dan that, “there were three,” and then Dan responded, “well, I think one of the chairs fell out on the freeway so I’m going to go back and talk to the police officers.” Jake TT 12:17-20.

29. At the trial, Jake testified that when Dan called Jake, that Dan told Jake that Dan had been contacted by the police, and that, “they believ[ed] that one of his chairs was involved with an accident.” Jake TT 9:10-16.

30. At trial, it was brought to the jury’s attention that in Jake’s deposition taken prior to trial, Jake testified that Dan told him Dan was, “going to go back to where [he] saw the chair” and that Dan thought, “. . . one of the chairs fell out on the freeway so [he was] going to go back and talk to the police officers,” and that Dan, “would go back and take care of it.” Jake then told his father to let him know as soon as he found out what was going on. Jake TT 12:16-25, 13:1-16. It was only after Jake had shared testimony in his deposition that Dan had admitted to speaking with a police officer, that Dan finally admitted at trial that he could remember a police officer “calling him” about the accident. Dan TT 32:15-17.

31. Jake did not see the chair fall from his vehicle. Jake TT 19:1-20.

32. While driving, Jake testified that he never changed lanes but that he, “stayed in the right hand lane, the slow lane, the whole way there.” Jake TT 26:3-7.

33. The Plaintiff testified that the chair flew out from a green truck when the truck changed lanes from the right lane to the center lane. TT 56:1-19. This was also indicated in the Highway Patrol Report. TR 152, 922.

35. In his answer, Dan never asserted the Defense of Corporate Shield, nor did he ever make a Rule 9(l) Designation of Fault that D & K bore any liability for the accident. He did, however, in a Rule 9(1) Designation of Fault and his Answers designate Jake and Jiffy Lube. TR 63, 69-70, 346 478.

B. FACTS APPLICABLE TO COURT’S DENIAL OF MOTION TO AMEND

36. This lawsuit was filed approximately on June 22, 2005. TR 1-5.

37. Plaintiff’s complaint stated that on March 29, 2002, Plaintiff Jennifer Ottens was traveling northbound on 1-15 at approximately 11800 South in Salt Lake County, Utah, in a 1992 Red Ford F150. The weather was sunny and dry and there was good visibility. TR 2.

38. Plaintiff’s complaint alleged that as Ms. Ottens was driving, a chair flew out of a truck driven by Dan, and that she slowed to a stop in front of a chair and was then rear-ended and injured. TR 2.

39. The Highway Patrol Report indicated that the accident was caused when a

chair flew out of the back of a pickup truck driven by Dan. Dan's address was indicated as being in Bluffdale, Utah. TR 922.

40. Plaintiff's counsel sought to effect service upon Dan. TR 215-217.

41. Plaintiff first tried to serve Dan in Salt Lake at the address Dan had indicated on the Highway Patrol Report but he had moved. Therefore, on Sept. 1, 2005, Plaintiff had to submit an order to compel the Utah Dept. of Public Safety (UDPS) to release any address information it had of Dan's whereabouts. TR 11-14. Plaintiff obtained information and attempted to serve Dan at 1518 E. 4500 S. and then at 285 W. 100 S. Heber, Utah but each time he had moved ahead. TR 37, 41, 51, 168. Then, Plaintiff tried to serve Dan in Moab, Utah but this person, while sharing the same name, was the wrong individual. TR 160-161.

42. Dan's auto insurance was Auto-Owners Insurance. Plaintiff's counsel requested that Auto Owners Insurance accept service on Defendant McNeil's behalf, or provide information so that he could be served, but it refused. TR 37, 170-171.

43. Auto Owners Insurance contacted the firm of Smith & Glauser, and communications between Mr. Lambert and Michael Wright of Smith & Glauser began regarding Mr. Wright accepting service on behalf of Auto-Owners Insurance. TR 47, 53-54, 173, .

44 . **Mr. Wright indicated that his firm would accept service on behalf of Dan.** TR 215-217 (Aff. Loren M. Lambert ¶¶ 4-10). Several inquiries were placed by

Plaintiff's counsel's staff, and at least one voice mail message was left for Mr. Wright regarding the acceptance of service, and on two different occasions Mr. Wright requested an Acceptance of Service and it was sent to him in January, 2006. TR 56, 58, 173, 175, 177, 224, 226, 230. **However, it was not until February 14, 2006 that Mr. Wright informed Ms. Ottens' counsel that he had been instructed by Auto-Owners to not accept service. TR 47-48, 62, 179, 228, 230.**

45. Amidst these problems, on November 23, 2005, Plaintiff filed a Motion for Alternate Service, which was granted December 1, 2005. TR 36-39. Then, on February 24, 2006, Plaintiff filed an Amended Motion for Alternate Service, which was granted March 6, 2006. TR 44-49.

46. After the Amended Motion for Alternative Service was granted on March 6, 2006, according to Dan's counsels, the insurance company:

“... authorize[d] the expenditure of funds to skip trace Mr. [Dan] McNeil, which allowed [defense] counsel to contact the Defendant. At that point Mr. [Dan] McNeil authorized counsel to act on his behalf, and to accept service [on March 13, 2006].” TR 63.

47. Eventually, Dan filed an answer on March 27, 2006. In the answer, Dan alleged that, “Mr. Jake McNeil . . . may have been operating the green ford pickup at the time of the accident and who may have been responsible for loading the vehicle.” TR 63, 69-70.

48. Although Dan's Answer was signed on March 22, 2006, it was not mailed until Friday, March 24, 2006, and Plaintiff's counsel did not receive it until March 27,

2006, only two days before the statute of limitations ran. TR 74.

49. **Without providing an address for his son**, on May 1, 2006, Dan indicated in his initial disclosures, that his son, Jake, “**may have been driving** the pick-up truck.” TR 82, 185-186.

50. Also, on May 2, 2006, in his answer to Plaintiff’s first discovery request, sent immediately after the Answer was filed on March 29, 2006, Dan indicated, “**on information and belief**,” that his son, Jake, was the driver of the vehicle. TR 79, 92, 190-192.

51. Due to all of the problems in serving Dan, and due to Dan’s equivocal assertions that “Jake McNeil . . . **may** have been operating the green ford pickup at the time of the accident and **who may have been** responsible for loading the vehicle,” Plaintiff’s counsel believed that Dan **may have been** purposely deceiving Plaintiff’s counsel to avoid liability, or possibly acting so that the statute of limitations would pass. Therefore, before attempting to amend the complaint, Plaintiff’s counsel desired to take both the depositions of Dan and Jake to attempt to specifically establish each person’s role in the accident. TR 214-221 (Aff. Loren M. Lambert).

52. Plaintiff immediately sought to take Dan and Jakes’ depositions. Plaintiff sent a Notice of Deposition on April 18, 2006 and started trying to locate Jake to subpoena him to a deposition on June 15, 2006. But this date had to be canceled because Jake could not be located. TR 80, 237, 239. A second Notice of Depositions was sent on June

27, 2006. TR 102.

53. On June 14, 2006, Dan provided an **unsigned** response to Plaintiff's second discovery request, sent on May 2, 2006, indicating that his son, Jake McNeil's, address was 13517 South **Skizzer** Lane, Herriman, Utah 84065. TR 90. This address was not correct. On July 5, 2006, Plaintiff requested further information thereon from Dan. TR 199. **In response, Dan McNeil's attorney's asserted by letter that the address was correct. TR 203. It was not.** Jake was eventually served for his deposition at his correct address of 13517 South **Skipperling** (not Skizzer) Lane. TR 104-106, 194-197, 206 (Depo Jake 3:12-14).

54. The depositions of Dan and his son, Jake, were taken on August 10, 2006. In those depositions, it was more conclusively determined that, contrary to the Highway Patrol report, Dan and his son, Jake, would assert that Jake was the driver of the truck from which the kitchen chair fell. TR 205-211.

55. On Sept. 26, 2006, Plaintiff filed a Motion to Amend her complaint to add Jake as a party defendant by alleging that he, along with his father, Dan, may have been negligent by failing to secure the chair and therefore it fell from his truck and thereby caused the accident. TR 109-123.

56. The proposed amended complaint alleged that Plaintiff slowed to a stop or a near stop to avoid hitting the chair that flew allegedly from either Jake's or Dan's truck, and thereafter was struck from behind and injured. TR 109-123.

57. Plaintiff argued that, even though the statute of limitations had passed, she should have been allowed to amend her complaint and add Jake as a party defendant because Jake had “unity of interest” with Dan and because under the “Discovery Doctrine,” Dan had mislead Plaintiff into believing he was the driver of the vehicle. TR 115-123, 131-175.

58. In ruling upon the Plaintiff’s Motion to Amend, the Trial Court determined the following:

Defendants oppose the motion . . . because it is legally futile, brought four (4) years from the date of the accident . . . and, thus, barred by the . . . statute of limitations . . . [and] the amendment would not relate back in time because there is not identity of interest between Jake and Dan McNeil . . . [since] these individuals do not have the same “legal position.”

Finally, argue Defendants, Plaintiff knew of the basis for the claim against Jake before the statute of limitations ran and, yet, failed to move to amend the Complaint for almost six (6) months thereafter.

. . . [T]he Court finds granting the Plaintiff’s Motion to Amend . . . is not proper because it is legally futile, being brought for years from the date of the accident. . . [U]nder the reasoning . . . in *Penrose* . . . the Complaint is time barred . . . and the amendment would not relate back because the requisite identity of interest between Jake and Dan McNeil is lacking. TR 242-243, 261-262.

SUMMARY OF ARGUMENTS

Based upon the legal principles discussed in *Magana v. DRC, & ABM Crane Rental*, 2009 UT 45, No. 2008629 (Utah 2009), there was sufficient evidence that Dan personally and vicariously is liable to Plaintiff and this claim should have been submitted to the jury. The evidence demonstrated that Dan was personally negligent in securing his kitchen chair and any negligence of his son, Jake, can be imputed to him.

Early in the litigation Plaintiff moved to join Jake McNeil as a party. Plaintiff demonstrated that Dan McNeil either intentionally or inadvertently engaged in deceptive practices that delayed Plaintiff's discovery of Jake's potential liability and therefore under the discovery rule and the "identity of interests" principle, Plaintiff should have been allowed to add Jake as a party in this case.

Dan raised at trial, for the first time, that it was in the course and scope of his employment with D & K that he transported his kitchen chair to his condo and therefore he was shielded from any personal liability. Plaintiff argues that pursuant to URCP Rule 9(1) and URCP Rule 15, the Trial Court should he have been barred from asserting this late found defense. In the alternative, Plaintiff argues that, pursuant to URCP Rule 12 and the unity of interest rule that she should have been allowed to amend her complaint to add D & K as a party. Plaintiff asserts that it was an error to allow Dan to present this untimely defense and that the defense was inapplicable because Dan was acting outside his position as a corporate officer when he moved his kitchen chair.

Plaintiff further argues that, to establish that Dan had control over the chair while its was being transported and to show that he owned it, she should have been allowed to introduce evidence that Dan pled guilty to and paid the fine for failure to secure the kitchen chair. Last, Plaintiff argues that Dan should not have been allowed to ask the jury to speculate when his counsel asked Plaintiff questions about her retaining representation on the matter.

ARGUMENT

I. IN VIEW OF EVIDENCE OF DAN MCNEIL’S FAILURE TO SECURE HIS KITCHEN CHAIR, THE TRIAL COURT COMMITTED LEGAL ERROR WHEN IT GRANTED DEFENDANT’S MOTION FOR A DIRECTED VERDICT

A. Dan McNeil’s Liability to Plaintiff

i. Factual Analysis

On March 29, 2002, because of a divorce, Defendant Dan was moving his personal property from the marital residence in Bluffdale to a condo on Ft. Union Boulevard and 1300 E. Dan TT 3:11-14. Dan’s son Jake, among others, assisted Dan in the move. Dan TT 3:15-17. At trial, Dan and Jake asserted that Dan was transporting both his “office” and his “personal stuff. . . ,” “including his clothing and personal hygiene items,” “a dresser,” “kitchen table and chairs and some boxes.” At depositions prior to trial and in his Answers, neither Dan, nor his son, Jake, alleged that Dan was moving his office, nor did Dan assert a defense under the Corporate Shield doctrine or make a Rule 9(l) designation of liability asking that D & K be designated a party for potential liability. Dan TT 3:18-21, 36: 9-15. To the contrary, Dan affirmatively stated at trial that he did not move from the Bluffdale residence, “boxes of tax returns, miscellaneous stuff, tools, all [his] office, because [he] was still using the office.” Dan TT 25:24-25; 26: 1-5, 36:23-25; 37:1; Jake TT 7:10-25, 8:14-25, 9:1-24, 28:15-25, 29:1-10.

Once at trial however, Dan argued, that even if any facts indicated that he or his son, Jake, acted negligently, that since he and his son were acting under the aegis of his

business, he was shielded from personal liability, and since the business was not a party defendant, their activities were irrelevant. Dan's business, D & K, did carpentry finish work in houses. At trial, Jake was asked during what time periods he was employed by D & K. After being admonished by the Trial Judge not to "guess" or "pull things out of the air," Jake indicated that he was employed by D & K, "probably between 1992 and '94 and then again probably '95 or '96 through maybe 2001." Jake TT 3:15-25, 4:1-17. The move and accident occurred on March 29, 2002 – at a time when Jake no longer worked for D & K.

D & K was not a moving company, nor did it assist couples who separated in divorce. Dan TT 3:22-25, 4:1-3. Dan was moving to an upstairs condominium that would not accommodate a carpentry business. Furthermore, the property being moved that caused the accident was a chair from a kitchen table set – not a desk chair used in the D & K business. In view of this, a jury could have concluded that Dan and Jake's recently contrived trial testimony about an "office move" was incredible and that the move was better characterized as one to transport Dan's personal property because of his divorce and had nothing to do with D & K's business operations. Therefore, any movement of D & K property, if any, was incidental to Dan's personal move and did not relate to this accident.

During the move, Dan was both "directing the move," and "was supervising the loading of his possessions." Jake TT 24:8-10, 29:8-10. Moreover, Dan testified he,

“helped load both of [the ‘two trucks . . . backed up to the residence’s porch’],” and he also helped, “secure the property in the vehicles,” by, “just throwing ropes back and forth and hooking them in the eye hooks.” This is contrary to the trial judge’s statements that there was, “not evidence that supports that Dan [was Jake’s] employer,” that all the evidence was that, “Dan was one person loading, but mostly directing from in the house what to take,” that, “there [was] no evidence of means and the methods of loading,” and finally that the trial judge, “didn’t hear evidence that [Dan] was in fact helping to secure [the kitchen chair/load in the truck].” TT 20:15-16; 21:8-12, 23-24; 39:21-22..

Dan did not inspect the loads nor use any tarps to secure them. TT 7:19-25, 8: 1, 7-16, 9:6-14. Jake’s personal opinion was that the chair that blew out, “probably got missed when the ropes were getting looped through everything.” Jake TT 19:1-20. Dan recalls paying his son some, “gas money or something,” for the move. Dan TT 8:2-6, 9:15-19, 10:12-15. Jake, although per his own testimony was not an employee of D & K at the time, remembers getting paid through the D & K payroll for moving Dan’s **“personal property --not his office.** Jacob TT 14:3-25, 15:1-8.² Interestingly during argument on the Directed Verdict, when Plaintiff’s counsel recited Jake’s trial testimony that he had been paid to the court, the judge stated, “No, he didn’t . . . Mr. Glauser?” Mr.

² Q: You indicated you were paid, correct? A: Yes, the company did this for the day. . . . Q: And were you able to completely finish moving your father’s property . . . ? A: . . . Just helped during the eight hour period I was there for work . . . Q: And he did pay you on the paycheck correct? He put the time that you spent moving his personal property on your paycheck, correct? A: Yes. TT:14:3-5, 16-23; 15:5-8.

Glauser: “No.” TT 6:5-10. The trial judge further stated, “. . . I’m not even close to hearing that he was working for his father, employed by his father. . .” TT 7:24-25.

Contrary to the Trial Court’s statement, a jury could conclude from Jake and Dans’ testimony that Dan was supervising the move and was maintaining control over the manner and method in which his kitchen chair was being packed, loaded and secured by both him, Jake and others and that Dan, even though he improperly paid his through the D & K payroll, hired Jake for a day to move his personal property.

Dan does not know what was packed in either his or in Jake’s truck. Dan TT 23: 12-19. After the trucks were fully loaded, Jake and a companion left first and then, approximately **15 minutes to 30 minutes after**, Dan followed his son, Jake, in his loaded vehicle. Dan TT 9:20-22, 10:4-11, 16-25, 11: 1. On his way, Dan, “got almost there,” and he, “called Jake on the cell phone, because [he] thought [he] recognized one of [his] black chairs on the side of the road,” near 106th S. around Costco. The chair “was sitting on its back . . . on the side of the road by . . . a cement embankment . . . It didn’t look damaged.” He told Jake that, “It looks like you’re missing one,” and that Dan would be there in a minute. Dan TT 11:6-25, 12: 1-23.

Dan and Jakes’ position in these proceedings and at trial has been that the chair fell from the vehicle Jake was driving. Dan TT 27:3-16; 28:13-16. Contrarily, the police report containing, “Dan McNeil’s Written Statement,” identified Dan as the driver of the vehicle from which the chair fell that caused the accident in this case. TR 151, 153, 155,

157, 992, Plaintiff's proposed trial Exh. 2. In regards thereto, Dan identified the following handwritten notes in the Highway Patrol Report to be "similar" to his handwriting: "Registered Owner, D&K Finish Carpentry;" the address Dan was moving out of – "*15400 Pony Express Road, Utah, 84065;*" Dan's phone number – "*801-835-8915;*" the driver's name – "*Dan McNeil;*" Dan's date of birth – "*11-29-55;*" Dan's age at the time – "*46;*" Years of Dan's driving experience – "*Twenty-nine;*" allegedly Jake's Ford truck from which the chair fell – "*1996 Ford blue-green pickup truck.*" Dan TT 15:4-25, 16:1-12; 17-19; 20:1-19, TR 992, Plaintiff's proposed trial Exh. 2.

Contrary to the Trial Judge's view otherwise, a jury had a right to view this evidence in the light most favorable to Plaintiff and conclude that Dan was the driver of the vehicle. TT 38:18-24.

Moreover, while Dan (after he knew about Jake's testimony to the contrary) testified at trial that he could remember a police officer calling him about the accident, (Dan TT 32:15-17), in his deposition taken on August 10, 2006, he denied talking to any officer about the accident. Dan TT 33:5-8. Interestingly, Jake became aware of the accident when Dan called him. Dan told Jake that he had been contacted by the police. Dan had Jake count the kitchen chairs to see if one was missing and then Dan told Jake, "well, I think one of the chairs fell out on the freeway so I'm going to go back ['to where I saw the chair'] and talk to the police officers." Dan told Jake that the police, ". . . believ[ed] that one of his chairs was involved with an accident," and Dan, "would go

back and take care of it.” Jake TT 9:10-16, 25, 10:1-14, 12:16-25, 13:1-16.

Jake, himself, did not see the chair fall from his vehicle. Jake TT 19:1-20. While driving, Jake claims he never changed lanes but that he, “stayed in the right hand lane, the slow lane, the whole way there.” Jake TT 26:3-7. However, the Plaintiff testified that the chair flew out from the truck when the truck changed lanes from the right hand lane to the center lane. TT 56:1-19. This was also indicated in the Highway Patrol Report. TR 152, 922,

This testimony and evidence raises the following questions. Why was Dan identified as the driver on the Highway Patrol Report? How did handwriting, according to Dan, “similar to his” end up on the Highway Patrol Report identifying Dan as the driver when Dan says he was not? Next, given that the accident happened immediately after the chair flew out of the truck, how is it that Dan, who followed his son within 15 to 30 minutes, did not come upon the accident, yet claims to have seen the chair and to have identified it as laying on the side of the road? How is it that Dan denied mentioning having spoken to police officers at his deposition when his son, Jake, at his deposition indicated that Dan had told Jake that police had contacted him, and that Dan was going to go back to speak to the officers to clear things up, and then only at trial admitted that he had indeed spoken to police officers? Lastly, if it is true that Jake never changed lanes during his commute, why is it that the Plaintiff and the Highway Patrol Report indicate that the chair, belonging to Dan, blew from a vehicle changing lanes from the right lane to

the center lane?

The fair inferences from the evidence that can be drawn in Plaintiff's favor to answer these questions are that for some unknown reason, Dan and Jake, father and son, are not being truthful about what happened, and in fact, Dan was driving the truck from which his kitchen chair flew onto the highway, and that he saw the chair blow out and cause the accident. Dan then returned, and spoke to the officers and personally filled out the report identifying himself as the driver of the vehicle. These facts are sufficient under several different legal theories to have submitted the question of Dan's alleged negligence to the Jury.

ii. Legal Analysis

a. Retained Control and Direct Liability

In, *Magana v. DRC, & ABM Crane Rental*, 2009 UT 45, No. 2008629 (Utah 2009) [Addendum Exhibit A], the plaintiff, Mangana, alleged that DRC (a business entity), through its agent/employee, Brett Campbell was negligent and caused Magana's paraplegia when a load of tresses, being hoisted by a crane being operated by ABC, became unbalanced and fell upon him. DRC and its agent, Brett Campbell, hired ABC to operate the crane to hoist the tresses. Immediately prior to the accident, DRC agent, Brett Campbell, assisted ABC agent, Ted Alexander, in rigging the tresses.

Mr. Magana alleged that DRC was liable to him because: (1) Under the retained control doctrine, it actively participated in ABC's execution of its duties, and (2) DRC's

agent, Brett Campbell, had negligently assisted in rigging the tresses. In ruling upon these two theories of liability, the Utah Supreme Court found that while there was insufficient evidence under the doctrine of retained control to hold the DRC liable, there was sufficient evidence for a jury to consider that due to DRC agent, Brett Campbell's, negligence, DRC was liable.

As in *Magana* , just as DRC agent, Brett Campbell, and ABC agent, Ted Alexander, negligently rigged the tresses causing them to fall upon Magana while being transported by ABC/Ted Alexander, Dan and Jake improperly secured or "rigged" Dan McNeil's kitchen chair in the truck being driven by either Jake or Dan. As a consequence, while Dan's kitchen chair was being transported, it flew out causing an accident. Notably, neither the crane operation in *Magana* , nor the truck operation in this case, were alleged to have been negligent. Hence, the means by which the tresses and the kitchen chair were transported is irrelevant to the legal analysis in both cases. Rather, it was the manner in which the tresses and kitchen chair were secured. Also, as in *Magana*, the Plaintiff alleges that Dan is individually liable to her for improperly securing or "rigging" the load, and Dan is liable to Plaintiff because he exercised sufficient control over those who assisted him in loading, rigging and transporting his kitchen chair to the extent that he had a duty to Plaintiff to make sure that the load was properly "rigged" or secured.

In *Magana* , the Utah Supreme Court stated that to apply the retained control

doctrine, it must be shown that an employer actively participated in the behavior that causes the injury. Active participation means that the employer “directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished,” to such a degree that the independent contractor cannot carry out in its own way the injury-causing aspect of the work. To determine if this is the case, the Supreme Court established a two-step analysis. First, it must be determined whether the employer actively participated in the contractor’s work by directing that the contracted work be done by use of a certain mode or otherwise interfere with the means and method by which the work is to be accomplished and thereby assumes a limited duty of care to ensure that the work was conducted safely. The second step is to determine whether the employer breached that duty of care.

Using this standard, in *Magana* the Supreme Court determined that since DRC did not, “direct, instruct, or control the manner in which” ABC and its agents conducted the operation, there was no liability under the theory of the retained control doctrine. However, since Magana testified that DRC’s agent, Brett Campbell, “had assisted in the rigging of the load of tresses that slipped and fell on Magana,” the question of whether or not this caused the injury to Magana was a question of fact that should have been submitted to a jury.

In this case, the question of whether or not Dan was liable to Plaintiff for the accident should have been submitted to the jury. Under the Doctrine of Retained Control,

the facts and all inferences that can be drawn therefrom indicate that Dan supervised and maintained control over the loading and securing of his kitchen chair onto the trucks, and that Dan also personally used a certain mode or means to secure the loads with ropes so that Jake did not act independently in loading the property as an independent contractor.

Moreover, the facts and all inferences that can be drawn therefrom indicate that Dan's involvement in the loading and securing of his personal property established a duty to the Plaintiff. Dan should have done so in a manner that did not create a known hazard to others when the kitchen chair was being transported, regardless of whether or not he was the driver of the vehicle that was transporting the kitchen chair when it flew out. He therefore had a duty to have secured the chair.

b. Employer, Employee, Vicarious Liability

Here, however, unlike the *Magana* case, the legal status and capacity of the joint players, Dan and Jake, is disputed. It is Plaintiff's position that Dan was engaged in a wholly personal affair and employed his son, Jake, to assist him. Dan, at trial, asserted that he was transporting the kitchen chair as an agent for D & K Finishing, and that Jake, while assisting in the move, was either a volunteer, an independent contractor or an employee for D & K.

Black's Law Dictionary defines the word "employee" as "[a] person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details

of how the work is performed.” Black’s Law Dictionary 471 (5th ed. 1979). This definition was echoed by the *Utah Supreme Court in Western Casualty & Sur. Co. v. Marchant*, 615 P.2d 423, 426 (Utah 1980), in which the court stated that “[i]n general, it can be said that an employee is one who is hired for compensation, for a substantial period of time, to perform duties wherein he is subject to a comparatively high degree of direction and control by the one who hires him.”

In viewing the facts in the light most favorable to the Plaintiff, a reasonable jury could conclude that Dan, due to a divorce, had to quickly move his **personal property, including his kitchen chair**. He temporarily hired his son for a substantial period of time—a entire work day--to assist moving his personal property and paid him a days wages through the D & K payroll account.

Defendant, Dan, will argue that since it presented testimony at trial for the first time that the move allegedly included D & K office property, and since Jake testified that he was paid with a D & K payroll check, that the entire move was per se done for and on behalf of D & K. Dan will further argue that since the move was a D & K operation, equivalent to building cabinets, and since D & K was not a party, that it could raise, also for the first time, the Corporate Shield doctrine. In raising this defense, Dan argues and the trial judge agreed, that even if one office pen was transported in the move, he is, per se, ipso facto, cloaked by the corporate shield and not liable to Plaintiff. This is incorrect.

Although it is true that:

“[A]n officer or director of a corporation is not personally liable for torts of the corporation or of its other officers and agents merely by virtue of holding corporate office, but can only incur personal liability by participating in the wrongful activity.” *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶ 19, 70 P.3d 35.

It is also true that:

“Furthermore, **a corporate officer or director can incur personal liability for his own acts even though the action is done in furtherance of the corporate business.** See *Armed Forces Ins. Exch.*, 2003 UT 14 at ¶ 19, 70 P.3d 35 (Utah 2003).

Therefore pursuant to *Armed Forces Ins. Exch.*, Dan can have **personal liability for his own acts even though the action is done in furtherance of the corporate business.**

In *Bennett v. Huish*, 155 P.3d 917, 931, 932 (UT 2007), the trial and appellate court found that, although Defendant Grant S. Huish was allegedly acting on behalf of a business entity, he was personally liable for Plaintiffs’ damages. In *Bennett*, the Defendants claimed that the Corporate Shield defense cloaked Huish in an impermeable barrier that protected him from incurring personal liability. In ruling otherwise, the Court stated:

[A] corporate officer or director can incur personal liability for his own acts even though the action is done in furtherance of the corporate business. (Citations omitted).

... We conclude that Defendants’ corporate shield defense fails because Huish personally committed acts in breach of his fiduciary duty to Plaintiffs which resulted in damage to Plaintiffs.

....

Moreover, as noted in footnote 15, the *Huish* plaintiffs asserted that because the Corporate Shield defense was not raised by the Defendants in their answer, or at any time prior to trial, it was waived. The Trial Court agreed therewith. Dan, likewise, never raised the Corporate Shield defense in any of his answers. Moreover, URCP Rule 9(1) states that:

A party seeking to allocate fault to a non-party . . . shall file:

(l)(1)(A) a description of the factual and legal basis on which fault can be allocated; and (l)(1)(B) information known or reasonably available to the party identifying the non-party, including name, address, telephone number and employer. . .

(l)(2) The information specified in subsection (l)(1) **must be included in the party's responsive pleading if then known** . . . but in no event later than 90 days before trial.

(l)(3) A party may not seek to allocate fault to another except by compliance with this rule.

URCP Rule 12 (a), (b) and (h) state:

(a) . . . Unless otherwise provided by statute or order of the court, a defendant shall serve an answer . . .

(b) . . . Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto . . .

. . . .

(h) Waiver of defenses. A party waives all defenses and objections not presented either by motion or by answer or reply. . .

Here, Dan never made a Rule 9 designation to allocate any fault to D & K nor did he assert a corporate shield defense as required by UCRP Rule 12.

In conclusion, it was an error for the Trial Court to have concluded that, “there is no credible evidence upon which a juror could conclude that Dan McNeil breached a duty

owed to the plaintiff to secure the load in the truck,” and it was an error for the Trial Court to have concluded that, “there is no evidence upon which a reasonable juror could conclude that Jake McNeil was acting on behalf of Dan McNeil personally.”

II. DUE TO DAN MCNEIL’S DECEPTION TO LAW ENFORCEMENT REGARDING THE DRIVER OF THE VEHICLE, THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PLAINTIFF’S MOTION TO JOIN JAKE MCNIEL AS A PARTY

Prior to trial, under the Discovery Rule and the Unity of Interest doctrine, Plaintiff asked that she be allowed to amend her complaint to add Jake as a Defendant.

A. The Court Should Have Granted the Motion to Amend.

i. Factual Analysis

In this case, the Highway Patrol Report identified Dan as the driver of the car and owner of the chair. TR 151-153, 155, 157, 992, Plaintiff’s proposed trial Exh. 2. Based on this information, Plaintiff filed her complaint against Dan as a defendant. The Plaintiff then took extraordinary measures to serve Dan. She pursued him first in Bluffdale. Then, with information subpoenaed from the Utah Dept. of Public Safety, she attempted to serve Dan at 1518 E. 4500 S. and then at 285 W. 100 S. Heber, Utah. TR 37, 41, 168. Then, she thought she located him in Moab, Utah. TR 41, 51, 160-161.

She then attempted to secure the cooperation of Dan’s auto insurance, Auto-Owners Insurance and then his appointed attorneys. The attorneys at first said they would accept service. TR 37, 47, 53-54, 173, 170-171. She also obtained the Court’s permission to effect alternative service on Dan, at which time Dan’s attorney accepted

service on March 13, 2006. TR 44-49, 56, 58, 62, 63, 173, 175, 177, 179, 215-217, 224, 226, 228, 230 (Aff. Loren M. Lambert ¶¶ 4-10). So, after eight months of diligent effort to track down Dan and then asking the insurance company and its attorneys to accept service, Dan's attorneys finally did so on March 13, 2006. TR 63.

Dan filed an answer on March 27, 2006. Although Dan's Answer was signed on March 22, 2006, it was not mailed until Friday, March 24, 2006 and Plaintiff's counsel did not receive it until March 27, 2006 – only two days before the statute of limitations ran. In his answer, Dan alleged that, “Mr. Jake McNeil . . . **may have** been operating the green ford pickup at the time of the accident and **who may** have been responsible for loading the vehicle.” TR 63, 69-70, 74.

Then, in initial disclosures and discovery, Dan vaguely alleged that Jake, “**may have been driving** the pick-up truck.” He also gave incorrect location information for his son. TR 79, 82, 92, 185-186, 190-192. As a consequence, Plaintiff was justifiably skeptical of Dan's allegation, and therefore sought to take Dan and Jakes' depositions. This could not be done until August 10, 2006, in large part because of Dan's misinformation. TR 80, 90, 102, 104-106, 194-197, 199, 203, 206, 214-221, 237, 239, Depo Jake 3:12-14. Per Dan and his son, Jakes' depositions, it first became apparent that the two would assert that Jake was the driver of the truck from which the kitchen chair fell. TR 205-211. Therefore, after Dan mislead everyone in the accident report that he was the driver, after eight months of trying to serve Dan, after Dan provided

misinformation of his son's whereabouts, and after finally clarifying Dan's equivocal remarks that Jake **may have been driving**, on Sept. 26, 2006, only 36 days after taking their depositions, Plaintiff filed a Motion to Amend her complaint to add Jake as a party defendant. TR 109-123, 109-123.

Dan opposed the Motion and the Trial Court held:

Defendants oppose the motion . . . because it is legally futile, brought four (4) years from the date of the accident . . . and, thus, barred by the . . . statute of limitations . . . [and] the amendment would not relate back in time because there is not identity of interest between Jake and Dan McNeil . . . [since] these individuals do not have the same "legal position."

Finally, argue Defendants, Plaintiff knew of the basis for the claim against Jake before the statute of limitations ran and, yet, failed to move to amend the Complaint for almost six (6) months thereafter.

. . . [T]he Court finds granting the Plaintiff's Motion to Amend . . . is not proper because it is legally futile, being brought four years from the date of the accident. . . [U]nder the reasoning . . . in *Penrose* . . . the Complaint is time barred. . . and the amendment would not relate back because the requisite identity of interest between Jake and Dan McNeil is lacking. TR 242-243, 261-262.

ii. Legal Analysis

a. The Discovery Rule Tolloed the Statute of Limitations

In, *Beaver County v. Tax Commission*, 2006 P.3d 6, 12 (Utah 2006), the Utah

Supreme Court explained:

The discovery rule operates to "toll the period of limitations until the discovery of facts forming the basis for the cause of action," [W]here the party can make "an initial showing . . . that [he] did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitation period." Indeed, we have noted that in Utah "the principle of equitable tolling . . . has been developed almost exclusively through application of the discovery rule." (Citations omitted.)

In *Russell Packard Development, Inc. v. Carson*, 2005 P.3d 741 (Utah 2005), the

Utah Supreme Court analyzed the many rules and principles that allow a tolling of the statute of limitations. It stated:

We have limited the circumstances in which an equitable discovery rule may operate to toll an otherwise fixed statute of limitations period to the following two situations: (1) [inapplicable to this case] . . . and (2) “where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action.” . . . We have previously suggested that these “concealment” and “exceptional circumstances” versions of the equitable discovery rule may apply even where a statute of limitations contains a statutory discovery rule . . .

....

. . . [W]hen a defendant fraudulently causes a plaintiff to delay in bringing a cause of action, the discovery rule balances (1) the policy underlying all statutes of limitations ““to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared,”” . . . , with (2) the policy of “not allowing a defendant who has concealed his wrongdoing to profit from his concealment,” *id.* If we were to look only to whether a plaintiff theoretically could have brought a suit before the limitations period expired without looking to the relative reasonableness or unreasonableness of that action under the circumstances, we would reward a defendant’s fraudulent and deceptive misbehavior by depriving an innocent plaintiff of a reasonable period within which to act. This we refuse to do . . .

....

For the concealment version of the equitable discovery rule to toll a statute of limitations until a plaintiff’s discovery of the facts forming the basis for the cause of action, a plaintiff must demonstrate either (1) [inapplicable to this case] . . . ; or (2) that notwithstanding the plaintiff’s actual or constructive knowledge of the facts underlying his or her cause of action within the limitations period, a reasonably diligent plaintiff may have delayed in filing his or her complaint until after the statute of limitations expired.

In this case, since it was difficult to locate Dan to serve him, since Dan McNeil mislead the Plaintiff by identifying himself as the driver of the vehicle from which the

chair flew, and since Dan then equivocated about his son, Jake's, alleged involvement in the accident and gave incorrect information about his son's residence, it is reasonable that the Plaintiff did not immediately name or seek to name Jake as a defendant until the statute of limitation had run and after the depositions. Therefore, until it became evident that Dan and Jake would claim that Jake was the driver, the statute of limitations was tolled under the discovery rule.

Moreover, the Trial Court never addressed this argument made by Plaintiff (TR 117-123, 121-122) nor did it analyze any of the facts presented to it on Plaintiff's motion. The Court's have held that the Trial Court must make findings on all material issues, and its failure to do so constitutes reversible error "unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'" *Acton v. J.B. Deliran*, 737 P.2d 996, 999 (Utah 1987) (quoting *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983)). In addition, the findings must be sufficiently detailed and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusion on each factual issue presented. *Acton*, 737 P.2d at 999; *Lee v. Lee*, 744 P.2d 1378, 1380 (Utah Ct.App. 1987). Here the Trial Court failed to indicate why the discovery rule did not apply to Plaintiff's motion to amend and therefore it abused its discretion.

b. Is There an Identity of Interest Between Dan and Jake?

Dan will assert that, despite the fact that he enlisted the services of his son, Jake, to move his personal property, they were not engaged in a joint or common enterprise, and

therefore there was no identity of interest that would allow the amendment to relate back to the time the original complaint was filed.

In support of his argument, Defendant will assert, as did the Trial Court, that in *Penrose v. Ross*, 71 P.3d 63 (Ut. App. 2003), “the Court of Appeals determined that an identity of interest only exists if the party named in the amended pleading has the same ‘legal position’ as the party initially named, and it may not be based on a claim that the party (or his insurer) knew of the suit when it was filed.” Defendant will claim that Dan and Jake do not have the same legal position. He will argue that not only will Dan blame Jake for failing to secure his kitchen chair, but that Jake, who is liable only for his own negligence under the Utah Comparative Fault Statute, will most likely assert that Dan was negligent because of his failure to secure the chair. Therefore, Defendant argues:

Since both parties may be expected to point to the other as the only person liable for the negligence, they do not have the same “legal position” with respect to the claim, and therefore there is no identity of interest and the claim does not relate back.

This is an overly broad and simplistic interpretation of *Penrose*, 71 P.3d 631 (Ut. App. 2003). In *Penrose*, on November 17, 2000, just days prior the statute of limitation’s expiration, Penrose filed a complaint for negligence (Original Complaint) against Christopher Ross (**Father/Chris**) and Does 1-5. The Original Complaint in *Penrose* alleged that **Father/Chris**, as the driver of the vehicle, and Does 1-5, failed to keep a proper look-out and negligently caused an accident. On December 27, 2000, after the statute of limitations had run, Penrose filed an Amended Complaint, identifying the

Father's son, **Son/Ross**, as the person who negligently drove the car. Aside from substituting the identity of the negligent party, the Amended Complaint was identical to the Original Complaints.

On January 5, 2001, **Father/Chris** filed an affidavit denying he was the driver, and including “**a copy of the police report [Highway Patrol Report] that identified [Son]Ross [again, his son] as the driver of the car that collided with Penrose.**”

Pursuant to a Motion for Summary Judgment, **Son/Ross** successfully asserted before the trial court and on appeal that the statute of limitations barred the action against him.

In this case, unlike ***Penrose***, Plaintiff, Jen Ottens, did not have a police report that correctly identified Jake as the driver of the vehicle. The Highway Patrol Report identified Dan as the driver. Moreover, it appears Dan was in fact driving the truck, or he intentionally misled the police regarding the truck's driver. In his deposition, Jake indicated that Dan told him that he was going to go speak with the police to clear up the situation. Jake TT 12:16-25, 13:1-16; TR 205-208 [Depo Jake 8:19-25, 9:1-5, 15:13-24, 17:2-18]. Despite the Highway Patrol Report and Jake's testimony, Dan denied this in his deposition. TR 209-211 [Depo Dan 20:14-18]. This would tend to indicate that Dan did speak with the police and did represent, either correctly or falsely, to the police that he was the driver – therefore, it was reasonable that Plaintiff identified Dan as the driver of truck from which the kitchen chair fell.

In its analysis, the court in *Penrose* stated:

Utah courts have allowed the relation back of amendments to complaints incorporating newly named parties in two types of cases: (1) in so called “misnomer cases,” and (2) where there is a true “identity of interest.”

....

... [I]t cannot be argued that Penrose merely made a technical mistake in naming Father as the negligent driver, because, as evidenced by the police report, **Penrose was given notice at the scene of the accident that [Son/]Ross was the driver and Father was the owner of the vehicle.**

Contrary to *Penrose*, Plaintiff, Jen Ottens, can argue that she made “a technical mistake in naming [Dan] as the negligent driver,” because the Highway Patrol Report named **Father/Dan** as both the driver and the owner of the vehicle.

In its analysis of “identity of interest,” the court in *Penrose* at 635-636, stated:

Black’s Law Dictionary defines “identity” as “[t]he identical nature of two or more things.” Webster’s defines identity as “sameness of essential or generic character in different instances” and “the condition of being the same with something described or asserted.” Therefore, an identity of interest requires parties to have the “same” interest. This definition is supported by the Utah Supreme Court in *Attorney General v. Pomeroy*, . . . In *Pomeroy*, the issue before the court was whether a final judgment as to one issue in a case with multiple parties was effective as to all parties for the purpose of an appeal. The court applied the “identity of interest” test, which it defined as “whether the determination of the issues as to any Defendant depends on or affects the determination of the issues as to the other Defendants.”

Similarly, in *Nunez v. Albo*, . . . this court determined that an identity of interest existed between **an employer and an employee**, permitting an amendment to the complaint adding the employer as a party to the complaint. . . In determining whether the amended complaint related back to the original complaint, this court analyzed Rule 15(c) and cases outlining the exception permitting the addition of parties where an identity of interest is established.

We held that an identity of interest existed between the Hospital and the physician because the cause of action “‘arose out of the conduct, transaction, or occurrence set forth ... in the original pleading.’” This court also noted that the Hospital had potential vicarious liability as the employer of the physician. Further, the University provided legal counsel for the physician, asserting that the physician was acting within the scope of his employment by the Hospital and was entitled to

the protections of the Governmental Immunity Act.

In *Nunez*, any disposition of the case against the physician would necessarily affect the Hospital's liability. Thus, an identity of interest existed because the legal position and defenses of the two parties were the "same." (Citations omitted).

Similarly, as in *Nunez v. Albo*, whether or not Dan paid his son, Jake, to help him move his kitchen chair, their relationship at the time was identical to that of an employer and employee. Therefore, "an identity of interest existed between" them, "permitting an amendment to the complaint adding the [employee] as a party to the complaint." This is true because, despite the fact that Dan and Jake may point fingers at each other (which does not preclude the existence of an identity of interest), they, in fact, have an "identity of interest exist[ing] between" them just as "the Hospital" in *Nunez* had "an identity of interest with the physician because the cause of action 'arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading.'" It is therefore irrelevant that, in *Nunez*, the Hospital could have claimed that the doctor was an independent contractor and solely negligent, or the doctor could have claimed the Hospital was somehow solely negligent.

This is true because, as in *Nunez*, the "court [should] also [note] that [Dan has] potential vicarious liability as the employer of [Jake McNeil his son]." Moreover, this is true and consistent with in *Nunez*, because, "the [insurance company will most likely provide] legal counsel for [Jake McNeil], asserting that [he] was acting within the scope of his employment [with Dan] and [is] entitled to the [same defenses that neither was

liable because as asserted by Defendant, it is the other Defendants who failed to come to a complete stop behind Ms. Jen Ottens' car that caused the accident]. Hence, as in *Nunez*, "any disposition of the case against the [Jake McNeil] would necessarily affect the [Dan McNeil's] liability. Thus, an identity of interest [exists] because the legal position and defenses of the two parties [are] the same," even though they may have other defenses to allow them to blame each other.

Although the relationship of father to son between Dan and Jake is "on all fours" with *Penrose*, as is the allegation that Dan was not the driver, the similarities stop there. The differences are, nonetheless, substantial and material. In *Penrose*, the proper party (the son, Ross) was identified in the police report, and the Father and Ross, the son, were not engaged in any common enterprise in which the father was directing the activities of the son and participating in their execution. Hence, in applying the law to the facts, in *Penrose* the court noted that since, "A disposition as to either party does not affect the claims or defenses available to the other party. Thus, where they do not have the 'same' legal interest there is no identity of interest." *Id.* at 636-637. This is not the case here. The substantiated fact that the father, Dan, was directing the activities of his son, Jake, in loading and moving his personal property creates an identity of interest because of their common enterprise. And, as to this common enterprise, they have similar defenses and claims. Most importantly, the cause of action against them both arises "out of the conduct, transaction, or occurrence set forth . . . in the original pleading." *Also see*,

Conder v. Hunt, 2000 UT App 105, ¶ 9, 1 P.3d 558 (noting that claim preclusion applies in limited exception for those in privity with one another evaluated by the parties' identity of interest); *James Constructors, Inc. v. Salt Lake City Corp.*, 888 P.2d 665, 669 (Utah Ct.App.1994) (stating an identity of interest exists between principal and surety in the context of indemnity).

Moreover, as noted in footnote 6 in *Penrose, Nunez v. Albo*, 53 P.3d 2, also addressed Rule 15(a) of the Utah Rules of Civil Procedure requiring that amendments should be permitted "when justice so requires." Here, in view of the incorrect information on the Highway Patrol Report, justice tips the scales in Plaintiff's favor. Plaintiff should not be faulted for the delay in taking the depositions of Jake and Dan, so that their liability could be established and so that an appropriate Motion to Amend could be filed based upon the information these individuals provided.

Based upon the foregoing arguments, the Plaintiff requests this Court overturn the Trial Court and grant her Motion to Amend the complaint to add Jake as a party.

III. THE TRIAL COURT ERRED WHEN IT ALLOWED DAN TO ASSERT HIS CORPORATE SHIELD DEFENSE AND DENIED PLAINTIFF'S MOTION TO ADD D & K AS A PARTY DEFENDANT

As stated above in Section I, Dan asserted at trial, for the first time in the proceedings, that he was shielded from liability because D & K was transporting his kitchen chair to his condominium and not him personally. Given the late assertion of this defense at trial, Plaintiff moved either strike this defense or to amend her complaint to

add D & K as a party.

In response thereto the Trial Court found that adding D & K would have violated its rights under both the US and State Constitutions and would be prejudicial. TR 985-986. During oral argument the trial judge also erroneously stated: “You might reach Dan if you had sued D & K Inc. And you pierced the corporate veil. But you’ve got to have both steps.” TT 9:11-12. As was argued above and as shown below, this is not the law.

As set forth above in *Penrose* and *Nunez*, if Dan was acting on behalf of D & K in moving his kitchen chair, then his relationship at the time was identical to that of D & K. Therefore, there was “an identity of interest exist[ing] between” him and D & K, “permitting an amendment to the complaint adding the [employer] as a party to the complaint.” This is true because, despite the fact that Dan and D & K may point fingers at each other (which does not preclude the existence of an identity of interest), they, in fact, have an “identity of interest exist[ing] between” them just as “the Hospital” in *Nunez* had “an identity of interest with the physician because the cause of action ‘arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading.’” This is true because, as in *Nunez*, the “court [should] also [note] that [D & K has] potential vicarious liability as the employer of [Dan].” Moreover, this is true and consistent with *Nunez*, because, “the [insurance company will most likely provide] legal counsel for [D & K], asserting that [Dan] was acting within the scope of his employment [with D & K] and [is] entitled to the [same defenses that neither was liable because as asserted by Dan, it is

the other Defendants who failed to come to a complete stop behind Ms. Jen Ottens' car that caused the accident and it was Jake, an independent contractor that failed to secure the kitchen chair]." Hence, as in *Nunez*, "any disposition of the case against the [Dan] would necessarily affect the [D & K's] liability. Thus, an identity of interest [exists] because the legal position and defenses of the two parties [are] the same," even though they may have other defenses to allow them to blame each other.

IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED FROM EVIDENCE THE FACT THAT DAN HAD BEEN ISSUED A CITATION IN THE CASE FOR FAILURE TO SECURE HIS LOAD AND PLED GUILTY AND PAID THE CITATION

As set forth above, the evidence suggests that, despite his denial, Dan was the driver of the truck from which the chair flew. As further proof of this fact, Dan was cited for "Failure to Secure his Load" and pled guilty and paid a fine thereon. TR 559-560, 780 (Dan Depo. 27-28). This evidence tends to prove that Dan drove the vehicle. Although evidence regarding the issuance of a traffic citation is generally not admissible, under the circumstances of this case, this evidence should be admitted as an admission against interest to show that Dan drove the truck.

The trial court is granted broad discretion to admit or exclude evidence, and its decision thereon will only be disturbed if there is an abuse of discretion. *State v. Whittle*, 1999 UT 96, ¶ 20, 989 P.2d 52. Thus, a trial court's ruling on evidence will not be reversed unless the ruling "was beyond the limits of reasonability." *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 57, 82 P.3d 1076 (quoting *State v. Hamilton*, 827 P.2d 232, 239-40

(Utah 1992)).

While the late UCA §§ 41-6-40, 41-6-170 indicated that traffic citations cannot be used to attack credibility, they do not prohibit the admission thereof for other purposes like establishing ownership and control. "Under rule 403 of the Utah Rules of Evidence, the trial court should only exclude relevant evidence if its 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *State v. Vargas*, 2001 UT 5, ¶ 51, 20 P.3d 271 (quoting *State v. DeCorso*, 1999 UT 57, ¶ 48, 993 P.2d 837).

In this case, given Dan's obfuscation and given that Dan and Jake could have arguably manipulated the evidence, the its probative value of this evidence is not substantially outweighed by the danger of unfair prejudice. Therefore, in this case it was an abuse of discretion not to allow this.

V. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED INTO EVIDENCE INFORMATION REGARDING WHEN PLAINTIFF HIRED AN ATTORNEY

Dan argued that since Plaintiff allegedly retained an attorney "very quickly" after the accident that this fact somehow proves that her medical care and treatment, and her claim of disability are excessive and grossly exaggerated. This argument would require a juror to base such an inference upon supposition and prejudice against individuals that hire attorneys. Dan's argument thereon suggests that Plaintiff retained an attorney not to protect her legal rights, but to plot with her attorney regarding how to run the bill up and

dishonestly fabricate a case against Dan. Aside from the fact that this did not happen, this inference is offensive. Just as the Defendant had a right to an attorney at the very onset of any potential litigation, so did Plaintiff.

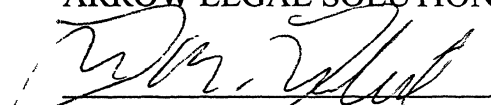
When, where and how a plaintiff hires an attorney is irrelevant to the underlying issues. To rule otherwise would put a plaintiff in a damned-if-you-do-damned if-you-don't situation. Pursuant to URE 401, "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, the fact of whether or not Plaintiff had an attorney was not relevant to any factual dispute and Dan's counsel should not have been allowed to question Plaintiff about it.

CONCLUSION

It is respectfully requested that this matter be remanded for trial with the direction to the Trial Court to add Jake McNeil and D & K as parties, and to allow the issue of Dan McNeil's liability to be submitted to a jury. It is further requested that the Court allow admission into evidence to the jury the fact that Dan was issued a citation for failure to secure his load, to which he pled guilty and paid a fine, and disallow Dan to question the Plaintiff about retaining her counsel.

DATED: Oct 5, 2009

ARROW LEGAL SOLUTIONS GROUP, PC



Loren M. Lambert

Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed, first-class postage prepaid, a true and correct copy of the foregoing document on this 6 day October to:

Richard Glauser
Michael Wright
SMITH & GLAUSER
7351 South Union Park, #200
Salt Lake City, UT 84047

_____

ADDENDUM

- A. (Case of central importance)
- B (Court's Directed Verdict)
- C. (Court's Denial Motion to Amend)
- D. Ruling on Motion In Limine

ADDENDUM

A

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Celso Magana and Yolanda Magana, No. 20080629
Plaintiffs and Petitioners,

v.

Dave Roth Construction,
ABM Crane Rental, and
John Does I-V,

F I L E D

Defendants and Respondent. July 21, 2009

Third District, Salt Lake
The Honorable Kate A. Toomey
No. 050914998

Attorneys: Daniel F. Bertch, Kevin K. Robson, Salt Lake City,
for petitioners
Peter H. Barlow, Ryan P. Atkinson, Salt Lake City,
for respondent

On Certiorari to the Utah Court of Appeals

DURRANT, Associate Chief Justice:

INTRODUCTION

¶1 In the spring of 2005, Celso Magana worked for an independent contractor that subcontracted with Dave Roth Construction ("DRC") to frame the walls for a planned restaurant. While Magana was working at the construction site, a load of trusses slipped from its rigging during the off-loading process and fell on Magana. As a result, Magana suffered spinal injuries and is now paraplegic.

¶2 Magana filed a negligence claim against DRC and ABM Crane Rental, asserting, in part, that DRC's superintendent, Brett Campbell, negligently rigged the bundle of trusses that fell on Magana. DRC later moved for summary judgment, claiming that Campbell did not actively participate in the off-loading of

the trusses and, therefore, DRC was shielded from liability by the retained control doctrine. In response, Magana argued liability under two negligence theories: retained control and direct negligence.

¶3 The district court granted DRC's motion for summary judgment, dismissing Magana's negligence claim against DRC. The court of appeals affirmed the district court's decision. Both courts determined that even if Campbell directly participated in rigging the trusses, he did not actively participate in the rigging process in such a way as to retain sufficient control to expose DRC to liability for the negligent rigging of the trusses. Neither court addressed Magana's direct negligence argument outside the context of the retained control doctrine.

¶4 We granted certiorari on the question of whether the court of appeals erred in its analysis of Magana's active participation argument. For the reasons discussed below, we hold that (1) the court of appeals correctly analyzed Magana's retained control argument, but (2) erred in failing to consider Magana's direct negligence argument outside the context of the retained control doctrine. Accordingly, we reverse the court of appeals' decision, and we remand this case to the district court to further consider Magana's direct negligence claim.

BACKGROUND

¶5 Because we are reviewing a grant of summary judgment, we view "the facts and all reasonable inferences drawn therefrom in the light most favorable" to Magana, the nonmoving party.¹ Accordingly, we recount the facts in the light most favorable to Magana.

¶6 The owner of a future restaurant hired DRC as the general contractor on the construction project. As general contractor, DRC was responsible for overseeing the construction of the building, purchasing building materials for the project, and securing necessary subcontractors. DRC hired Brett Campbell to superintend and manage the project. Among other duties, Campbell's job description included inspecting and ensuring quality control of the work completed by the subcontractors, including Circle T Construction ("Circle T").

¹ R&R Indus. Park, L.L.C. v. Utah Prop. & Cas. Ins. Guar. Ass'n, 2008 UT 80, ¶ 18, 199 P.3d 917 (quoting Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600).

¶7 DRC subcontracted with Circle T to provide "framing labor and crane work." Circle T conducted most of the framing work, and Campbell and DRC participated in related tasks. For example, Campbell worked with Circle T's owner, Ted Alexander, to determine where to place the walls, and Campbell snapped the lines marking their location. Further, DRC supplied the lumber and arranged for the shipping of the framing materials to the project site. In addition, Magana claims that DRC was responsible for determining where on the construction site the lumber should be placed.

¶8 On the day before the accident, Campbell notified Alexander that truss joists were arriving that day and that Circle T was responsible for off-loading the joists by crane. Alexander later learned that the crane company Circle T normally used was not available and notified Campbell. Campbell offered to help Alexander find another crane company, and both agreed to start calling crane companies. Campbell eventually found an available crane company and scheduled it to off-load the truss joists the following day.

¶9 The next morning, Campbell "got Ted Alexander and the truck driver [of the truck carrying the trusses] together to work out the exact place to unload the trusses." The crane showed up later that morning, and Alexander directed the crane's operator where to set up the crane and where to off-load the trusses. After the crane was set up, Alexander and Campbell began off-loading the trusses. Before lifting the first load of trusses from the truck bed, the bundles were rigged to a hoist. The crane off-loaded the first bundle without any help or direction from Campbell, after which Circle T employees removed the rigging straps and returned them to Alexander.

¶10 Magana testified that after the first bundle of trusses was off-loaded, he saw Campbell on the bed of the flatbed truck with Alexander, and both were placing straps around the second bundle of trusses.

¶11 While this second bundle was being carried to the off-loading site, the bundle became unbalanced and fell on Magana. As a result, Magana suffered spinal injuries and is now paraplegic. When the load fell on Magana, Campbell was on the truck bed helping Alexander unload boxes of blocking.

¶12 The off-loading process was solely Circle T's responsibility. Campbell and Alexander both testified that even if Campbell had helped in rigging the trusses, he did not retain any control over the process or direct, instruct, or control the manner in which the truss joists were rigged or off-loaded. Both

also testified that if Campbell had assisted Alexander to rig the trusses, Alexander would have retained complete control over Campbell's rigging work.

¶13 ABM Crane Rental did not bill either DRC or Circle T for its work on the date of the accident. But the owner of the crane company stated that he would have billed DRC for the work, not Circle T.

¶14 Following the accident, Magana filed a complaint alleging that ABM Crane Rental's and DRC's negligence caused Magana's injuries. Magana subsequently settled with ABM Crane Rental. DRC moved for summary judgment. In support of the motion, DRC argued that Circle T, not Campbell, controlled the manner in which the trusses were rigged and off-loaded and, therefore, DRC was not liable for Campbell's negligence, even if Campbell were the one who negligently rigged the trusses.

¶15 In response, Magana asserted two negligence theories. First, Magana made a direct negligence argument. Specifically, Magana claimed that Campbell directly helped rig the second load of truss joists and that there was an issue of fact as to whether Campbell was the one who "failed to safely rig the second load of truss joists." Magana also made this argument before the court of appeals and does so before us as well.

¶16 Second, Magana argued that because Campbell (1) was responsible for on-site safety, (2) determined where to place the walls and snapped a line marking their location, (3) hired the crane company, (4) directed the crane where to set up and off-load the trusses, and (5) directly participated in rigging the second load, DRC actively participated in Circle T's work and was liable for Magana's injuries under the retained control doctrine.

¶17 The district court granted DRC's motion and determined that the central issue in the matter was whether DRC, through Campbell, actively participated in the off-loading process. The court found that DRC did not actively participate, and, based on that finding, the court granted the summary judgment motion. Magana appealed the decision to the Utah Court of Appeals, which likewise held that Magana failed to show that Campbell exercised sufficient control over Alexander or Circle T to meet the active participation standard.²

¶18 Magana subsequently filed a petition for certiorari review, which we granted. Pursuant to our jurisdiction under

² Magana v. Dave Roth Constr., 2008 UT App 240U.

Utah Code section 78A-3-102(3)(a) (2008), we now review the court of appeals' decision and determine whether the court of appeals correctly applied the active participation standard to Magana's claims.

STANDARD OF REVIEW

¶19 On certiorari, we review the court of appeals' decision for correctness.³

ANALYSIS

¶20 We hold that the court of appeals' analysis of the active participation standard, as it relates to DRC's argument that it did not retain control, was correct. But the active participation standard does not apply to Magana's direct negligence argument. Because a question of fact remains regarding Campbell's direct negligence in causing Magana's injuries, the court of appeals erred in affirming the district court's dismissal of Magana's negligence claim against DRC.

I. THE COURT OF APPEALS CORRECTLY APPLIED THE ACTIVE PARTICIPATION STANDARD

¶21 Magana contends that DRC, through its agent Campbell, is liable for the negligence that caused Magana's injuries because Campbell "actively participated" in the construction project. We disagree. Active participation is a term of art that describes the level of control necessary to find an employer liable for its contractor's actions. In this case, DRC and its agent Campbell are the employer while Circle T and its agent Alexander are the contractor as those terms are used in applying the active participation standard.⁴

³ Massey v. Griffiths, 2007 UT 10, ¶ 8, 152 P.3d 312.

⁴ For purposes of the general non-liability rule, the terms "employer" and "independent contractor" are used generally. For example, the term "employer" could mean an owner who hires a contractor to oversee the construction of a building, in which case the contractor would be considered the "independent contractor." The term "employer" could also mean a contractor who hires a subcontractor to complete a specific part of the construction, in which case the subcontractor would be the "independent contractor." In the current case, the employer is DRC and the contractor is Circle T.

¶22 "Utah adheres to the general common law rule that 'the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.'"⁵ "This general rule recognizes that one who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety of the manner or method of performance implemented."⁶ By the rule's plain language, the scope of the rule is limited to circumstances in which the direct act or omission of the contractor, not the employer, causes an injury.

¶23 Despite the general non-liability rule, the employer of a contractor remains liable for the contractor's actions when the employer "'participate[s] in or control[s] the manner in which the contractor's work is performed,' and therefore 'owes [a] duty of care concerning the safety of the manner or method of performance implemented.'"⁷ This exception to the general non-liability rule is called the retained control doctrine, and it is applied narrowly in "'unique circumstance[s] where an employer of an independent contractor exercises enough control over the contracted work to give rise to a limited duty of care.'"⁸

¶24 In determining whether an employer exercised sufficient control to create liability under the retained control doctrine, we apply the active participation standard.⁹ Under that standard, an employer has a duty to ensure the safety of its contractor's work where the employer "actively participates" in the contractor's work.¹⁰ An employer actively participates if the employer "'directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods

⁵ Thompson v. Jess, 1999 UT 22, ¶ 13, 979 P.2d 322 (quoting Restatement (Second) of Torts § 409 (1965)).

⁶ Id.

⁷ Beqaye v. Big D Constr. Corp., 2008 UT 4, ¶ 8, 178 P.3d 343 (alterations in original) (quoting Thompson, 1999 UT 22, ¶ 13).

⁸ Id. ¶ 8 (quoting Thompson, 1999 UT 22, ¶ 15).

⁹ Id. ¶¶ 8-9.

¹⁰ Thompson, 1999 UT 22, ¶ 19.

by which the work is to be accomplished.'"¹¹ In contrast, an employer does not actively participate in an activity when the employer merely exercises "'a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.'"¹²

¶25 Accordingly, the retained control doctrine and the accompanying active participation standard establish a two-step analysis. The first step is to determine whether the employer actively participated in the contractor's work and, therefore, had a limited duty of care to ensure that the work was conducted safely. When an employer actively participates, the next step is to determine whether the employer breached that duty of care.

¶26 Magana asserts that DRC is liable for Magana's injuries because Campbell actively participated by: (1) snapping the lines for the walls and determining where to place them; (2) deciding with Circle T where to off-load the lumber shipped to the site; (3) hiring the crane company that assisted in the off-loading; (4) bearing responsibility for on-site safety; and (5) directly participating in rigging the load of truss joists that fell on Magana. The first three facts that Magana relies upon fail to meet the active participation standard because they exceed the scope of the injury-causing activity. The fourth fact fails to meet the standard because a duty over general on-site safety cannot establish active participation. Finally, the fifth fact fails to meet the standard because it does not demonstrate that Magana retained control over the means and methods of rigging the trusses.

A. Scope of the Injury-Causing Activity

¶27 Under the retained control doctrine, an employer is liable for the actions of an independent contractor when the employer exerts sufficient control over the independent contractor "such that [the contractor cannot] 'carry out the injury-causing aspect of the work' in its own way."¹³ An aspect

¹¹ Begaye, 2008 UT 4, ¶ 9 (emphasis omitted) (quoting Thompson, 1999 UT 22, ¶ 19).

¹² Thompson, 1999 UT 22, ¶ 20 (quoting Restatement (Second) of Torts § 414 cmt. c (1965)).

¹³ Begaye, 2008 UT 4, ¶ 11 (emphasis added) (quoting (continued...))

of the work constitutes an injury-causing aspect when the aspect is a legal cause of the plaintiff's injuries. An event is the legal or proximate cause of the plaintiff's injury when the event "in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause--the one that necessarily sets in operation the factors that accomplish the injury.'"¹⁴

¶28 Magana was injured when a load of trusses slipped from their straps and fell from the crane that was carrying them, landing on Magana. The rigging process involved strapping the load of trusses to the crane. Neither Campbell's snapping the lines for the walls and determining where to place them, his deciding with Circle T where to off-load the lumber shipped to the site, nor his hiring the crane company that assisted in the off-loading was the legal cause of Magana's injuries. Each of the above listed activities occurred prior to the rigging of the load of trusses, which rigging constituted an efficient intervening cause of Magana's injuries. Further, Magana fails to offer any explanation or theory as to how any of the above stated actions relate to off-loading the trusses. Accordingly, each falls outside the scope of the injury-causing aspect of Circle T's work and, therefore, fails to show that DRC, through Campbell, actively participated in the process.

B. General Responsibility for On-Site Safety

¶29 Only Campbell's general responsibility for on-site safety spanned the period during and after the load was rigged. Yet we have held that a general obligation to oversee safety on a project "does not equate to exerting control over the method and manner of the injury-causing aspect of [the sub-contractor's] work."¹⁵ The same is true even where the general contractor has

¹³ (...continued)
Thompson, 1999 UT 22, ¶ 21).

¹⁴ Mitchell v. Pearson Enters., 697 P.2d 240, 245-46 (Utah 1985) (quoting State v. Lawson, 688 P.2d 479, 482 n.3 (Utah 1984)).

¹⁵ Begaye, 2008 UT 4, ¶ 5 n.2; see also Thompson, 1999 UT 22, ¶ 24 (refusing to find an employer liable for the acts of an independent contractor where the extent of the employer's control "amounted merely to control over the desired result" of a project).

closely monitored on-site safety.¹⁶ In support of this rule, we have noted that "[p]enalizing a general contractor's efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety."¹⁷ Therefore, Campbell's general responsibility for on-site safety does not amount to actively participating in an injury-causing aspect of the work.

C. Retaining Control of the Means and Methods of the Work

¶30 Finally, Magana asserts that DRC is liable for Magana's injuries under the retained control doctrine because Campbell actively participated by assisting Alexander in rigging the load of truss joists that fell on Magana. We disagree.

¶31 Under the retained control doctrine, the employer must "'direct[] that the contracted work be done by use of a certain mode or otherwise interfere[] with the means and methods by which the work is to be accomplished.'"¹⁸ In other words, this standard requires that an employer "exert such control over the means utilized that the contractor cannot carry out the injury-causing aspect of the work in his or her own way."¹⁹ Thus, the question of whether an employer actively participated is not simply whether an employer participated in an injury-causing activity, but whether the employer controlled the means and methods by which the injury-causing activity was performed.²⁰

¶32 As we noted in an earlier decision, the Arizona Supreme Court's decision in Lewis v. N.J. Riebe Enterprises, Inc.²¹ illustrates the degree of control necessary to meet the active

¹⁶ Begaye, 2008 UT 4, ¶ 11 n.4.

¹⁷ Id. (quoting Martens v. MCL Constr. Corp., 807 N.E.2d 480, 490 (Ill. App. Ct. 2004)).

¹⁸ Id. ¶ 9 (emphasis omitted) (quoting Thompson, 1999 UT 22, ¶ 19).

¹⁹ Thompson, 1999 UT 22, ¶ 21.

²⁰ Id. ¶ 20 (quoting Restatement (Second) of Torts § 414 cmt. c (1965)).

²¹ 825 P.2d 5, 7-8 (Ariz. 1992).

participation standard.²² In Lewis, a general contractor ordered a subcontractor to reinstall a roof using a different method than that generally used by the subcontractor.²³ The contractor's method was faster but less safe than that normally used by the subcontractor.²⁴ Employing the new method resulted in numerous sheets of plywood lying unfastened on top of the roof's beams.²⁵ One of the subcontractor's employees later stepped on one of the loose sheets and fell through the roof.²⁶ The Arizona Supreme Court held that, under these facts, the contractor interfered with the subcontractor's normal method of performing the work and, therefore, was subject to retained control liability.²⁷ We agreed and held that this was the degree of control necessary to meet our active participation standard.²⁸

¶33 Applying this standard to the case at hand, we affirm the court of appeals' conclusion that Campbell did not actively participate in rigging the load of trusses.

¶34 The undisputed evidence shows that Circle T, through its agent Alexander, controlled the off-loading process. Alexander decided where to place the truss joists and was solely responsible for the method and means used to off-load the trusses. Both Campbell and Alexander testified that, even if Campbell helped rig the second load, he did not direct, instruct, or control the manner in which Circle T conducted the operation. Magana did not contest their testimony. Rather, he suggests that by participating in rigging the second load, Campbell actively participated in off-loading the trusses. However, participation alone is not sufficient to show active participation for purposes of the retained control doctrine. Because Magana failed to offer any testimony or other evidence supporting a claim that Campbell directed or controlled the manner in which Circle T off-loaded the trusses, his argument fails.

²² Thompson, 1999 UT 22, ¶ 22.

²³ Id. (citing Lewis, 825 P.2d at 7-8).

²⁴ Id.

²⁵ Id.

²⁶ Id. (citing Lewis, 825 P.2d at 7-8).

²⁷ Id. ¶ 23 (citing Lewis, 825 P.2d at 14-15).

²⁸ See id. ¶¶ 22, 24.

¶35 In sum, the court of appeals correctly held that DRC, through Campbell, did not actively participate for purposes of the retained control doctrine in off-loading the trusses when he determined where to place the walls, snapped the lines to mark the location of the walls, hired the crane company, decided with Circle T where to place the trusses, bore responsibility for on-site safety, or helped Alexander rig the second load of trusses. Each of these activities either exceeds the scope of the injury-causing activity or fails to show that DRC exercised sufficient control over Circle T's work. Accordingly, DRC did not owe Magana a duty to ensure that Circle T conducted the off-loading process safely and is not liable under the retained control doctrine for Magana's injuries.

II. THE RETAINED CONTROL DOCTRINE DOES NOT IMMUNIZE A CONTRACTOR FROM ITS OWN NEGLIGENT ACTS

¶36 We now turn to Magana's direct negligence theory. Although the court of appeals correctly held that Campbell's assistance in rigging the second load of trusses did not constitute retaining control of the subcontractor's actions, the court erred in affirming the dismissal of Magana's negligence claim. The court made this error because it only considered Magana's negligence claim under the retained control doctrine. The court failed to separately consider Magana's claim under the direct negligence theory that Magana also advanced.

¶37 The retained control doctrine is separate and distinct from a direct negligence theory. Specifically, the retained control doctrine does not apply when a plaintiff alleges that an employer's own actions were negligent. Rather, the doctrine is limited to circumstances where the plaintiff alleges that the employer of a contractor is liable for the contractor's negligence because the employer retained sufficient control over the contractor's actions to owe the plaintiff a duty of care regarding the contractor's actions.²⁹ Likewise, the common law general non-liability rule only recognizes that employers are not

²⁹ Begaye v. Big D Constr. Corp., 2008 UT 4, ¶ 8, 178 P.3d 343.

liable for the actions of their contractors.³⁰ The rule does not speak to an employer's liability for its own actions.³¹

¶38 Once an employer goes beyond mere direction or control of the contractor's work and directly acts in such a way that causes an injury, the employer may be liable for its own direct negligence. It is not a defense that the employer was conducting the work of the independent contractor when the employer caused the injury. Simply because an employer submits to the means and methods chosen by the contractor does not change the fact that the employer remains the contractor's employer. If while assisting the contractor the employer were to decide to change the means and methods of the work, the employer would be at liberty to do so.³² Accordingly, we conclude that an employer remains liable for its own direct actions, even if the employer is assisting its contractor and acting according to the means and methods that the contractor has prescribed.

¶39 Magana testified that he observed Campbell and Alexander both rigging the load of trusses that subsequently slipped and fell on Magana.³³ DRC accepts this fact as true for

³⁰ Thompson v. Jess, 1999 UT 22, ¶ 13, 979 P.2d 322 ("'[T]he employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.'" (emphasis added) (quoting Restatement (Second) of Torts § 409 (1965))).

³¹ See W. Page Keeton et al., Prosser and Keeton on the Law of Torts 510 (1984) ("Quite apart from any question of vicarious responsibility, the employer may be liable for any negligence of his own in connection with the work to be done.").

³² See, e.g., Thompson, 1999 UT 22, ¶¶ 22-23.

³³ DRC contends that Magana's testimony regarding Campbell rigging the trusses is inconsistent and should, therefore, be disregarded. We disagree.

In Webster v. Sill, we explained that "when a party takes a clear position in a deposition, that is not modified on cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy." 675 P.2d 1170, 1172-73 (Utah 1983).

Magana's deposition testimony was unclear and his subsequent affidavit provided a sufficient explanation of the discrepancy. In his deposition, Magana first testified that he saw someone

(continued...)

purposes of its summary judgment motion. Whether Campbell indeed assisted in the rigging of the load of trusses that slipped and fell on Magana is a question of fact regarding Campbell's direct negligence. Accordingly, the court of appeals erred in affirming the district court's grant of summary judgment.

CONCLUSION

¶40 The court of appeals correctly held that DRC, through its agent Campbell, did not retain control of the off-loading of the truss joists by determining where to place the walls of the restaurant, deciding with Circle T where to off-load the lumber on-site, hiring the crane company that assisted in the off-loading, bearing responsibility for on-site safety, and directly participating in rigging the second load of truss joists. In each instance, Magana's claims either exceeded the scope of the injury-causing aspect of Circle T's work or failed to meet the active participation standard. But the active participation standard does not apply to Magana's direct negligence theory. By asserting that Campbell himself negligently rigged the truss joists, Magana's negligence claim exceeds the scope of the retained control doctrine because the assertion relates to Campbell's acts, and not the acts of Circle T. Further, Magana's testimony that he witnessed Campbell rig the second load is sufficient to create a factual issue as to direct negligence. Therefore, we reverse the court of appeals' decision and remand this case to the district court for further proceedings consistent with this opinion.

¶41 Chief Justice Durham, Justice Wilkins, Justice Parrish, and Justice Nehring concur in Associate Chief Justice Durrant's opinion.

(...continued)

helping Alexander rig the second load, and then changed his testimony by stating he was not sure whether he saw someone helping. This inconsistency within the testimony itself suggests that his position was unclear. During cross-examination, Magana modified his statement by stating that someone did help Alexander rig the second load. In a subsequent affidavit, Magana explained that in regard to his answer that he was not sure whether he saw someone help rig the load, there was either a mis-translation or he had misunderstood the question. Under Webster this is a sufficient explanation of the discrepancy such that we decline to disregard Magana's testimony.

ADDENDUM

B

IMAGED

Richard K. Glauser, #4324
Michael W. Wright, #6153
SMITH & GLAUSER, P.C.
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FILED DISTRICT COURT
Third Judicial District

FEB 17 2009

ENTERED IN REGISTRY
OF JUDGMENTS

SALT LAKE COUNTY

Deputy Clerk

Attorneys for Defendant McNeil

DATE 02/18/09

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JENNIFER OTTENS,

Plaintiff,

v.

NICKOLAS COLEMAN, an individual
and DAN MCNEIL, an individual

Defendants.

)
)
) **JUDGMENT ON DIRECTED
VERDICT**
)

) Civil No. 050911123
)

) Judge Robert K. Hilder
)
)

The above matter came on regularly for trial on December 15, 2008. Plaintiff was present personally and represented by her attorney, Loren Lambert. Defendant was present personally and represented by his counsel, Richard K. Glauser.

Voir Dire was conducted by the court and by both counsel. A jury was duly empaneled. Both parties presented opening statements. Plaintiff called witnesses and elicited testimony and presented exhibits.

The trial continued on Tuesday, December 16, 2008 and Wednesday, December 17, 2008. Both parties presented evidence by elicited testimony and documents. On December 17, 2008, the parties stipulated that all evidence regarding liability had been presented and that the court could proceed to hear post trial motions with regard to liability issues.

Judgment on Directed Verdict @J



Post trial motions were heard on Thursday, December 18, 2008. The court, having heard argument of counsel and having carefully considered all of the evidence in this case pertaining to issues of liability and being fully advised in the premises;

NOW, orders as follows:

1. Plaintiff's oral motion to admit into evidence a statement authored by unknown individuals but alleged by plaintiff to be partially by Dan McNeil is denied. The court already ruled on this matter and allowed counsel for plaintiff to freely question Dan McNeil regarding this statement and allow this evidence to go to the jury. The statement contains references to insurance which are contrary to this court's prior order in limine and is of unknown authorship and does not appear to be inherently reliable.
2. Plaintiff made an oral motion to amend the pleadings to add D&K Finish Carpentry, Inc., as a party defendant. This motion was also denied. The court finds that the motion is not timely made, that granting the motion at this stage would result in tremendous prejudice to the defendant and to D&K Finish Carpentry, Inc. The court further finds that to add D&K Finish Carpentry, Inc. and to bind it to any results of this trial would violate the Fifth and Fourteenth ^{R&R} Amendments to the United States Constitution and would result in a taking of property without due process of law. The court also finds adding D&K Finish Carpentry and binding it to any judgment at this hour would violate Article I Section 7 of the constitution of the State of Utah as depriving D&K Finish Carpentry, Inc. of property without due process of law. The court also finds that there is no unity of interest between Dan McNeil and D&K Finish Carpentry, Inc. In fact, Dan McNeil's defense that Jake McNeil

was acting as an employee of D&K Finish Carpentry, Inc. rather than his employee and other matters evidence a conflict in the legally helpful positions of the two. The court finds that the liability of D&K Finish Carpentry, Inc., was never explored, litigated or set forth in this matter and that there is no basis to amend the pleadings at this stage regarding D&K Finish Carpentry, Inc.

3. The court, having carefully considered Dan McNeil's motion for a directed verdict, hereby grants the same. The court finds that there is no evidence upon which ^{any R&K} ~~a~~ reasonable ^{jury R&K} ~~jury~~ could conclude that Jake McNeil was acting as an employee of or in the course and scope of employment with Dan McNeil personally. The court finds there is no basis from which vicarious liability would lie on the part of Dan McNeil for the actions of Jake McNeil.
4. The court further finds that there is no credible evidence upon which a jury could conclude that Dan McNeil breached a duty owed to plaintiff to secure the load in the truck owned by and driven by Jake McNeil.

THEREFORE, a directed verdict and judgment is hereby rendered in favor of Dan McNeil and against plaintiff, Jennifer Ottens. Dan McNeil is awarded costs ^{in the} ~~as the~~ prevailing party pursuant to Rule 54 of the Utah Rules of Civil Procedure and is directed ^{Amount of \$2541.75 Consistent with the Ruling of today's date} ~~to file a memorandum in conformance with that rule.~~ ^{R&K}

DATED this 13th day of February, 2009.

BY THE COURT:


HONORABLE ROBERT K. HILDER



Approved as to form:

LOREN LAMBERT

ADDENDUM

C

NOV - 9 2006

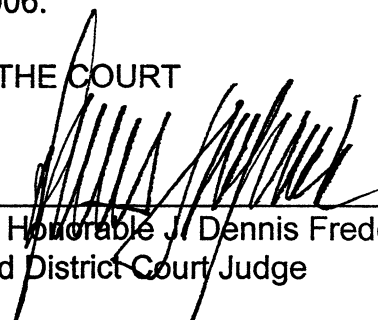
By Deputy Clerk

The Plaintiff's Motion to Amend Complaint is hereby denied, because it would be legally futile, as the relevant statute of limitation for bringing the action ran before the motion to amend was filed. The record shows that Plaintiff knew of its claim against Jake McNeil before the limitations period expired, but did not move to amend its complaint for almost six

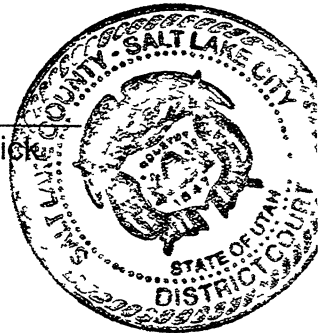
(6) months thereafter. The amended complaint would not relate back to the time of the filing of the original complaint because there is no identity of legal interest between Jake McNeil and his father Dan McNeil, under the test enunciated by the Utah Court of Appeals in *Penrose v Ross*.

DATED this 22nd day of Nov. ~~October~~, 2006.


BY THE COURT



The Honorable J. Dennis Frederick
Third District Court Judge



Approved as to Form



Loren Lambert
Attorney for Plaintiff

John Lund
Attorney for Defendant Nicolas Coleman

Jake McNeil before the limitations period expired, but did not move to amend its complaint for almost six (6) months thereafter. The amended complaint would not relate back to the time of the filing of the original complaint because there is no identity of legal interest between Jake McNeil and his father Dan McNeil, under the test enunciated by the Utah Court of Appeals in *Penrose v Ross*.

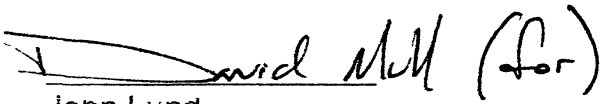
DATED this _____ day of October, 2006.

BY THE COURT

The Honorable J. Dennis Frederick
Third District Court Judge

Approved as to Form

Loren Lambert
Attorney for Plaintiff

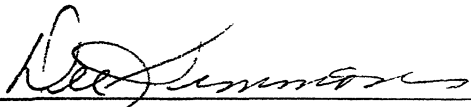
 (for)
John Lund
Attorney for Defendant Nicolas Coleman

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 21st day of October, 2006, a true and correct copy of the foregoing was served on the following, by placing it in the U.S. Mail, postage pre-paid.

Loren M. Lambert
ARROW LEGAL SOLUTIONS GROUP, PC
266 East 7200 South
Midvale, Utah 84047

John Lund
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84145



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JENNIFER OTTENS, Plaintiff, vs. NICKOLAS COLEMAN and DAN MCNEIL, Defendants.	MINUTE ENTRY Case No. 050911123 Hon. J. DENNIS FREDERICK October 6, 2006
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The above-entitled matter comes before the Court pursuant to Plaintiff's Motion to Amend Complaint. Although oral argument was requested, such is not required by the applicable rules, nor is the Court persuaded a hearing would be of assistance in this matter. Accordingly, the ruling with respect to the motion will be addressed in the following Minute Entry.

This case arises the result of an auto accident allegedly precipitated by a chair falling out of the back of a truck on I-15.

With this motion, Plaintiff seeks to amend her Complaint to add Jake McNeil as a defendant. According to Plaintiff, she recently discovered that Jake McNeil, Defendant Dan McNeil's son, was the driver of the vehicle that was operating the truck from which the chair fell, setting into motion the chain of events that caused Plaintiff's injuries. According to Plaintiff, Jake was working for his father at the time of the accident.

Defendants oppose the motion arguing amendment should not be allowed because it is legally futile, brought more than four (4) years from the date of the accident that gave rise to the underlying claims and, thus, barred by the relevant statute of limitations. Moreover, contend Defendants, the amendment would not relate back in time because there is no identity of interest between Jake and Dan McNeil. Indeed, assert Defendants, these individuals do not share the same "legal position."

Finally, argue Defendants, Plaintiff knew of the basis for the claim against Jake before the statute of limitations ran and, yet, failed to move to amend the Complaint for almost six (6)

months thereafter.

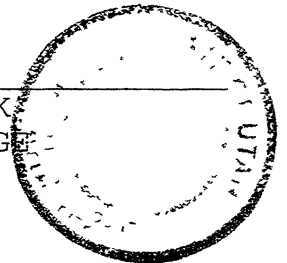
After reviewing the record in this matter, the Court finds granting Plaintiff's Motion to Amend Complaint is not proper because it is legally futile, being brought more than four years from the date of the accident. Indeed, despite Plaintiff's claims to the contrary, under the reasoning of the Utah Court of Appeals in *Penrose v. Ross*, 71 P.3d 63 (Utah App. 2003), the Complaint is time barred under the relevant statute of limitation and the amendment would not relate back because the requisite identity of interest between Jake and Dan McNeil is lacking.

Based upon the forgoing, Plaintiff's Motion to Amend Complaint is, respectfully, denied.

DATED this 10th day of October, 2006.



J. DENNIS FREDERICK
DISTRICT COURT JUDGE




CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050911123 by the method and on the date specified.

METHOD	NAME
Mail	RICHARD K GLAUSER ATTORNEY DEF 7351 SOUTH UNION PARK AVENUE SUITE 200 MIDVALE, UT 84047
Mail	LOREN M LAMBERT ATTORNEY PLA 266 E 7200 S MIDVALE UT 84047
Mail	JOHN R LUND ATTORNEY DEF 10 EXCHANGE PLACE 11TH FLR POB 45000 SALT LAKE CITY UT 84145
Mail	MICHAEL W WRIGHT ATTORNEY DEF 7351 S UNION PARK AVE STE 200 MIDVALE UT 84047

Dated this 12 day of October, 2006.



Deputy Court Clerk

ADDENDUM

D

DEC 1 1978

By

Plaintiff, plaintiff's counsel and plaintiff's witnesses are precluded from

mentioning that a citation was issued to Dan McNeil or the disposition of that citation.

2. Defendant's Motion in Limine Regarding the Liability Insurance Coverage for the defendant is also granted. Plaintiff, plaintiff's counsel and plaintiff's witnesses are precluded from mentioning that defendant has insurance coverage available to him for this accident.
3. Defendant's Motion to Exclude and Disclose Witnesses is uncontested and is granted. Plaintiff shall be limited to calling witnesses that were properly disclosed in pretrial disclosures.
4. Defendant's Motion to Remove PIP Benefits from the Verdict, if any, was also unopposed and is granted.
5. Defendant's Motion in Limine prohibiting plaintiff from mentioning that defendant never went back and picked up the chair is denied. However, plaintiff's counsel is instructed to confer with the court before mentioning to the jury that defendant failed to go retrieve his chair until the court has an opportunity to hear the evidence and make an informed decision on the matter.


With regard to plaintiff's motions in limine, the court rules as follows:

1. Plaintiff's Motion in Limine prohibiting evidence of apportionment of fault to Jiffy Lube is denied. The court will rule on whether Jiffy Lube can be included on a special jury verdict form after the court has heard the evidence.

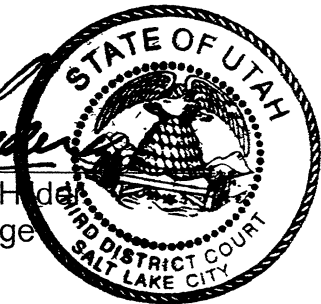
2. Plaintiff's Motion in Limine to prohibit mentioning defendant's health insurance is not contested and is granted.
3. Plaintiff's Motion in Limine to prohibit irrelevant medical records is denied at this time. However, counsel for plaintiff can address specific pages at a later time and the court will determine whether the documents are prejudicial or totally irrelevant as well as the burden on counsel for such redactions.
4. Plaintiff's Motion in Limine regarding DOPL records is denied.
5. Plaintiff's Motion in Limine regarding illegible documents is denied.
6. Plaintiff's Motion in Limine regarding school records other than the school transcript is reserved for ruling at a later time.
7. Plaintiff's Motion in Limine regarding articles of incorporation is denied.
8. Plaintiff's Motion in Limine regarding plaintiff's settlement documents with Jen Ottens is granted. However, defense can point out that plaintiff made a claim and collected on the claim and settled the claim.
9. Plaintiff's Motion in Limine regarding Social Security records is denied as to applications but granted as to the decision by the Social Security Administration.
10. Plaintiff's Motion in Limine regarding when plaintiff retained an attorney for this accident is denied.
11. Plaintiff's Motion in Limine regarding specific pleadings is reserved until the court hears evidence at the time of trial.

DATED this 18th day of December, 2008.

BY THE COURT



The Honorable Robert H. Hedges
Third District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was faxed and mailed, postage prepaid this 12th day of December, 2008, to the following:

Loren M. Lambert
ARROW LEGAL SOLUTIONS GROUP, PC
266 East 7200 South
Midvale, Utah 84047

