

2009

Jennifer Ottens v. Nickolas Coleman and Dan McNeil : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Ottens v. Coleman and McNeil*, No. 20090231 (Utah Court of Appeals, 2009).
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IN THE UTAH COURT OF APPEALS

JENNIFER OTTENS,

Plaintiff and Appellant,

vs.

Case No. 20090231

NICKOLAS COLEMAN and DAN MCNEIL,

Defendant and Appellee.

REPLY BRIEF OF APPELLANT

AN APPEAL FROM JUDGMENT FROM A DIRECTED VERDICT

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FILED
UTAH APPELLATE COURTS
JAN 27 2010

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Defendant and Appellee.	:	

REPLY BRIEF OF APPELLANT

ARGUMENT

I. DIRECTED VERDICT– A. Dan Had a Duty to The Public and Therefore to the Plaintiff

The Defendant erroneously and repeatedly asserted in his brief that:

“[To] support imposing a duty of due care on Dan . . . or . . . support a finding that he acted negligently . . . ,” “[Plaintiff] **produced no evidence**” . . . that Dan [1] “. . . **had** undertaken any affirmative act . . . to ensure that the load placed in Jake’s truck was secure, . . . [2] was responsible for loading the chair”. . . “or [3] that the chair came loose from the vehicle as a result of Dan’s actions or omissions”. . . App’ee Brief p. 7, 8.

First, Dan was both “directing the move,” and “was supervising the loading of his possessions,” and “personal stuff . . . ,” “including his clothing and personal hygiene items,” “a dresser,” “kitchen table and chairs and some boxes,” from his marital residence to an upstairs condominium on Ft. Union Blvd. Dan TT 3:18-25, 4:1-3, 36:9-15, Jake TT

24:8-10, 29:8-10. Second, the kitchen chair that caused the accident was Dan's property. Third, although neither Jake nor Dan knew who loaded the chair, nor what was packed in the other's truck, Dan, "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." TT 20:15-16; 21:8-12, 23-24; 39:21-22; Dan TT 23: 12-19. Fourth, the chair's fall evinces a negligent attempt to secure it. And lastly, as shown below, the evidence suggests that Dan drove the truck from which the chair fell.

Based hereon, Dan had a duty to secure his chair. He failed to do this. Dan did not secure with tarps nor inspect the loads. TT 7:19-25, 8: 1, 7-16, 9:6-14. In fact, the chair fell, "probably [because it] got missed when the ropes were getting looped through everything [by the McNeils]." Jake TT 19:1-20.

Defendant minimized the significance of this evidence, arguing:

. . . [Plaintiff] was able to point to only a single bit of testimony, indicating that . . . Mr. McNeil did not inspect the loads to see if they were secure, [and that] he had participated in "throwing some ropes" back and forth across two of the trucks. Clearly, this one act would not support the existence of a duty, because the testimony itself is so vague, and there was no follow-up. There is no indication when the event occurred, what stage the packing was in, what had gone on before, or what went on after. Similarly, there is no mention of attempting to secure the chair that came loose . . . App'ee Brief p. 17

Aside from the fact that this was not "one act" but a series of interrelated acts and decisions orchestrated by Dan, the law does not require a second by second freeze-frame

replication of events to allow an inference to be drawn therefrom. Dan's "single" and conclusive statement that he helped to load both of trucks and helped, "secure the property in the vehicles," by, "just throwing ropes back and forth and hooking them in the eye hooks," is sufficiently tendentious so that reasonable minds could conclude that the chair fell upon the highway because Dan missed securing it, "when the ropes were getting looped through everything," and he was therefore negligent. Jake TT 19:1-20.

Dan suggests that, since UCA 72-7-409(9) imposes criminal liability upon drivers of vehicles who fail to secure their loads, it forecloses the possibility that Dan, who allegedly was not the driver in this case and who only assisted in loading and securing his kitchen chair, could have a duty to the Plaintiff. To support this argument, Dan cited *Ganno v. Langano Corp.*, 80 P.3d 180, 184 119 Wash. App. 310, (Wash.App. 2d 2004). In *Ganno*, the plaintiff, Mr. Ganno, went to the Defendant, Lumbermen's store and purchased a heavy 12-foot beam. In so doing, Ganno had to drive by a lumberyard sign stating it was Lumbermen's policy not to secure customer loads. Then a Lumbermen employee, using a forklift, placed the beam in Ganno's open truck bed. Due to its dimensions, the beam protruded four feet behind it. The employee asked Ganno if he wanted the beam flagged. Ganno said "yes," and the employee flagged it. The employee did not secure the beam for Ganno and he drove off with the unsecured, heavy beam protruding from the truck bed. As he turned a corner, the beam fell off the truck into the road. As Ganno attempted to retrieve it, another motorist hit it, causing the beam to

shatter Ganno's kneecap. Ganno sued Lumberman for negligence.

Under various theories of liability, including premise liability, the voluntary rescue doctrine, commercial risk of loss and comparative negligence, the Washington court held that Mr. Ganno had not shown the lumber company had a duty toward him, stating:

Where the seller is a merchant, the risk of loss passes to the buyer on receipt of goods. Accordingly, Lumbermen's duty of care ended when it placed the beam into Ganno's truck bed . . . **In the absence of a legal duty to secure a customer's load**, as here, there is no liability to a customer once he is in possession of the goods . . . The risk of loss passed to Ganno when Lumbermen's loaded the beam into his truck. *Id.*, at 317.

Although the defendant in *Ganno*, loaded the plaintiff's vehicle, the factual similarity to this case ends there. In *Ganno*, after the beam was delivered to its customer defendant had no continued property interest in insuring that the beam arrived safely at its destination. Here, unlike *Ganno*, Dan directed, supervised and assisted in the loading, securing and transportation of **his own property** in which the risk of loss, because he was not a merchant, was retained by him during the entire process. Furthermore, while a violation of a safety law is evidence of negligence, it does not preclude a finding that Dan had a duty to Plaintiff. *Child v. Gonda*, 972 P.2d 425 (Utah 1998). To determine if a duty exists, in *Normandeau v. Hanson Equipment, Inc.*, 215 P.3d 152, 154 (Utah 2009) the Utah Supreme Court stated:

A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. A court determines whether a duty exists by analyzing the legal **relationship** between the parties, the **foreseeability** of injury, the **likelihood of injury**, **public policy** as to which party can best bear the loss occasioned by the

injury, and **other general policy considerations** . . . Foreseeability as a factor in determining duty does not relate to the specifics of the alleged tortious conduct but rather to the general relationship between the alleged tortfeasor and the victim. “Whether a harm was foreseeable in the context of determining duty depends on the **general foreseeability** of such harm, not whether the specific mechanism of the harm could be foreseen.” (Citations omitted).

Also regarding duties, in *Ams Salt Industries, Inc. v. Magnesium Corp. of America*, 942 P.2d 315, 320-321 (Utah 1997) the Utah Supreme Court stated:

““Whether the law imposes a duty does not depend upon foreseeability alone. The . . . **magnitude of the burden** of guarding against it and the consequences of placing that burden upon defendant, must also be taken into account.”” A duty may also be found on the basis of **reasonable mutual reliance, voluntary conduct which increases the risk of harm** . . . (Citations omitted).

Many states, determine whether a defendant owes or assumes a duty of care to a particular plaintiff by considering public policy. *Burroughs v. Magee*, 118 S.W.3d 323, 329 (Tenn. 2003). Public policy considerations are relevant because “the imposition of a legal duty reflects society’s contemporary policies and social requirements concerning the right of individuals and the general public to be protected from another’s act or conduct.” *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993).

There is a great danger to the public when private parties and businesses haphazardly transport property in overloaded trucks. Dan made the arrangements to have his personal property transported by either inviting or hiring those moving the property. Dan instructed those assisting in the move what to take and where to take the property. Dan benefitted by the transportation of his property. Dan’s personal property caused the accident and Dan had the greatest interest in ensuring that the property arrived safe and

undamaged at its final destination. Dan's actions and omissions created a great foreseeable risk to all commuters on the freeway and to the Plaintiff. To require individuals like Dan to transport their personal property in a manner that protects the public's well-being is a relatively light burden, in view of the grave consequences that result when this is done improperly, is sound public policy.

B. The Retained Control Doctrine

Plaintiff argues that the principles discussed in *Magana v. DRC, & ABM Crane Rental*, 2009 UT 45, No. 2008629 (Utah 2009) further establish Dan's liability to her. Pursuant to those principles, Plaintiff asserts that Dan's involvement in the loading and securing of his personal property established a duty to the Plaintiff irrespective of whether or not he was the driver of the vehicle from which the chair fell.

In rebuttal thereto, Defendant asserts:

. . . In *Magana* the case for direct liability . . . was based upon the fact that the defendant participated in the very act that caused Mr. Magana (sic) injury. . . [L]iability . . . was [imposed because] . . . **the defendant's foreman was seen actively involved in securing the very load of trusses that came loose and caused the plaintiff to suffer injuries** . . . Here, unlike the facts in *Magana*, no one was able to say who loaded the chair at issue . . . App'ee Brief p. 18, 19. (Citations to the record omitted).

Contrarily, Dan "**was seen actively involved in securing the very load**" of his personal property, including the kitchen chair from which the chair, "**came loose and caused the plaintiff to suffer injuries.**" Just as in *Mangana*, it was irrelevant who loaded the individual trusses, it is irrelevant that "no one was able to say who loaded the

chair at issue . . .” Defendant further erroneously argues:

. . . [T]here was no testimony about who individually secured the vehicle’s load or looked over the contents. App’ee Brief p. 19.

Dan and his son Jake did this in tandem by, “just throwing ropes back and forth and hooking them in the eye hooks.” TT 20:15-16; 21:8-12, 23-24; 39:21-22. Therefore, Dan’s own argument establishes that *Mangana*’s principles apply to him.

C. New Evidence at Trial Indicating Dan Drove the Subject Vehicle

Lastly, as argued below, Dan presented evidence at trial that proved he drove the vehicle from which the chair fell.

II. DAN PERSONALLY EMPLOYED JAKE

The Defendant repeatedly asserted in his brief that:

There was no evidence presented at trial that would support a finding that Jake McNeil was employed by his father, Dan McNeil. . . App’ee Brief p. 7, 8, 9.

. . . .

. . . [T]he defendant did not assert that Jake . . . [was an] independent contractor; rather, he asserted that [he was] **employed by someone** other than him (personally). . . . App’ee Brief p. 18

Dan hereby concedes that Jake was “employed by someone” (just not Dan personally) to move his personal property. Therefore, any suggestion that Jake was not acting as an agent/employee are moot, the only issue is—who hired Jake? Dan suggests that if Jake received a D&K paycheck, he was, ipso facto, employed by D&K. No legal authority supports this proposition. Dan, as one of two owners of D&K, used company resources and assets for a private matter. Defendant erroneously claims that:

[A]ll of the evidence pointed to the conclusion that Jake was employed by D&K . . . and that the move itself was a corporate activity . . . App'ee Brief p. 9, 10.

Dan testified that his son, Jake, his daughter and somebody else assisted in the move. Dan TT 3:15-17. The move was not driven by any business need but was due to “the last deal with [Dan] and [his] wife, which included . . . some of his ‘personal stuff’” Dan TT 3:18-21. Dan moved his personal belongings from the Bluffdale residence, including his “clothing” and “personal hygiene items,” “some kitchen chairs,” “a dresser . . . , [and] some boxes” Dan TT 36: 9-15; Jake TT 7:10-25, 8:14-20, 9:11-24. Dan, however, **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. 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. One chair, belonging to Dan, of a kitchen set, caused the accident. This testimony indicates that the move was for Dan’s personal purposes.

Additionally, despite Jake’s assertion that he received a D&K payroll check for moving Dan’s personal property, Jake was not working for D&K at that time. Moreover, Jake was not performing the duties that in the past he had done for D&K. Jake TT 3:15-25, 4:1-17; Dan TT 3:22-25, 4:1-3. Furthermore, Dan presented no evidence that D&K paid Jake as an employee. Despite this, Dan further argued that he could not be liable for Jake’s actions because:

...[Utah] has long rejected the family purpose doctrine, *Conklin v. Walsh*, 193 P.2d 437, 440 (Utah 1948) . . . Rather, the . . . question . . . is whether the purported principal had the right to control the agent during the trip. *Fox v. Lavender*, 56 P.2d 1049, 1052 (Utah 1936) . . . App'ee Brief p. 13.

Defendant then misleadingly asserts that Jake was not Dan's agent because:

... Here, all of the evidence shows that Jake was driving his own vehicle at the time of the accident and that he was fully in control of that vehicle, and operating without instruction or supervision from Dan . . . App'ee Brief p. 14.

This case's facts bear no relationship to any situation in which one family member runs an errand for another. Dan concedes that Jake had been hired to move his property. Whether or not Jake worked for Dan personally or D&K through Dan, Dan had the right to control Jake. "It is not the *actual* exercise of control that determines whether an employer-employee relationship exists; it is the right to control that is determinative." *Hinds v. Herm Hughes & Sons, Inc.*, 577 P.2d 561 (Utah 1978). This right, therefore, does not require Dan to tell Jake which route to take, which lane to drive in and whether to obey the speed limit. It is enough that he had the "right" to do this. Moreover, he did "control" Jake. He "directed" and "supervised" the move. He directed Jake to go from point A, the marital residence, to point B, his new residence on Fort Union Boulevard. This is sufficient. Most employers do not tell their employees which route to take and "how" to drive during simple commutes—they reasonably assume their employees will take the most direct route and will obey the traffic laws.

III. JAKE MCNEIL SHOULD HAVE BEEN ADDED AS A PARTY – A. The Discovery Rule Tolloed the Statute of Limitations

In response to the facts supporting Plaintiff's motion to amend pursuant to the discovery rule, Dan made the following inaccurate and misplaced statements:

. . . First, while the appellant has been quick to assume that Mr. McNeil committed some malfeasance, the evidence does not support that claim. . . App'ee Brief p. 25.

. . . .

. . . “[A] defendant who causes a delay in bringing a cause of action is estopped from relying on that statute of limitations as a defense to the action.”

. . . .

Here, . . . the appellant did not . . . prove that Jake played any part in providing inaccurate information . . . And it would be improper to attribute the purported acts of his father to the son. App'ee Brief p. 27, 28.

The Discovery Rule can be applied when, “a reasonably diligent plaintiff may have delayed in filing his or her complaint until after the statute of limitations expired,” because: “a **defendant** . . . has concealed his wrongdoing,” because of a “defendant’s fraudulent and deceptive misbehavior,” or due to “**exceptional circumstances.**” *See, Beaver County v. Tax Commission*, 2006 P.3d 6, 12 (Utah 2006) and *Russell Packard Development, Inc. v. Carson*, 2005 P.3d 741 (Utah 2005). Plaintiff, therefore, is not constrained to prove Jake committed malfeasance, nor must she support her motion with evidence that is admissible in the underlying action, she must only show she reasonably delayed in filing her complaint due to, “**exceptional circumstances.**”

It is uncontested that, due to the police report identifying Dan as the driver of the vehicle, Dan's peripatetic lifestyle (whether innocent or otherwise), Dan delaying the McNeil depositions, and Dan's equivocal statements in his answer and responses to discovery, Plaintiff delayed bringing a cause of action against Jake. In regards thereto,

Defendant misleadingly states:

. . . [Officer Roger Lee] revealed that [he] did not know who had filled in the accident form, including the information identifying . . . Dan McNeil [as the driver]. . . . Clearly, the investigating officer's testimony calls into doubt the reliability of the document relied upon by Ms. Ottens to establish "malfeasance" on the part of Mr. McNeil, and does nothing to show that Mr. McNeil made any misrepresentation. . . . App'ee Brief p. 26.

This assertion is false, irrelevant and supportive of Plaintiff's position in several respects. First, Plaintiff's Motion to Amend was filed on Sept. 26, 2006. TR 109-123. Officer Lee's deposition was not taken until January 30, 2007. Hence, besides not being considered by the trial court on Plaintiff's motion to amend, Plaintiff was unaware of the police report's inaccuracy until depositions were taken. Moreover, although Officer Lee forgot who filled it out, he authenticated it as the report pertaining to his investigation of this accident. This has never been disputed. TR 109-123.

Second, Misleadingly, Dan asserts:

. . . Dan McNeil noted that there were at least three different types of handwriting in the report, and that while some of them were similar to his own others were not . . . [H]e did not recall filling out the form . . . , . . . did not believe he had filled out the form, and . . . he "definitely did not fill out that I was the driver of the vehicle." (Citations to the Record Omitted.) App'ee Brief p. 26, 27.

Dan nevertheless verified that the police report contained the following notes written in handwriting similar to his: "*Registered Owner, D&K Finish Carpentry*;" Dan's marital address, "*15400 Pony Express Road, Utah, 84065*;" Dan's phone number, "*801-835-8915*;" **the driver's name, "*Dan McNeil*;** Dan's birth date, "*11-29-55*;" Dan's age, "*46*;" Dan's years of driving experience, "*Twenty-nine*;" and 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. Therefore, a jury could conclude that he did fill these portions out.

Third, as it relates to her motion to amend, the report is not hearsay. Plaintiff did not submit the report to prove Dan was the driver for the truth of the matter stated therein. but to show why she named Dan as the driver in her complaint.

Fourth, Dan acted deceptively. Defendant has erroneously argued:

. . . [B]efore the statute of limitations had expired, Dan . . . put Ms. Ottens on notice that **Jake . . . was the driver** . . . App’ee Brief p. 28.

To the contrary, in Dan’s answer, received by Plaintiff on March 27, 2006 (two days before the expiration of the Statute of Limitations), Dan averred that Jake “may have been operating,” the truck when Dan’s kitchen chair fell out. TR 63, 69-70. Then, in his initial disclosures, Dan stated that his son, Jake, “may have been driving the pick-up truck.” TR 82, 185-186. Following that on May 2, 2006, in his answer to Plaintiff’s first discovery request, Dan indicated, “**on information and belief**,” that his son, Jake, was the driver of the vehicle. TR 79, 92, 190-192. Given Dan’s current position and testimony at trial that Jake was unquestionably the driver of the truck from which the chair fell, it was unforgivably misleading for Dan to have represented that, Jake may have been or “**on information and belief**” was the driver. Dan could have categorically stated at the onset that Jake was the driver. Therefore, Dan did not put Ms. Ottens on notice that Jake was the driver of the truck. Defendant further erroneously argues:

. . . Both [McNeils] testified that on the day of the move, Dan was primarily inside the home supervising the loading of boxes, and was not present when Jake departed. At any rate, . . . **only a few days before the statute ran**, Ms. Ottens was aware of two important facts. First, . . . Dan was not the operator of the Ford pick-up. Second, she knew the name of the likely driver. Yet, armed with these facts, she did nothing. . . . (Citations to the record omitted) App'ee Brief p. 29.

It irrelevant what the McNeils testified to at their depositions. Dan's equivocation caused Plaintiff's counsel to hesitate to add Jake as a party. Once Ms. Ottens was "armed" with the more conclusive information from the McNeils' depositions, she immediately sought to add Jake as a party.

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

Plaintiff asserts that Jake had an identity of interest with Dan. In his response to this argument, Defendant incorrectly stated:

[In its analysis of] . . . *Nunez v. Albo* 2002 UT App 247, 53 P.3d 2 . . . [This Court] noted, . . . that the **new party acknowledged** the employee-employer relationship, . . . that the employee had been working within the course and scope of his employment, and that the employer had provided a defense for the employee from the outset of the case . . . Appellee Brief p. 22.

In *Nunez*, Dr. Albo was the original defendant. It was Dr. Albo who asserted, in a motion for summary judgment, that he was immune from personal liability because he is an employee of the University, his treatment of Ms. Nunez had been in the scope of his employment, and that the University had provided his defense. In *Nunez*, the plaintiff sought to add the University of Utah Medical School (University) as a new party. The University did not acknowledge the employment relationship between the parties. *Nunez v. Albo*, 53 P.3d 2, 6 (Utah Ct. App. 2002). Similarly, Dan, the original Defendant,

concedes that Jake was working as an employee at the time of the move, but was conducting D&K's business when the accident occurred. Given that Dan was one of two owners of D&K, Dan thereby acknowledges that there was an identity of interest between him and Jake—just as there was between Dr. Albo and the University in *Nunez*.

Arguing that the McNeils' opposing positions vitiate the finding of an identity of interest, Defendant asserts:

... Dan McNeil's defenses ... were that he was neither the driver of the vehicle ... , nor the employer of his son ... In contrast, Jake's defense, like that of the son in *Penrose*, [was that] ... **the statutory period had run**. App'ee Brief p. 23.

This is not a difference that the Court indicated would avert a finding that there was an identity of interest. Indeed, also in *Nunez*, the trial court erroneously, "denied Ms. Nunez's motion to amend, ruling that she had failed to comply with the express provisions of the Immunity Act and that such failure prevented any claims from being asserted against the University." In other words, the trial court erroneously determined that Ms. Nunez could not sue the University because, due to the passage of time, **the statutory period had run** on the medical malpractice pre-litigation requirements and made the same error as the trial court did here.

IV. DAN'S CORPORATE SHIELD DEFENSE AND PLAINTIFF'S MOTION TO ADD D&K AS A PARTY DEFENDANT – A. Plaintiff's Motion to Amend at Trial

At trial, Plaintiff sought to either to strike Dan's Corporate Shield Defense or add D&K as a party. TR 1014:4:2. This was done in reaction to Dan asserting the affirmative Corporate Shield Defense that if either he or Jake were negligent, they were acting on

D&K's behalf. Dan mis-characterizes Plaintiff's Motion to Amend as follows:

... [Plaintiff] moved to amend [her] complaint to add ... D&K as a party to the action, ... alleging that D&K was an alter-ego of Mr. McNeil, thereby allowing [her] to pierce the corporate veil ... App'ee Brief p. 30, 31.

....

One of Ms. Ottens' ... complaints is that the trial court allowed Mr. McNeil to argue that he was not Jake's employer ... and to make that point stronger by showing that Jake was, in fact, employed by D&K ... App'ee Brief p. 38

To properly describe Plaintiff's claim against D&K, assume that either Dan, or Jake acting under Dan's direction, negligently caused injury to Plaintiff. Assume further Dan's negligent act occurred while acting in the scope of his employment for D&K. Consequently, as Defendant indicated, D&K would be the proper party because corporate directors, officers and shareholders are protected from personal liability for causes of action arising out of corporate business because the corporation is a separate entity or "person."

Assume further that Dan and Kim, the only officers of D&K, had not complied with the legal formalities necessary to maintain the "corporate veil." Under these circumstances, if the corporation's assets were insufficient to satisfy a claim, the Plaintiff could both continue to pursue the corporation **and**, if the Plaintiff could marshal evidence proving that Dan and Kim treated the corporation as their "alter ego," she could "pierce the corporate veil," and attach Dan's personal assets up to the extent of D&K's liability. **Plaintiff has never sought to do this.** TR 1014:4:2, 44-45.

Now, assume again that either Dan, or Jake acting under Dan's direction,

negligently caused injury to Plaintiff. Assume further that either Dan, acting outside the scope of D&K's business, engaged in an inappropriate relationship on business premises, was using a corporate asset to engage in a wholly private venture unrelated to the business entity's business interests, or was simply engaging in personal matters. See *D.D.Z. v. Molerway Freight Lines, Inc.*, 880 P.2d 1, 5 (Utah Ct.App.1994)) [See *Clark v. Pangan*, 998 P.2d 268 (Utah 2000)]. Under any of these factual scenarios, the proper party would be Dan—not D&K.

Assume further that, despite Plaintiff's causes of action against Dan personally, during the litigation or at trial, Dan attempted to marshal evidence in his defense demonstrating that at the time the negligent act was committed he and/or his agent were engaged in D&K's business and therefore they were protected from personal liability by D&K's "corporate veil." In the case law this is known as raising the affirmative, "Corporate Shield Defense." This is what happened in this case, and is the proper characterization thereof. See *In Stanwade Metal Products, Inc. v. Heintzelman*, 158 Ohio App.3d 228, 237 (Ohio Ct. App. 2004). Dan further has mis-characterized Plaintiff's Motion to Amend as follows:

One of Ms. Ottens' primary **complaints** is that the trial court allowed Mr. McNeil to argue that he was not Jake's employer (and thereby not vicariously liable for his negligence), and to make that point stronger by showing that Jake was, in fact, employed by D&K . . . App'ee Brief p. 38.

The record demonstrates that Plaintiff has never made these "**complaints.**" She has consistently argued that Dan, acting in his personal capacity (not as an official or

agent for D&K), hired Jake who was incidentally paid through the D&K payroll. Nor has Plaintiff argued either that the McNeils were performing a D&K activity, or that Dan was treating D&K as his alter ego, which would have enabled Plaintiff to “pierce the corporate veil.” Dan had the obligation to both plead and then prove the affirmative, “Corporate Shield Defense,” or it is lost. He did neither. *See Christensen v. Swenson*, 874 P.2d 125, 127 (Utah 1994); *Zagoria v. Dubose Enterprises, Inc.* 163 Ga. App. 880, 887; *Hommel v. Micco*, 76 Ohio App.3d 690, 697-698 (1991); *Joseph Murat v. F/v Shelikof Strait Kodiak*, 793 P.2d 69 (Alaska 1990).

B. The Timeliness of Plaintiff’s Defensive Motion to Amend

In response to Plaintiff’s argument to add D&K as a party, Defendant stated:

In . . . *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, 87 P.3d 734, the Court of Appeals . . . stated that . . . a proposed amendment **is generally deemed to be untimely when it is made in the advanced procedural stages of the litigation** . . . App’ee Brief p. 32

This is, “**generally**” true. However, the special circumstances here preponderate in Plaintiff’s favor. Dan interjected new facts and took new legal positions during the trial proceedings. Therefore, in fairness to Plaintiff, either Dan’s Corporate Shield defense should have been stricken, or D&K should have been added as a party.

Prior to trial, Dan never raised the Corporate Shield Defense, nor did he ever make a URCP Rule 9(i) Designation of Fault against D&K. Contrary to Dan’s deposition testimony, in which he was asked what he loaded onto his and Jakes’ vehicles, and he answered, “there was furniture . . . on both vehicles (Exhibit A Dan’s Depo. 14:25-25; TR

777 15:1-8),” “. . . I mean we had tables, we had chairs, we had book shelves” (TR 777 16:1-3); at trial, he indicated that in the move he was transporting, “. . . [his] ‘office’ . . .” Dan TT 3:18-21. Also, when Dan was asked at his deposition where he was moving from, he said nothing about it being, “. . . [his] ‘office’ . . .” as he did at trial, but instead stated, “. . . that was the house Kim and I lived in (TR 778 22:24-25, 779 23:1-5).” Furthermore, in his deposition he consistently referred to the property that was being moved as his “personal property,” and as “my stuff,” **not** D&K’s property. See Exhibit A Dan Depo. at 6:21-25, 10:3-10, 13:14-19.

Jake was asked at his deposition what he moved for his father. Jake only indicated he moved a “kitchen table and chairs and some boxes,” and **did not mention** any office equipment, nor did he mention the word “office,” [Jake TT 8:21-25, 9:1-10], yet at trial, Jake testified that he helped his Dad move his office. Jake TT 7:10-25, 8:14-20, 9:11-24. At no time during his deposition did Jake indicate that the McNeils were moving Dan’s D&K Office or office equipment on the day of the accident. Jake TT 28:15-25, 29:1-10. To the contrary, at his deposition Jake stated, “. . . what we were doing was moving [Dan] from his house in Bluffdale and he was moving to an apartment . . . (TR 789 8:20-21).”

Further testimony demonstrated this was a private move. Dan admitted in his answer, “. . . that the chair [that fell from the truck] belong[ed] to Dan McNeil.” Dan TT 27:3-16; 28:13-16; TR 422-428. Jake testified at trial that he was not working for D&K during the move. Jake TT 3:15-25, 4:1-17. Therefore, since Dan changed his legal

theory at trial that this was a D&K move, fairness would dictate that either Dan's affirmative Corporate Shield Defense should have been stricken, or that Plaintiff should have been allowed to add D&K as a party.

C. The Corporate Shield Defense and Unity of Interest between Dan and D&K

Dan waived the Corporate Shield Defense. As correctly quoted by Defendant:

[Pursuant to] *Prince v. Bear River . . . , Co., . . .* 56 P.3 524, . . . an affirmative defense is one which employs matters that are outside of, or are extrinsic to, the plaintiff's prima facie case, and which, if proven, will defeat the cause of action even if all the allegations in the complaint are true. App'ee Brief p. 39.

Regarding *Prince*, Dan, without any analysis, mistakenly states, "Clearly, this is not what Mr. McNeil was doing when he identified D&K as Jake's employer." App'ee Brief p. 39. To the contrary, if Dan McNeil was identifying D&K as Jake's employer, he was identifying himself as the agent that acted on D&K's behalf to hire and supervise Jake during the move. Dan concedes that Jake was an employee. In so doing, it is not that Dan, "was intend[ing] to prove 'it wasn't me, it was someone else,'" [App'ee Brief p. 42], but that, "it was me, I was just acting in my official capacity and within the scope of my duties as an agent for D&K." Therefore, if "D&K was Jake's employer," Dan hired Jake and he is raising the Corporate Shield Defense to defeat Plaintiff's allegation of liability against him.

Moreover, the Corporate Shield Defense is an affirmative defense. This is true because "even if all the allegations in [Plaintiff's] complaint are true," that Dan negligently caused Plaintiff's injury due to his own and his agents' activities," the

“extrinsic” factual assertion that the McNeils were acting on D&K’s behalf, and are therefore protected from personal liability due to the “Corporate Shield,” would defeat Plaintiff’s cause of action. App’ee Brief p. 43

In her motion to amend, the Plaintiff further alleged that Dan and D&K had a “Unity of Interest.” In response to this, Defendant alleged:

... The court ultimately concluded that there was insufficient evidence ... to show that D&K and Dan McNeil had an identity of interest ... App’ee Brief p. 34

Just as in *Nunez*, where the court found a unity of interest between University employee Dr. Albo and the University, since Dan was one of two owner’s of D&K, and was acting on D&K’s behalf at the time of the move, Dan categorically had a unity of interest with D&K. Therefore, Dan’s knowledge of the claim can be imputed to D&K, and given that Dan raised the Corporate Shield Defense, it would not have violated D&K’s rights of notice to have allowed a claim against it to proceed.

D. Rule 9 of the Utah Rules Of Civil Procedure

In conjunction with her motions to either strike Dan’s Corporate Shield Defense or to amend, Plaintiff argued that Dan should have named D&K as a non-party pursuant to Rule 9(i). In response thereto, Defendant erroneously asserts:

The ... rule requires that a party make the designation only if it intends to ask the finder of fact to allocate some portion of fault to a non-party. App’ee Brief p. 43.

....

... [T]here was no need to allocate fault to D&K, because its potential liability, as an employer, was merely derivative. In other words, if Jake, who was identified under Rule 9, was allocated 10% of fault for the accident, then D&K, as Jake’s employer, would be liable for that very same 10%. Since no additional fault would

be allocated to D&K, there was no practical reason to name them under Rule 9. App'ee Brief p. 44.

Pursuant to URCP Rule 9(i), Dan only requested that fault be allocated to Jake in his personal capacity and not in his official capacity as an employee for D&K. TR p 426. Therefore, since D&K is a separate "person" from the McNeils, Dan's suggestion that D&K should be allocated any fault due to his or Jake's actions would have required Dan to designate D&K pursuant to URCP Rule 9(i). Second, by asserting that the Corporate Shield Defense protected him against any personal liability, any and all liability assessed against him for his own actions or against his son as his agent would be imputed to D&K. In so doing, Dan was "merely" asking "the finder of fact to allocate some portion of fault (his portion) to a non-party"—D&K. Therefore, Dan should not have been allowed to argue that D&K be allocated any fault for the McNeils' actions.

V. DAN'S CITATION FOR FAILURE TO SECURE HIS LOAD, GUILTY PLEA AND PAYMENT OF THE CITATION

Plaintiff argues that she should have been permitted to show that Dan had been issued a citation for failure to secure his load, plead guilty thereto and paid the citation. Pursuant to *Kealamakia, Inc., v. Kealamakia* 2009 UT App 148 ¶ 10, 213 P.3d 13, Dan argues that it was incumbent on Plaintiff to "marshal all of the evidence, on both sides of the question, to demonstrate the presence of an abuse." App'ee Brief p. 44. The case law, including *Kealamakia*, appear only to apply this obligation to the findings of fact supporting judgments in civil cases and criminal convictions, and not to evidentiary

rulings.

Defendant erroneously argued that:

. . . [T]he relevant pleadings did not make . . . [the] allegation [that Dan drove the vehicle from which the chair fell], and the question of who was driving was not at issue . . . App'ee Brief p. 45 . . . In his answer, Mr. McNeil admitted that Jake was the driver . . . Accordingly, any evidence . . . demonstrat[ing] that Dan was actually driving the vehicle was simply not relevant, i.e., it did not tend to prove a fact of consequence to the determination of the action. App'ee Brief p. 46.

Contrarily, it is disputed whether or not Dan is directly liable for causing Plaintiff's injuries. Showing that Dan drove the vehicle from which the chair fell would tend to prove this issue. In regards hereto, Defendant argues:

. . . The court . . . held that Ms. Ottens' complaint did not allege that Dan was the driver and [was] an effort to change the . . . theory of the case at the last minute . . . App'ee Brief p. 2, 3.

Candidly, the McNeils' deposition testimonies prompted Plaintiff to amend her complaint to assert that Jake drove the vehicle. However, new facts introduced by Dan on the eve of trial, and during trial, indicated that Dan was the driver. While the formalities of litigation are often indispensable to its fairness and efficiency, they should not be so inflexible as to allow Dan to use them as a shield prohibiting the Plaintiff to adjust her theory of the case while wielding the sword of change in his own defense.

Just 2 ½ months before trial, on Sept. 15, 2008, in Dan's response to a motion to compel discovery (TR 639) it was stated that, "Counsel recently located his client, Dan McNeil, who currently lives in the state of Oregon . . . upon finding the client, . . . defendant promptly responded to the discovery . . ." Dan's response then admitted that

the police report's handwritten notes identifying him as the driver were similar to his handwriting. Dan TT 15:4-25, 16:1-12; 17-19; 20:1-19; TR 922. Jake then testified at trial that while driving he never changed lanes but, "stayed in the right hand lane, the slow lane, the whole way there." Jake TT 26:3-7. However, the Plaintiff established, as did the police report, that the chair fell from the truck when it changed from the right lane to the center lane, and neither McNeil knew in which truck the falling chair had been loaded. TT 23: 12-19, 56:1-19, 152, 922. This new evidence tends to prove that Dan was the driver, contrary to the McNeils' position during the litigation.

Furthermore, according to all the evidence, after the trucks were fully loaded, Jake and a companion left before Dan. Approximately 15 minutes to 30 minutes after, Dan followed in his loaded vehicle. Then, on his way, 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." Dan TT 11:6-25, 12: 1-23. Dan then said, "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. Jake also did not see the chair fall from his vehicle. Jake TT 19:1-20. The most logical inference that can be drawn from all these facts is that Dan saw the chair fall out of his truck when he changed lanes, he saw the accident occur and he drove back knowing that the police would be arriving shortly. Given this evidence, the trial court should have allowed Plaintiff to introduce evidence about Dan's citation, guilty plea and payment of the fine.

VI. EVIDENCE THAT PLAINTIFF HIRED AN ATTORNEY

Plaintiff argues that Defendant's counsel's intrusion upon her right to consult counsel should not have been violated. In response thereto, the Defendant argues:

... During ... trial, ... Ms. Ottens was asked if she retained (counsel) within two months of the accident, and she answered [affirmatively] ... [N]o further inquiries were made. App'ee Brief p. 47, 48

....

... [There are] ... two potential reasons why such evidence might be relevant. First, as ... recognized in the case of *Pennington* ..., early attorney involvement ..., and possible counsel initiated referrals to healthcare providers can support an inference that medical bills and treatment are inflated or unreasonable. Additionally, the defense anticipated that Ms. Ottens would ... portray Mr. McNeil as dishonest with respect to the information ... in the police report, and assert that she was prejudiced [thereby] ... The fact that Ms. Ottens retained counsel almost immediately after the accident tends to undermine the claim of prejudice ... App'ee Brief p. 48, 49.

Additionally, Defendant argues that:

... [when Ms. Ottens retained counsel] ... was relevant to ... show that counsel directed treatment ... App'ee Brief p. 6, 7.

A. Counsel Directed Unreasonable or Inflated Medical Treatment

To allow a jury to draw “an inference that medical bills and treatment are inflated or unreasonable,” or that “counsel directed treatment” due to early attorney involvement is, with all due respect, very imprudent law. Such reasoning has no more validity than to allow a jury, due to “early attorney involvement,” to draw inferences that defendants and their attorneys fabricate testimony and conspire with witnesses. To allow such inferences is an affront to the Plaintiffs' Bar and to the entire legal profession, because it assumes that plaintiffs' attorneys are “direct[ing] treatment” and illegally conspiring with treating,

professionally-licensed, physicians to provide unnecessary treatment and to inflate medical bills.

To rebut such an inference, a plaintiff's attorney would have to present testimony from the client or take the stand himself to indicate whether or not "counsel directed treatment," and to what extent. This would intrude on the attorney/client privilege. Whether or not "medical bills and treatment are inflated or unreasonable" is a medical question that should be addressed by the medical experts only, and not by the courts and defense counsels calling upon a jury to speculate about the influences of "early attorney involvement." On the onset of any potential legal issue, all parties have a right to "early attorney involvement" without fear that the courts will allow opposing counsels to ask the jurors to draw negative inferences therefrom.

B. Early Attorney Involvement on The Issue of Prejudice

Since the trial court, and not the jury, determined if the misleading Police Report reasonably delayed Plaintiff from adding Jake as a party, the fact that Plaintiff "had early attorney involvement" was irrelevant to any issue in dispute during the trial.

CONCLUSION

It is respectfully requested that Plaintiff's appeal in all respects be granted.

DATED: January 27, 2010

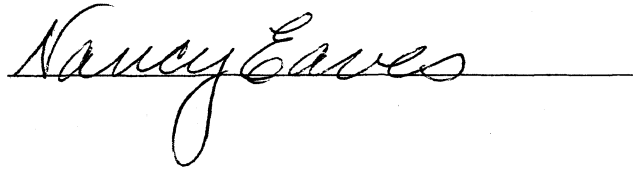
ARROW LEGAL SOLUTIONS GROUP, PC


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 27 day January, 2010 to:

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

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

ADDENDUM

A. Deposition of Dan McNeil

ADDENDUM

A. DEPOSITION OF DAN McNEIL

ORIGINAL

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

JENNIFER OTTENS,)	
)	
Plaintiff,)	
vs.)	Case No. 050911123
)	Judge Frederick
NICKOLAS COLEMAN and)	
DAN McNIEL)	
)	
Defendants.)	

DEPOSITION OF: DAN McNEIL



August 10, 2006
1:40 p.m.

Location:
Arrow Legal Solutions Group
266 East 7200 South
Midvale, Utah

Reporter: Jeanette Lund, CSR, RPR, and
Notary Public in and for the State of Utah



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1 find out.

2 A All right.

3 Q And, frankly, people in your position aren't
4 always necessarily willing to give me information that
5 may lead to information that's relevant to the case, and
6 that's not a debate you I need to have. But, anyway,
7 did the -- you said their last name was Winguist?

8 A Winguist.

9 Q Do they still live there?

10 A No, they live in California now.

11 Q Were they present when you were moving from
12 that home?

13 A No.

14 Q Where were they when that was occurring?

15 A I have no idea.

16 Q When you were living --

17 A Excuse me. I'm sorry for interrupting. Are
18 you talking about moving my stuff out of Kim's home?

19 Q Let me ask a better question. That's a good
20 point.

21 Do you recall moving your personal property on
22 March 29th, 2002 from 154 -- 15400 Bluffdale -- Pony
23 Express, Bluffdale City to an apartment on 13th East and
24 7200?

25 A Yes.

1 can't remember if there were -- if there was somebody
2 else or just us.

3 Q Tell me what vehicles you loaded, if you
4 recall.

5 A What vehicles I loaded?

6 Q Yes.

7 A My truck. We both backed up to the porch and
8 we just started -- I was telling Jake, okay, we need
9 this, this, and this out of the house. That was my
10 stuff.

11 Q Did you load anything into the vehicle that
12 Jake was driving?

13 A Oh, probably.

14 Q What kind of a vehicle was the vehicle that
15 Jake was driving?

16 A A pickup truck.

17 Q What make and year?

18 A A Ford. I have no idea what year it was. It
19 wasn't my truck.

20 Q Do you know what color it was?

21 A Greenish blue, I believe.

22 Q Do you know who held title to the vehicle?

23 A As far as I know Kirk Gilger did.

24 That was something that was between Jake and
25 Kirk, not me.

1 Q So if you wrote a check to pay your
2 subcontractors, who would write out the check and sign
3 it?

4 A Well, I would write out -- they would pay me
5 and I would write out the check if I owed them, whatever
6 I owed them.

7 Q Do you know if you paid any money for anyone
8 to help you move your property on March 29th, 2002?

9 A You know, I have no idea. I could have or I
10 couldn't have. I don't really think that I would have
11 given them a check. I probably gave somebody gas money
12 or something if anything like that. I mean, I didn't
13 pay anybody to --

14 Q Who supervised the loading of your personal
15 property onto the two pickup trucks that you used that
16 day?

17 A As far as supervising, what do you mean? As
18 far as -- we went into the house, I says, Okay, this is
19 my stuff, we need this in the trucks. I didn't go to
20 each truck and say, Okay, put this here, put that there,
21 if that's what you're talking about. I'm not sure.

22 Q Correct. So the most you recall doing is
23 indicating what needed to be loaded --

24 A Correct, out of Kim's house.

25 Q Did you supervise the manner in which anything

1 was placed in the truck or wrapped or secured?

2 A Probably in the house I probably did. You
3 know, if we had breakables or pictures, I probably had
4 them put them in a box or something. That's a long time
5 to remember back doing something like that.

6 Q And do you know who secured any of the items
7 in either of the vehicles?

8 A Well, I secured mine and we roped everything
9 down on both vehicles. I mean, I never went and
10 inspected anything, but -- I mean, I know that we roped
11 everything down on both vehicles. We were doing it
12 together.

13 Q When you say "we," who are we?

14 A Me and Jake.

15 Q Do you recall at all if you in any manner
16 assisted in roping down or securing any of the items in
17 Jake's vehicle?

18 A Yeah, we helped rope each vehicle down.

19 Q So if I'm understanding your testimony
20 correctly, the two of you jointly roped the property in
21 both vehicles?

22 A Right. Correct. As far as I can remember
23 that's how it went.

24 Q And tell me, when everything was loaded on the
25 vehicles, describe for me the amount of property that