

2009

# Jennifer Ottens v. Dan McNeil : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JENNIFER OTTENS,

Plaintiff and Appellant,

vs.

DAN MCNEIL,

Defendant and Appellee.

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Appellate Case No. 20090231-CA

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**BRIEF OF APPELLEE**

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AN APPEAL FROM JUDGMENT FROM A DIRECTED VERDICT

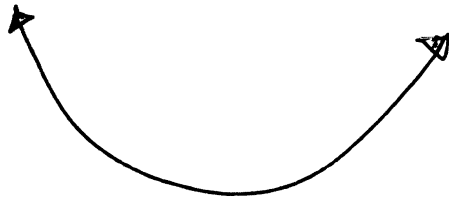
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## **Appellee's Statement of the Case**

This case comes from the trial court on an appeal from a directed verdict. After the parties closed their evidence on the issue of liability, the court heard and granted a motion for directed verdict from the defense. Ms. Ottens had alleged that Dan McNeil was directly and vicariously liable for causing an accident that occurred after a chair owned by Mr. McNeil fell from a pick-up being driven by his son Jake. In her pleadings Ms. Ottens had claimed that Dan had employed his son Jake, and that Dan had also improperly loaded and or secured the chair.

As will be shown by citation to the record in the body of this brief, all of the evidence presented at trial showed that on the day of the move Jake was employed by D&K Finish Carpentry, Inc., (D&K), paid by D&K, and was engaged in moving D&K's office and equipment from a residence in Bluffdale to Union Park. Some personal items belonging to Dan McNeil were also being moved. There was also some equivocal testimony that Dan McNeil had given Jake some money for gas.

After hearing argument from both parties, the trial court noted that the overwhelming evidence showed that Jake was employed by D&K at the time of the accident. It also stated that there had been no evidence that Dan had employed his son. The court therefore directed a verdict in favor of the defense on vicarious liability.

A directed verdict was also granted on the direct negligence claims. There had been no evidence presented at trial that Dan, rather than any one of the other 6 people on site,

loaded the chair or secured it in Jake's vehicle. There was no evidence that he inspected the vehicle before it left. All that Plaintiff was able to show was that Dan had helped tie some ropes to the eye hooks on the pick up. The court found that there was no evidence to tie Dan to the chair or to allege he inspected the vehicles. It also held that under Utah law, the driver has the ultimate duty to inspect and ensure that a load is safely secured.

Ms. Ottens complained that the evidence of Jake's employment by D&K was an improper affirmative defense, and moved after the close of evidence to name D&K as a party, and to allege an action to pierce the corporate veil. The court denied the motion because of its untimeliness, its high potential for prejudice, and because it violated procedural due process.

Ms. Ottens has also sought review of the trial court's decision to deny her the opportunity to amend her complaint to name Jake McNeil as a party. The court had declined to permit the amendment because it was first proposed more than four years after the accident, and therefore would have been subject to an immediate dismissal on the grounds of the statute of limitations.

Finally, Ms. Ottens has sought review of certain evidentiary rulings made by the court. In particular, Ms. Ottens complains that the trial court erred when it refused to admit the investigative report, in an effort to show that Dan was the actual driver of the vehicle. The court allowed Ms. Ottens to question Mr. McNeil on the matter, but held that Ms. Ottens' complaint did not allege that Dan was the driver and this amounted to an effort to change the

pleadings and theory of the case at the last minute. The court also found the document to be of problematic origin, and internally inconsistent.

### **Appellee's Statement of Issues of Appeal**

1. Did the court err in directing a verdict for Dan McNeil on the claim for respondeat superior when all of the evidence showed that Jake McNeil was employed by, and engaged in the work of, D&K when the accident occurred, and where there was no evidence that he was employed or paid by Dan McNeil, as the plaintiff alleged in her complaint? Reviewed under a correctness standard. *Ferguson v. Williams & Hunt*, 2009 UT 49, ¶ 19.

2. Did the court err in directing a verdict for Dan McNeil on the direct negligence causes of action when there was no evidence to show that he placed, or attempted to secure, the chair into Jake's truck, and where the evidence shows that Jake, aged 23, was the sole driver of the vehicle, and where the evidence showed that Dan was under no duty to secure the chair? Reviewed under a correctness standard. *Ferguson v. Williams & Hunt*, 2009 UT 49, ¶ 19.

3. Did the trial court err when it declined to allow Ms. Ottens to amend her complaint to add Jake McNeil as a party after the statute of limitations had run, when the facts show that there was no identity of interest between Jake and his father Dan, and when there was no evidence that Jake committed any wrongdoing sufficient to invoke equitable tolling? Motions to Amend should be reviewed under an abuse of discretion standard. *Sulzen v. Williams* 977 P.2d 497 (Utah 1992).

4. Did the trial court err when it declined to allow Ms. Ottens to amend her complaint after the close of evidence to add D&K as a party to action, or to allege that there was an alter-ego relationship between Dan McNeil and D&K, or that Dan McNeil was driving the vehicle that dropped the chair on the highway? Motions to Amend should be reviewed under an abuse of discretion standard. *Sulzen v. Williams* 977 P.2d 497 (Utah 1992).

5. Did the court err when it allowed Mr. McNeil to introduce evidence that D&K employed Jake? Did this constitute an affirmative defense that must be set out in the pleadings under Rule 8 or Rule 9 of the *Utah Rules of Civil Procedure*? Interpretation of the Utah Rules of Civil Procedure is a question of law reviewed for correctness. *Pete v. Youngblood* 2006 UT App 303. ¶ 7, 141 P.3d 629.

6. Did the court err in denying Ms. Ottens request to enter the accident report into evidence as a means of showing that Dan McNeil was the driver of the pick-up, although she had not made that claim in the pleadings? This is reviewed under an abuse of discretion standard. *Daniels v Gamma West Brachytherapy, LLC* , 2009 UT 66 ¶ 58.

7. Did the court err in allowing counsel to inquire when Ms. Ottens first retained counsel, when Ms. Ottens claimed she was unduly prejudiced by misinformation in the police report? Evidentiary Rulings are reviewed under an abuse of discretion standard. *Daniels v. Gamma West Brachytherapy, LLC.*, 2009 UT 66 ¶ 58.

#### **Statutes, Constitutional Provisions, Ordinances and Rules**

See, Addendum 4.

### **Summary of Appellee's Arguments**

1. The trial court properly granted a directed verdict in this case. Ms. Ottens produced no evidence to show that Jake McNeil, who was driving the vehicle that dropped the chair at issue, was employed and paid by Dan McNeil as was alleged in the complaint. All evidence showed that Jake was employed by, paid by, and carrying out duties for D&K. Testimony that Jake may have received gas money and carried some items belonging to Dan McNeil did not establish a direct employment relationship. The trial court was also correct in directing the verdict on the claims for direct negligence. There was no evidence that Dan, rather than any other of the six persons on site, loaded or secured the chair into Jake's truck. The jury would have been required to speculate or assume to find negligence on the part of Dan McNeil.

2. The trial court properly denied the motion to add Jake McNeil as a party. The statute of limitations had run by the time the motion was made. Jake and Dan do not share an identity of interest, and there was no evidence of wrongdoing that would allow equitable tolling. The amendment would have been futile, and therefore the court did not abuse its discretion when it denied the motion.

3. The trial court properly denied the motions to amend to add D&K and to allege that Dan McNeil was liable as the driver of the truck or under an alter ego theory. These motions were not made until after the close of evidence. The motions were untimely, ex prejudicial, and would have violated D&K's due process rights to procedural regularity.

4. The trial court did not err when it allowed the introduction of evidence that Jake McNeil was employed by and working for D&K when transporting the chair at issue in this case. This information had been supplied to Ms. Ottens from the outset of the litigation. Additionally, the evidence did not constitute an affirmative defense; it was not an avoidance, but rather directly contradicted Ms. Ottens' allegations that Dan McNeil personally employed and paid his son to transport personal goods from one residence to the other. Dan was under no obligation to designate D&K under Rule 9 of the *Utah Rules of Civil Procedure*, as he was not seeking to allocate fault to D&K. Dan had designated Jake McNeil from the outset of the case.

5. The trial court did not err in declining to admit the investigative report into evidence to show that Dan McNeil was driving the truck from which the chair fell. There was inadequate foundation for the report, it was internally inconsistent, and it contained three different types of handwriting. Ms. Ottens was not able to show that Mr. McNeil filled in the report. Additionally, Ms. Ottens had amended her complaint during the course of litigation and abandoned the claim that Dan was the driver of the vehicle in favor of a respondent superior cause of action. This amendment was done after questioning the investigating officer about the report. The report was not relevant to the case pleaded.

6. The court did not abuse its discretion when it allowed Mr. McNeil to question Ms. Ottens about when she retained counsel. The facts were in evidence through her medical records. Additionally it was relevant to her claims of prejudice, and may have been relevant

to show that counsel directed treatment. This may have been relevant to the reasonableness of her treatment.

### **Argument**

**I) The trial court properly granted a directed verdict. Ms. Ottens produced no evidence that would support her claim that Jake McNeil was employed by the Defendant Dan McNeil. And she produced no evidence that would support imposing a duty of due care on Dan McNeil or that would support a finding that he acted negligently.**

In her second amended complaint against Dan McNeil, Ms. Ottens identified two potential grounds of liability. First, she alleged that he had employed and paid his son, Jake McNeil, to transport his personal property, and was therefore vicariously liable for Jake's negligence in allowing a chair to escape from the back of Jake's truck. Second, she asserted that Dan breached his duty of due care by improperly loading and securing the chair in Jake's vehicle, and was therefore liable for the injuries she suffered when the chair came loose on the highway. (Record 429-434)

On the fourth day of trial, after Ms. Ottens' counsel acknowledged that his evidence on the issues of liability had been fully presented, the court entertained a motion for a directed verdict made by defense counsel. After lengthy argument, and close consultation of the record, the motion was granted. (Record 1014 pp. 81-85) In doing so, the court stated that there was overwhelming evidence that Jake McNeil had been employed by D&K, that there was no evidence to support that Jake was employed by Dan McNeil; that there was no evidence that Mr. Dan McNeil had undertaken any affirmative act that would have given rise

to a duty requiring him to ensure that the load placed in Jake's truck was secure, and that there was no evidence that Dan McNeil was responsible for loading the chair at issue in this case. (Record 984-985, 1014 pp. 81-85, )

A directed verdict is proper if “after examining all evidence in a light most favorable to the nonmoving party, there is no competent evidence that would support a verdict in the nonmoving party's favor.” *Ferguson v. Williams & Hunt*, 2009 UT 49, ¶ 19 (quoting *Daines v. Vincent* 2008 UT 51, ¶ 20, 190 P.3d 1269.) When applying that standard, it is also essential to recognize that if a jury would be required to base its decision about the presence or absence of an essential element of a claim on mere speculation or conjecture, the trial court should direct a verdict in favor of the defendant. *Walker v. Parish Chemical Company*, 914 P.2d 1157, 1163 (Utah. App. 1996).

As will be shown more completely below, when the factual record in this case is carefully scrutinized, and the standards set out in *Ferguson* and *Walker* are applied to those facts, it becomes readily apparent that the trial court correctly granted the defendant's motion. There is no competent evidence that Jake McNeil was working for his father on the day the accident underlying this case occurred. Accordingly, there was no basis for to allow the question of vicarious liability to go to the jury. Additionally, there was no evidence that Dan McNeil was the individual who loaded the chair into Jake's pick-up, or that the chair came loose from the vehicle as a result of Dan's actions or omissions.

Based on these facts, the court properly concluded that Ms. Ottens failed to produce



sufficient evidence to present the matter to the jury, as she failed to establish that Mr. McNeil owed her a duty of due care or that he breached any duty he could have voluntarily undertake in any way<sup>1</sup>. Since two essential elements of a cause of action for negligence were missing, the directed verdict was appropriate.

**1.) There was no evidence presented at trial that would support a finding that Jake McNeil was employed by his father, Dan McNeil. The court properly directed a verdict on the claim for vicarious liability.**

One of Ms. Ottens' primary bases for asserting that Dan McNeil is responsible for the injuries she allegedly suffered is that on the day and time in question, Jake McNeil was working for, and being paid by, Dan McNeil to help move his personal property from his former rental home in Bluffdale, Utah. *Plaintiff's Second Amended Complaint* ¶ 14 (Record 431-432.) Thus, according to the appellant, Mr. McNeil was vicariously liable for the actions of his son. (Record 431-432.) At the time of trial, however, there were simply no facts elicited from the witnesses that supported this allegation. All of the testimony showed that Jake was employed by D&K, a company owned by his father and stepmother, that he was being paid by D&K on the day of the move, that other D&K employees were on site helping, and that the items moved on that day largely belonged to D&K, and were used in the business. In short, all of the evidence pointed to the conclusion that Jake was employed by

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<sup>1</sup> To prevail on a negligence claim, a plaintiff must establish four essential elements: (1) that the defendant owed plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages. *Asael Farr & Sons Co. v. Truck Ins. Exchange*, 2008 UT App 315, ¶¶ 28-29, 193 P.3d 650,

D&K at the time of the move, and that the move itself was a corporate activity. A careful review of the testimony unambiguously proves this point.

When Ms. Ottens called Jake McNeil to the stand, her very first questions were whether Jake was related to Dan McNeil, and whether he had ever worked for him. (Record 1010 p.3:13-16) The response was unequivocal; Jake testified that he had been employed by D&K. (Record 1010 p.3:17) Upon further examination by Ms. Ottens' counsel he stated that he received payroll from D&K (Record 1010 p. 4:24), that he was a finish carpenter by trade (Record 1010 p.5:14), and that at the time of the accident D&K would obtain work and he and other employees would go out and do the jobs it obtained. (Record 1010 p.5:22-23) He also testified that maintenance and gas for the truck he used in the business, which he was purchasing, was occasionally subsidized by D&K. (Record 1010 p.7:1-4.)

More importantly, all of the testimony elicited from Jake by Ms. Ottens shows that on the day of the accident, three or four employees of D&K, including Jake, were moving the company's office and carpentry equipment<sup>2</sup> from one location to another. (Record 1010 pp. 10:16-21, 25:1-2) The property included filing cabinets, boxes, a large wooden desk, shapers, chop saws, table saws and other carpentry equipment. (Record 1010 pp. 5:25, 6:1, 8:16-20, 22:23-25, 23:1-5). Furthermore, Jake testified that he and the other employees who were involved in the move were paid by D&K, as part of their ordinary wages. (Record 1010

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<sup>2</sup> A table and chairs belonging to Dan McNeil were also put in Jake's truck. It was one of those chairs that came loose.

p.19:1-12)

Dan McNeil confirmed his son's recollection. He testified that the vast majority of items being moved on that day belonged to, and were used in, the business he owned with his ex-wife. As Jake had done, Dan identified the work tools as a large part of the move, but also testified that there were three filing cabinets, a desk, a computer, a copy machine, a fax machine, a printer, rolls of pending projects, and office chairs being transported on that day. (Record 1012 p.37:15-25, 38:4-12) And, while Dan acknowledged that some personal items were also taken, he explained that he and Kim<sup>3</sup> had actually been divorced since 1998, and that he had moved most of his personal items out of the home when that became final. (Record 1012 p. 36:8-15) He had, however, kept his office in his former home. (Record 1012 p. 37:1)

In sum, the evidence elicited at trial was as follows: (1) On the day of the move Jake was employed and paid by D&K Finish Carpentry; (2) Jake and other company employees, were carrying out a corporate activity in moving D&K's business and office equipment from one location to the other, and (3) While some of Dan's personal belongings may have been moved<sup>4</sup>, the primary purpose of the activity was to move the property necessary to carry on the business of D&K. Ms. Ottens' assertion that including one or two personal items in the move changes it into a personal errand, and thereby makes Jake Dan's employee, rather than

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<sup>3</sup> Kim McNeil was the K of D&K.

<sup>4</sup> The only items specifically identified were a kitchen table and chairs.

D&K's, simply does not stand up to scrutiny<sup>5</sup>. Indeed, Ms. Ottens' characterization of this as a hasty move necessitated by a divorce, with the implication that it was therefore primarily personal in nature, is belied by the facts. The personal part of the move had long been completed. The business purpose remained.

Since all evidence pointed to the fact that Jake was employed by D&K, and not by Dan personally, and that Jake was fulfilling a corporate purpose at the time of the accident, the trial court was correct in directing a verdict on the claim of vicarious liability.

(ii.) *The fact that Jake was moving a table and chair belonging to Dan McNeil would not support a claim of vicarious liability.*

Briefly, it is important to note that in addition to the voluminous evidence relating to D&K's employment of Jake, the court also paused to point out that Ms. Ottens had simply failed to produce any evidence that Dan had employed Jake or that an agency relationship existed between the two. (Record 1014 p.19:13-18.) As the court noted, the only evidence relating to the claim that Dan personally employed Jake is that Dan stated that he may have given Jake some gas money for the move<sup>6</sup>. It also noted that it may be fair to assume that

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<sup>5</sup> The court noted that the litigated and tested evidence construed most favorably to Ms. Ottens' position would be that Jake was paid by the corporation in the ordinary course of business and was doing things for the corporation when the move occurred, and incidentally helping out his father at the same time. (Record 1014 p. 22:3-7).

<sup>6</sup> The precise testimony was that during his deposition, Mr. McNeil stated that he did not recall paying anyone for the move, but he may have given them gas money. (Addendum 2 p. 9:13). When asked about Jake's deposition testimony that he received his regular paycheck, Mr. McNeil stated that he would trust Jake's memory over his own, and that Jake was probably more accurate. (Addendum 2 p. 35:1-17; see also, Record 1012 p.9:15-19, where Mr. McNeil testified that he told Ms. Ottens' counsel that he gave Jake gas money.)

Jake may have been doing Dan a favor in moving some of his personal items along with the D&K property. (Rec. 1014 19:16-18).

Frankly, under established Utah law this type of activity would not be sufficient to establish an employment or agency relationship. This state has long rejected the family purpose doctrine, *Conklin v. Walsh* 193 P.2d 437, 440 (Utah 1948), and therefore the mere fact that Jake was helping his father move some personal items would not be sufficient to establish an employment or agency relationship. Indeed in one of the earliest Utah cases to discuss the parameters of vicarious liability for the operation of a motor vehicle, the Utah Supreme Court made clear that where family relationships are concerned, agency (and therefore vicarious liability) cannot be established by looking at the ultimate purpose or object of the trip. Rather, the court stated, the question that must be answered 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). If not, then there was no agency in the operation of the vehicle, and vicarious liability would not be present.

The example provided by the court to illustrate this point is telling, especially in light of the facts present here. Justice Wolf pointed out that a husband may take his own car and do a favor for his wife, such as picking up a dress from the cleaners, and would be in a sense his wife's agent to procure the dress. But, unless the wife exerted control over her husband's operation of the vehicle, he would not be her agent for the operation of the automobile, and not vicariously liable for any accident. The court then noted that this would be so, even if the

defendant had given the person a little cash to get the dress. *Id.* 1052. Here, all of the evidence shows that Jake was driving his own vehicle at the time of the accident (Rec. 1010 p. 6:20-22), and that he was fully in control of that vehicle, and operating without instruction or supervision from Dan.(Rec. 1010 pp.25-29) Thus, even if the overwhelming evidence about his employment by D&K is simply ignored, under the analysis contained in *Fox v. Lavender* there is still no evidence that Jake was employed by or acting as the agent of Dan McNeil. The trial court rightfully noted the absence of evidence to show employment/agency, and therefore properly dismissed the claim for vicarious liability.

**2.) The trial court properly found that there was no evidence to support a finding that Dan McNeil owed a duty to ensure that the chair at issue in this case was properly secured.**

When granting the directed verdict on the issue of direct negligence, the trial court also looked at the question of whether Dan McNeil had a duty to ensure that Jake's vehicle was properly loaded and secured before Jake left the Bluffdale property. This question is essential, because without a duty a party may not be held negligent as a matter of law. See, *Asael Farr & Sons Co. v. Truck Ins. Exchange*, 2008 UT App 315, ¶¶ 28-29, 193 P.3d 650, in which the Court of Appeals noted that establishing the existence of a duty is the first element in establishing a negligence claim. In this case, the trial court noted that based on existing law, and based on the facts developed as the case was tried, it could not find that Dan McNeil was under any legal obligation to ensure that Jake's vehicle was appropriately secured before leaving the property. (Rec. 1014 pp. 81-85) It did so by making reference

both to the statutory obligations imposed upon drivers of vehicles, and by looking at the facts that were specific to the case.

*Utah Code Ann.*, 72-7-409(6) states:

“A person may not operate a vehicle with a load on any highway unless the load and any load covering is fastened, secured, and confined to prevent the covering or load from becoming loose, detached, or in any manner a hazard to the safe operation of the vehicle, or to other highway users.”

This statute is essential to the proper resolution of this case, because it clearly indicates that our legislature, after due consideration, determined that it was the operator of the vehicle who has the duty to ensure that any load contained in the vehicle is properly confined and tied down. This makes sense, because it is, after all, the operator who must make the final decision about whether to move the vehicle onto a roadway, and it is his or her sole obligation to make decisions about the safety of the vehicle before he enters the roadway.

A recent case out of Appellate Court of the State of Washington shows why duties such as this may not properly be delegated to others. In *Ganno v. Langano Corporation*, 80 P.3d 180, 184 119 Wash. App. 310, (Wash.App. 2d 2004), the court was confronted with a claim that a lumberyard had failed to properly secure an I beam in the rear of the plaintiff's pickup. When the plaintiff suffered injury as a result of the beam coming loose from its moorings, he alleged that this was evidence of fault on the part of the lumberyard. The Court disagreed, pointing out that the Washington statute, which was very similar to ours<sup>7</sup>, made

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<sup>7</sup> The Court noted that RCW 46.61.655(1) stated that “No vehicle could be driven or moved on any public highway unless such vehicle is so constructed or loaded as to

the driver ultimately responsible for ensuring the security of his vehicle. *Id.*, 184. Thus, *even if the lumberyard had undertaken to secure the load*, it could not be negligent, as a matter of law, because it was the driver who “drove the truck on a public highway without first ascertaining that his load would not escape.” *Id.*, 184. While this is a case of first impression in Utah, the statutory schemes are very similar, and the reasoning is sound. It is the driver who determines to take the vehicle onto the roadway, and it is driver’s ultimate responsibility to make sure the load is secure before making that decision. To allow blame to be shifted to someone other than the driver would allow operators to skirt responsibility for an activity fully under their control, i.e., a final inspection of the vehicle before leaving.

It is necessary to recognize that the trial court also found that there was no evidence that Dan had voluntarily undertaken any efforts to supervise the loading of the vehicle or to secure the chair at issue, which, in its opinion, could potentially give rise to a duty. (Rec. 986, 1014 p. 73:20-23.) And this finding was clearly supported by the record. Both Dan and Jake testified that for most of the day in question, Dan remained in the home, deciding what should be taken away. (Rec. 1010 p. 24:8-14. 1012 p. 8:23-25) Dan further testified that he did not inspect any of the vehicles before they left (Rec. 1012 p.9:4), and Jake stated that when he decided to drive away his father was in the house with his ex-wife Kim. (Rec. 1010 p. 24:7).

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prevent any of its load from dropping shifting, leaking, or otherwise escaping therefrom.” *Id.*, 184.



In granting a directed verdict, and finding that Dan McNeil was under no duty of care, the court took note of all of this evidence, and compared it with what Ms. Ottens' offered as proof of an affirmative act on Dan's part. She was able to point to only a single bit of testimony, indicating that while Mr. McNeil did not inspect the loads to see if they were secure, he had participated in "throwing some ropes" back and forth across two of the trucks. (Rec. 1012 p. 9:14-14) 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. Simply stated, there were no facts that were sufficient to show that Dan had undertaken any acts that would give rise to a duty that did not exist otherwise. The trial court made the proper decision to direct the verdict because there was no duty of due care owed by Mr. McNeil.

**3.) There was no evidence that Dan McNeil improperly loaded or secured the chair at issue.**

Finally, Ms. Ottens argues that the recent case of *Magana v. Dave Roth Construction*, 2009 UT 45, 215 P.3d 143 has created new law that should cause this court to reassess Mr. McNeil's liability for the injuries she suffered. A closer look at *Magana*, however, shows that the case is both legally and factually inapposite to the facts presented at trial.

First, this court should note that *Magana* was primarily concerned with the application and limits of the "retained control doctrine", a general rule that recognizes that "one who

hires an independent contractor and does not participate or control the manner in which the ... work is performed owes no duty of care ....” *Id.*, ¶ 22. Here, the defendant did not assert that Jake or the other D&K employees were independent contractors; rather, he asserted that they were employed by someone other than him (personally). Thus, the entire discussion of retained control is irrelevant.

Second, the fact that the Supreme Court found that a general contractor may still have some liability for negligence, if he actively participated in the acts that caused the injury complained of, does not break new grounds. As will be discussed in greater detail below, Utah law has always held that an individual acting for or on behalf of a corporate entity may be held liable for his own acts of negligence. See, *Armed Forces Insurance Exchange v. Harrison* 2003 UT 14, ¶¶ 19, 21, 70 P.3d 35.

Third, and most important, however, a careful review of the *Magana* decision shows why Mr. McNeil may not be held liable under the facts disclosed during trial. In *Magana* the case for direct liability - as opposed to vicarious liability that is immunized by the retained control doctrine - was based upon the fact that the defendant participated in the very act that caused Mr. Magana injury. As the case makes clear, liability was not predicated on the general obligation to oversee and supervise the safety of the job site, instead it was predicated on the fact that 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. *Id.*, ¶ 37.

This, of course, is very different from what occurred in this case. Here, unlike the

facts in *Magana*, no one was able to say who loaded the chair at issue<sup>8</sup> (Rec. 1010 p.10:16-20), and Jake identified at least six people that were involved in the process. (Rec. 1010 p. 10:16-18). Similarly, there was no testimony about who individually secured the vehicle's load or looked over the contents. (Rec. 1010 p.23:23-25), though when Jake left the Bluffdale property Dan was inside the home. (Rec. 1010 p.24:7) The only testimony related to Dan was that he loaded some unspecified items and helped secure some ropes to the pick-up. (Rec. 1012 p. 9:14-14) Thus, in order for a jury to have found Dan liable under a theory of direct negligence, it would first have had to determine that Dan loaded the chair into Jake's truck or that Dan undertook to secure the chair, and failed to do so. In the absence of evidence, the jury would have been required to either assume or speculate that this was the case. As set out above, this is impermissible. *Walker v. Parish Chemical Company*, 914 P.2d 1157, 1163 (Utah. App. 1996). The trial court was correct in directing the verdict.

**II) The trial court properly denied the motion to amend the complaint to add Jake McNeil as a party to this lawsuit. The statute of limitations had run by the time that the motion was made. Jake had no identity of interest with Dan, and therefore the amendment would have been futile.**

Motions to amend pleadings are governed by Rule 15(a) of the *Utah Rules of Civil Procedure*. The straightforward language of the rule states that a party must seek leave of the court to amend its complaint once a responsive pleading has been filed, and that the court should grant such requests liberally as justice requires. As set out in the motions and

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<sup>8</sup> Jake suspected that it was him or one of the other employees, because they were the "young strong muscle." (Rec. 1010 p. 11:2)

memoranda that were filed in the underlying case, however, there are limits to a trial court's liberality. And it is an undisputed axiom of law that justice does not require that a court grant a request to amend, if the new pleading is legally insufficient or futile. *Jensen v. IHC Hospitals, Inc.*, 2003 UT 51, ¶ 139, 82 P.3d 1076. Futility, in turn, has been defined to include those proposed pleadings that would be unable to withstand an immediate motion to dismiss. *Id.*, ¶ 139.

This is precisely the case here. Ms. Ottens' proposed amended complaint, which was filed on September 5, 2006, acknowledged that the accident at issue occurred on March 29, 2002. (Rec. 109-114). Thus, by the time she asked the court for permission to add Jake McNeil as a party, the four-year statute of limitation had already run. *Utah Code Ann.*, §78-12-25 (currently renumbered as §78B-2-307). This would have made the amended complaint vulnerable to a motion to dismiss. *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 2004 UT App 274 ¶6, 98 P.3d 429.

Ms. Ottens herself acknowledged this difficulty in the motion and memoranda that she filed with the court. In those papers she recognized that unless she could provide a reason to ignore the statute of limitations, her attempt to add Jake McNeil would be untimely and, therefore, futile. In an effort to meet this challenge Ms. Ottens offered two potential grounds to excuse the late filing. First, she argued that under Rule 15(c) of the *Utah Rules of Civil Procedure* the proposed amendment should relate back in time to the filing of the original complaint, because Dan and Jake McNeil shared an identity of interest. (Rec. 120-121)

Second, she asserted that because she was unaware that Jake was the driver of the vehicle, the discovery rule should apply to toll the statute of limitations. (Rec. 121-122) As will be illustrated below, neither of these provides an adequate basis for ignoring the statute of limitations. Accordingly, the trial court was correct in denying the motion to amend to add Jake McNeil as a party, because such an amendment would be futile under the facts of this case.

**1. Jake and Dan did not share an identity of interest as defined by this Court because they did not share the same position or defenses in the litigation.**

Rule 15(c) of the *Utah Rules of Civil Procedure* holds that when a claim asserted in an amended pleading arises out of the same transaction or course of events described in the original complaint, the amendment will relate back to the date of the original pleading. This rule also allows a party to cure defects in her pleadings despite the intervening running of an applicable statute of limitations. *Russell v. Standard Corp.* 898 P.2d 263, 265 (Utah 1995). However, it is well established that Rule 15(c) does not generally apply in cases in which the plaintiff seeks to add a new party to the suit, as this would completely undermine the purpose of statutes of limitation. *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 217 (Utah 1984).

Naturally, the general rule has a narrow exception. If a plaintiff can demonstrate that the party to be added has an identity of interest with a previously named party, such that it can be assumed or proved that there would be no prejudice, then the amendment will relate back to the time the complaint was originally filed. *Penrose v. Ross* 2003 UT App 157 ¶ 9,

71 P.3d 631.

The initial question that must be confronted, then, is what does it mean to have an “identity of interest?” In *Penrose* this court answered the inquiry by holding that in the context of Rule 15(c) a “true identity of interest” requires that the parties have the “same” interests or posture toward the pending claim; i.e., the legal positions and defenses of the new and old parties must be the same. *Id.*, ¶¶ 15-17.

In showing how this standard should be applied, this Court engaged in an extended discussion of *Nunez v. Albo* 2002 UT App 247, 53 P.3d 2, a case it had considered just before taking on *Penrose*. In *Nunez* the plaintiff sought to add the defendant’s employer to the pending suit, after the statute of limitations had expired, and argued that under the unique circumstances of the case the two parties had the necessary identity of interest. It noted, for example, that the new party acknowledged the employee-employer relationship, that it admitted 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. *Id.*, ¶¶ 29-30. Thus, the disposition of the case against one party would *necessarily* affect the liability of the other, demonstrating that the existence of a true identity. *Penrose* at ¶ 19. In contrast, the defendants in *Penrose*, a father and son, were determined not to have the requisite identity of interest. In reaching this decision, this court focused on the fact the defenses offered by the two were not congruent. The father’s defense was simply that he was not the driver of the vehicle in question, and therefore was not responsible for

injuries resulting from its negligent operation. The son, however, was prepared to focus on the running of the statute of limitations. Thus, unlike the *Nunez* defendants, the father and son did not have the same posture toward the plaintiff's claims, did not share defenses, and the disposition against one would not necessarily affect the disposition against the other. *Id.*,

¶ 19. Accordingly, there was no identity of interest.

Here, the underlying facts are more similar (indeed they are almost identical) to those in the *Penrose* case than they are to the facts in *Nunez*. As set out in the briefing that was filed in connection with the motion to amend, Dan McNeil's defenses to the allegations were that he was neither the driver of the vehicle at issue in the case, nor the employer of his son. (Rec. 65-74, and 124-136) Thus, he claimed that he had no direct or vicarious liability. For this reason an allocation of fault under Rule 9 of the *Utah Rules of Civil Procedure* was included in the answer.(Rec.65-74) In contrast, Jake's defense, like that of the son in *Penrose*, would have focused on the fact that the statutory period had run. Additionally, had the amendment been allowed, counsel for each of the two defendants would have been obligated to explore who loaded the chair onto the truck, and who attempted to secure it. Clearly, then, there was the potential for each party to point to the other as the culprit in causing the injuries complained of by Ms. Ottens<sup>9</sup>. Under *Penrose* there is no identity of interest in such circumstances.

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<sup>9</sup> This does not necessarily mean that the parties would not have shared some common postures or defenses. It does show, however, that they did not have a completely unified stance or approach to the pending litigation.

Without the identity of interest<sup>10</sup>, the complaint against Jake would not relate back to the time the initial complaint was filed. Since the proposed amendment would have been filed more than five months after the statute of limitations had run, it would have been subject to an immediate motion to dismiss. And, as set out above, justice does not require that a trial court permit an amendment, when the pleading would be legally futile. The trial court, therefore, made the appropriate decision in denying the motion to amend, and in no way abused its discretion.

**2. The equitable discovery rule does not apply in this case. It would have been improper to add Jake McNeil as a party after the limitations period had run.**

Much of Ms. Ottens' argument regarding the propriety of the court's decision to deny her request to add Jake McNeil to the suit after the limitations period had run centers on the claim that she was deceived or misled by acts undertaken by Dan McNeil. Ms. Ottens asserts that absent that impropriety she would have been able to name Jake to the suit in a timely manner, and that the limitations period should be tolled under general principals of

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<sup>10</sup> Ms. Ottens makes a brief, and unconvincing, stab at asserting that this case could be analyzed as a misnomer case, which allows a party to correct technical defects in the pleadings. *Penrose* ¶ 14. A misnomer occurs when a party misstates the name of a defendant, for example identifying a defendant as "Geneva Rock Co.," instead of "Geneva Rock Products". See, *Wilcox v. Geneva Rock Corp.*, 911 P.2d 367, 370-71 (Utah 1986). It can also occur when the proper party is identified in the body of the complaint, but misidentified in the caption. *Sulzen v. Williams*, 1999 UT App 76, ¶ 14, 977 P.2d 497. Here there was no technical mistake. Ms. Ottens was not trying to substitute Jake for Dan, and thereby correct a mistake in her pleadings. She was trying to keep Dan in the suit, and add Jake. In *Penrose*, ¶ 14 this Court stated that this was not a type of misnomer.



equity. This argument falters on two grounds. First, while the appellant has been quick to assume that Mr. McNeil committed some malfeasance, the evidence does not support that claim<sup>11</sup>. Second, the elements of equitable estoppel, which underlie the equitable discovery rule, are simply not present in this case. Accordingly, there was no reason to apply the rule in this case, and no reason to toll the statute of limitations. The trial court correctly declined to allow an amendment under those circumstances.

*(I.) The appellant has failed to demonstrate that Mr. Dan McNeil mislead her in any way or that he was responsible for the contents of the police report and its addenda.*

In assessing whether Ms. Ottens is entitled to invoke the equitable discovery rule, it is essential to understand that her claim is based almost entirely on the assumption that it was Mr. McNeil who filled out the Utah Highway Patrol Accident Information Form, which identified him, rather than Jake, as the driver of the Ford pick-up involved in this action. (Rec. 151-157) This, she claimed, was an affirmative misrepresentation on the defendant's part that caused her to pursue the wrong individual in the first instance. (Rec. 131-149) The record, however, does not bear out this contention. In fact, testimony given during the discovery process and at trial strongly contradicts the accuracy of Ms. Ottens' basic assumption.

During the discovery period, Ms. Ottens deposed the investigating officer, Trooper

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<sup>11</sup> Nor does the evidence support the contention that she acted with reasonable diligence in moving her claim forward.

Lee, and asked about how he came to name Dan McNeil in the report. The questioning revealed that the officer did not know who had filled in the accident form, including the information identifying D&K Finish Carpentry and Dan McNeil. (Addendum 3, p. 15). He also testified that to the best of his recollection he got Mr. McNeil's name from a license plate (Addendum 3, p. 18), and that he could not remember whether he ever spoke with Mr. McNeil directly (Addendum 3, p. 18) Trooper Lee specifically stated that he did not know if Dan McNeil had filled in the information (Addendum 3, p.19) or if, in fact, he had a phone conversation with Mr. McNeil himself. (Addendum 3, p. 28). 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. In fact, we have no information how the report was compiled.

The testimony given at trial also undermines the assumption that Mr. McNeil told Trooper Lee that he was the driver of the vehicle. Counsel for Ms. Ottens aggressively questioned Mr. McNeil about the police report, but was unable to establish that the writing in the document was his. Under examination, Dan McNeil noted that there were at least three different types of handwriting in the report (Rec. 1012 p. 17:21-23), and that while some of them were similar to his own (Rec. 1012 p. 16:2, 17:4-6; 18:3-23) others were not (Rec. 1012 p. 17:18-20, 18:9-15). More significant, however, is the testimony that he did not recall filling out the form at issue, that he did not believe he had filled out the form, and that

he “definitely did not fill out that I was the driver of the vehicle.” (Rec. 1012 p. 21:21-25, 22:1.)

Based on this evidence only one conclusion can be drawn. Ms. Ottens’ assumption that Dan McNeil made a misrepresentation about who was driving the vehicle in question is not supported by any competent evidence.

**3. Jake McNeil cannot be made liable for the purported acts of Dan McNeil. The equitable tolling may not be applied to bring Jake into the lawsuit after the limitations period expired.**

Even if this court were to give credence to Ms. Ottens’ unfounded speculation regarding the source of the misinformation contained on the official accident report, the equitable discovery rule would still not apply to allow an amendment in this case. As set out above, the exception created in *Russell Packard Development v. Carson* 2005 UT 14 ¶ 26, 108 P.3d 741 is based upon principals of equitable estoppel, which are designed to keep a party who has committed some malfeasance or wrongdoing from benefitting from that impropriety. With respect to a statute of limitations, our Supreme Court held that “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.” *Id* ¶26.

Here, there is a very basic reason why this limited exception would not allow Ms. Ottens to amend her complaint and add Jake as a party after the limitations period had expired. Simply put, the appellant did not allege or prove that Jake played any part in providing inaccurate information to the investigating officer (or to the appellant); indeed

there is not a single fact anywhere in the record that even hints at such an occurrence. And it would be improper to attribute the purported acts of his father to the son. Because he did not cause any delay in bringing the action against himself, Jake was, and is, fully entitled to take refuge in the defense provided by the statute of limitations. Estoppel is inappropriate.

**4. Equity does not require that the discovery rule apply in this case.**

Finally, and briefly, this Court should also recognize that principles of equity, as applied to the facts in this case, do not compel the conclusion that Ms. Ottens should have been permitted to amend her complaint to add Jake McNeil. And they most certainly do not show that the trial court abused its discretion by denying her request.

Ms. Ottens hired counsel to pursue recovery for the injuries she allegedly suffered in the underlying car accident within months of the accident. (Rec. 1011p139:9-11) She came to a swift settlement with Ms. Cindy Quast, the driver who actually collided with the vehicle that hit Ms. Ottens' truck. (Rec. 1011p.137:1-7) After this she simply waited for a number of years, and then approximately three years later she finally filed suit against Mr. McNeil and Mr. Coleman. (Rec.1-7).

It is also worth noting that before the statute of limitations had expired, Dan McNeil put Ms. Ottens on notice that Jake McNeil was the driver of the pick identified in the police report. The defendant answered his complaint within days of his counsel accepting service, and in that answer he stated that Jake was the likely driver of the Ford pick-up. (Rec. 63-64, 65-74) While the appellant complains that this designation was somewhat equivocal, Mr.

McNeil did his best to provide information about an event that occurred almost four years earlier. The uncertainty arose because Mr. McNeil was unsure whether Jake or another individual was driving when the truck left his former residence. Both Dan and Jake 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. (Rec. 110:24:8-14, 1012 8:23-25) At any rate, while there were only a few days before the statute ran, Ms. Ottens was aware of two important facts. First, she knew that 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. A motion to amend was not made for more than five months. (Rec. 115-116) Clearly, this is not a timely and prompt response, and it need not be rewarded.

Finally, it is important to understand that the other issues raised by Ms. Ottens as evidence to justify her inaction are without merit. She complains that Mr. McNeil's insurer delayed in accepting service, but she fails to disclose that the delay was created in part by her own actions. When defense counsel became aware that Mr. McNeil's insurer did not know his location, it recognized that acceptance of service, which had been authorized by the insurer, could potentially compromise Mr. McNeil's rights. Counsel offered to accept service even though it did not know the whereabouts of Mr. McNeil, if Ms. Ottens would agree to cap any recovery to the limits of insurance. When that offer was turned down, however, there was no choice but to decline to accept<sup>12</sup> service. (All of these facts are disclosed in

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<sup>12</sup> The discussions were conducted in a two week period after a copy of the complaint and acceptance was forwarded to defense counsel. (Rec.228,230).

correspondence attached to Appellants papers moving to amend. Rec. 228-230). Efforts were made to skip trace Mr. McNeil, however, and when they proved successful, arrangements were then made to accept service, and an answer was filed before the expiration of the twenty days. (Rec.230, 65-74). Thus, rather than showing delay, the facts reveal that Mr. McNeil acted with reasonable promptness, and disclosed the essential facts of the underlying accident in time for Ms. Ottens to name Jake as a defendant to the action. Her failure to do so should rest at her own feet.

**III) The Court did not abuse its discretion in denying the appellant's motion to amend its complaint to allege a cause of action against D&K Finish Carpentry, Inc., The motion to bring a new party into the case was made after the close of appellant's evidence on liability.**

On December 17, 2008, after acknowledging to the court that he had finished presenting his evidence on liability<sup>13</sup>, appellant's counsel moved to amend its complaint to add D&K Finish Carpentry, Inc., ("D&K") as a party to the action, and to set out a cause of action alleging that D&K was an alter-ego of Mr. McNeil, thereby allowing it to pierce the corporate veil. (Rec. 1013. 17:16-22, pp. 28:12-25, 29:1-13). After hearing argument on the matter the following morning, the court declined to allow such an amendment, noting that the motion was untimely and posed a significant danger of prejudice to both Dan McNeil and

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<sup>13</sup> During a discussion that began with questions about jury instructions, the court stated that it anticipated motions to dismiss based on the evidence presented, and asked counsel if he had finished presenting evidence on the issue of liability. The parties stipulated that the evidence regarding liability was complete, and agreed to present argument on various motions, including that to amend the pleadings to name "D&K" as an additional party the following day. This stipulation was repeated the following day. (Rec. 1013, pp. 40:18-25, 41:1-17, 1013 p.1-3)

to D&K. (Rec. 1014 pp.56-58) In doing so, it stated that there was no identity of interest between D&K and Dan McNeill that could justify amending after the statute of limitations had run. The court also held that permitting such an amendment would violate the Due Process Clauses of both the United States Constitution and the Utah State Constitution. (Rec. 984-987.)

The appellant has characterized this ruling as a mistake of law on the part of the court, and has argued that it should therefore be reviewed under a “correctness” standard. (Brief of Appellant p. 2) This, however, is incorrect. Under well established case law, a denial of a motion to amend is reviewed under an “abuse of discretion” standard. *Sulzen v. Williams* 977 P.2d 497 (Utah 1992) And, when this standard is applied to the facts on the record in this matter, it becomes evident that the court did not abuse its discretion in denying the motion. In fact, the court made the proper decision.

**1.) The motion was untimely and posed a significant opportunity for prejudice to Mr. McNeil and to D&K.**

Rule 15(a) of the *Utah Rules of Civil Procedure* provides that a party must seek leave of the court to amend its pleadings after a responsive pleading has been filed, and further states that the court should freely grant such permission “when justice so requires.” This language has been interpreted to mean that the trial court should liberally allow amendments, however, this discretion is not without bounds. When an amendment is untimely, unjustified, or poses the risk of prejudice to the opposing party, the trial court, in its discretion, may properly deny such a motion. *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, ¶ 42, 87

P.3d 734. And, it is clear that if the court decides to deny a motion to amend, it need not find that all three conditions are satisfied. A denial may be justified on the basis of only one or two of these factors. *Id.*, at ¶ 42. See also, *Daniels v. Gamma West Brachytherapy, LLC.*, 2009 UT 66 ¶ 58. Here, after considerable argument, the trial court found that the motion to amend was untimely, and that it posed the potential of prejudice to the parties. (Rec. 1014 p. 56-58) It therefore declined to allow the amendment. This decision is clearly supported by the relevant law and the facts on the record.

In the recent case of *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, 87 P.3d 734, the Court of Appeals undertook a detailed analysis of the issue of timeliness, and stated that under established case law a proposed amendment is generally deemed to be untimely when it is made in the advanced procedural stages of the litigation. These would include motions made “after the close of discovery, upon the eve of trial, or after an order of dismissal had been entered.” *Id.*, ¶ 58. Here, the appellant failed to offer her motion until after she had finished presenting evidence on the question of Mr. McNeil’s liability, at a time when the trial was nearly complete. (Rec 1013 pp. 40:18-25, 41:1-17) Since the close of evidence is unquestionably later than the “close of discovery” or “the eve of trial”, under the standard definition of the term, Ms. Ottens’ motion was untimely<sup>14</sup>.

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<sup>14</sup> Parenthetically, the Court should recognize that there was no justification for waiting this long. Counsel for appellant knew of the existence of D&K from the inception of the litigation. The police report that appellant intended to introduce into evidence, and which appellant attached to numerous memoranda filed with the court, indicates that D&K was the registered owner of the vehicle. See, for example, the *Reply Memorandum in Support of Plaintiff’s Motion to Amend*, filed on September 26, 2006



Similarly, the court's finding of unavoidable prejudice is also well supported. Under Utah law a party is said to suffer unavoidable prejudice when the amendment would force it to litigate issues for which it had no time to prepare. *GLFP Ltd. v. CL Management, Ltd.*, 2007 UT App 131 ¶ 28, 163 P.3d 636. Here at least two parties would have been placed in this position had Ms. Ottens been allowed to amend her complaint for a third time, after the close of her case on liability.

First, as argued during the hearing, D&K, had never hired an attorney, had never conducted discovery, and had never explored any defenses that it might have been available. (Rec. 1014 p. 49:17-23, p. 50:1:24) Clearly, the lack of representation and lack of discovery would have placed it at a disadvantage in defending the allegations of wrongdoing. Second, since Ms. Ottens seems to want to amend her complaint not only to add D&K, but to add a cause of action to pierce the corporate veil<sup>15</sup>, Mr. McNeil would also be severely prejudiced. Had he been put on notice of that allegation, additional evidence would have been sought,

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(R.155) Additionally Jake McNeil testified that he was working for D&K at the time of the accident, and Mr. Lambert questioned him extensively about whether other employees were there helping and asked if Jake could remember their names. (*Deposition of Jake McNeil*, attached as addendum 1, p. 22:17-29, p. 26:1-12, 29:1-20.) Finally, the Defendant himself noted in an early pleading that Jake had claimed to be working for D&K. ( R. 124-127.)

<sup>15</sup> Mr. McNeil and his company could have an identity of interest only if the veil is pierced, and the parties are treated as one. An identity of interest is defined as having the same legal position and defenses, *Penrose* ¶ 14. If the veil exists, and the parties are treated as two separate individuals, then they would not have the same interest or position in the litigation. As was indicated in oral argument, Dan McNeil spent three days pointing to D&K as the employer of Jake McNeil. Had D&K been on notice and represented, it might have disagreed with that assessment. Or it might have offered other defenses. (Rec. 1014 p. 50:1-5)

additional testimony would have been introduced, and additional arguments would have been made, i.e., evidence regarding corporate formalities. Allowing Ms. Ottens to amend after the close of evidence to make this argument would have allowed her to try a case that was not plead and was not defended. This would have been unduly prejudicial, as the court expressly found. (Rec. 1014 p.57)

**2.) Permitting an amendment to bring in D&K under Rule 15(b) after the close of evidence would have violated the due process requirements of the United States Constitution and the Utah State Constitution.**

In response to the motion to amend, the trial court also considered whether it could be proper under Rule 15(b) of the *Utah Rules of Civil Procedure*, which may permit an amendment to conform to the evidence presented at trial. The court ultimately concluded that there was insufficient evidence presented during trial to show that D&K and Dan McNeil had an identity of interest or that the corporate veil should be breached<sup>16</sup>. Thus, if D&K were to be brought in, it would be as an entirely separate party. Faced with this situation, the trial court rightfully held that allowing Ms. Ottens to add a party, which was not represented, after the close of evidence, and to allow a jury to assess damages and allocate fault on that party would clearly be in derogation of the guarantees of due process. (Rec. 1014 p. 57:7-13)

The constitutions of both the United States and the state of Utah contain provisions protecting persons from deprivation of rights and property without the due process of the law. *Utah Const.* Article I, § 7, *U.S. Const.* am. 14. As our courts have held, this requires, at a

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<sup>16</sup> For example, there was no evidence of commingling of funds or failure to observe corporate formalities presented during trial.

minimum, that a party be given notice of the allegations levied against it, and be afforded an adequate opportunity to answer and defend. See, *Searle v. Searle* 2001 UT App 307 ¶ 36, 38 P.3d 307, quoting *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 108 S.Ct. 896, 899, 99 L.Ed.2d 75. This would not have occurred in this case if Ms. Ottens had been allowed to bring in D&K after evidence had closed.

Ironically, the very cases cited by Ms. Ottens to justify her attempt at the untimely amendment hold that such an action would inevitably run afoul of the minimum requirements of procedural due process. In *Hernandez v. Baker* 2004 UT App 462, 104 P.3d 664, the plaintiff obtained a default judgment against Mr. Baker. After default was entered against the defendant, the plaintiff moved to amend its pleadings and sought an immediate default and amended judgment of a corporate entity owned by Mr. Baker, Performance Auto. The trial court obliged, and naturally, Performance Auto sought a review on appeal on both jurisdictional and due process grounds.

In its first argument, Performance claimed that the trial court lacked jurisdiction over it because it was never served with a copy of the amended complaint, which it claimed was a prerequisite for finding jurisdiction. The Court of Appeals disagreed, in part, with that contention. It noted that if there was an identity of interest between the corporate entity and Mr. Baker, jurisdiction would have been established by the filing of the amended complaint. It further noted that the record showed only that Baker was an owner of the company, which

was insufficient to establish an identity. *Id.*, ¶ 17. This, of course, is very similar to facts present here.

More significant, however, this Court held that before judgment could be entered against the corporate entity it would have to be given an opportunity to respond to the allegations in the complaint and present its defenses to the court. *Id.*, ¶ 18. To do otherwise would be deprive the corporation of its fundamental rights of procedural due process. *Id.*, ¶ 18.

In making this decision, the Court relied on a decision issued by the United States Supreme Court in *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 120 S.Ct. 1579, 146 L.Ed.2d 530 (2000), which presented a factual scenario that was almost identical to that present in *Hernandez*. (The roles were reversed. Judgment against the corporate entity was entered, and then amended to include the individual owner.) The Supreme Court held that this violated fundamental due process rights. It noted that Rule 15 of the *Federal Rules of Civil Procedure* provided for due process by requiring that a party named in an amendment be served with a complaint, and that it also be allowed the requisite time to formulate its answer and prepare its defense. *Id.* 466, 1584. And, it further stated that the clock on an added party's time to respond does not start running until a new pleading is prepared, filed and served. *Id.*, 467, 1584-85. Finally, the court noted that Rule 15, and due process, required a more orderly and reliable course. *Id.*, 467, 1584.

This is precisely what the trial court recognized when it claimed that Rule 15(b) of the *Utah Rules of Civil Procedure* could not be used to amend the complaint to bring in a new party at this point of the trial. (Rec. 1014 pp. 56-58) While judgment may not have been entered, the evidence was complete, and Ms. Ottens was requesting that the case immediately proceed to that stage. Had the court allowed Ms. Ottens to bring D&K into the suit without preparing or serving a complaint, and without allowing D&K the opportunity to answer and defend, would have violated the order required by the rule and the dictates of fundamental fairness. The court was correct in ruling that the appellant could not add a new party under Rule 15(b) at that stage of the proceedings.

**IV) Under Utah law a corporation is a distinct legal person. Defendant's assertion that he did not employ Jake McNeil is not an affirmative defense that needs to be pleaded under Rule 8 of the *Utah Rules of Civil Procedure*.**

Ms. Ottens has also alleged that the trial court erred when it allowed Mr. McNeil to assert the he was not vicariously liable for the actions of his son, Jake McNeil, because Jake was employed by D&K (rather than by Mr. McNeil himself). In making this argument, the appellant first misinterprets, and then misapplies, two different rules of civil procedure, Rule 8(c), which deals with the necessity of asserting affirmative defenses, and Rule 9(l), which deals with the allocation of fault to non-parties. Compounding these difficulties, Ms. Ottens also misapplies the doctrine of the “corporate shield,” which was not put into issue by any pleadings in this case. This, unfortunately, creates additional confusion.

A closer examination of the factual background, and a proper understanding of the legal principals cited by the appellant, however, reveals that the trial court's decision on this issue was well founded. Simply stated, Mr. McNeil did not fail to assert an affirmative defense, and was not required to identify D&K in accordance with the provisions of Rule 9 of the *Utah Rules of Civil Procedure*. In the interests of clarity, and analytical rigor, each of the points will be addressed separately.

**1.) The testimony that D&K was Jake's employer is not an affirmative defense that needed to be set out in the answer to the complaint.**

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. Ms. Ottens apparently believes that this was an affirmative defense that must be set out in the pleadings, or forever waived, under Rule 8(c) of the *Utah Civil Procedure*. This argument falters on two separate grounds. First, it is based upon a fundamental misconception of basic principles of corporate law. Second, it is based on a misunderstanding of the nature of the affirmative defense. Once these two problems are sorted out, Ms. Ottens' complaints are revealed to be insubstantial and unworthy of consideration by this Court.

At the outset, when assessing the propriety of the trial court's decision on this issue, it is necessary to remember that under long established Utah law a corporate entity is vested with its own legal existence. Almost six decades ago, our Supreme Court expressly stated that "a corporation is a statutory entity which is regarded as having an existence and

personality distinct from that of its members of stockholders.” *Surgical Supply Center v. Industrial Commission of Utah, Department of Employment Security*, 223 P.2d 593, 595, 118 Utah 632 (Utah 1950.) And, even earlier, the Court made clear that a corporation is an “artificial” or “juridical” person with an independent existence. *Stewart Livestock Co., v. Ostler* 144 P.2d 276, 285, 105 Utah 529 (Utah 1943). In short, the law considers D&K to be one person, and Dan McNeil another.

It is equally important to understand the nature of an affirmative defense, in order to understand why Mr. McNeil was not required to specifically assert that D&K was Jake’s employer in his answer to the Second Amended Complaint. In *Prince v. Bear River Mutual Ins., Co.*, 2002 UT 68, ¶¶ 31-33, 56 P.3d 524, the Utah Supreme Court explained that 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<sup>17</sup>. Clearly, this is not what Mr. McNeil was doing when he identified D&K as Jake’s employer.

In paragraph six (6) of her Second Amended Complaint, Ms. Ottens alleged that the defendant hired and paid his son, and another unidentified male, to move personal items, including the chair at issue, from his rental in Bluffdale to an apartment on 13<sup>th</sup> East and 7200 South. (Rec. 430). In response to that allegation, Mr. McNeil admitted that the chair belonged to him, but denied everything else, including the fact that he employed and paid

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<sup>17</sup> See also, *Black’s Law Dictionary* 430 (7<sup>th</sup> ed. 1999)

Jake McNeil. (Rec. 422). Even a cursory reading of this answer, then, shows that Mr. McNeil was directly controverting an essential element of the plaintiff's prima facie case for vicarious liability; he expressly denied that he was Jake's employer. The testimony about D&K that was elicited by Ms. Ottens' counsel at trial<sup>18</sup> did not change the nature of Mr. McNeil's defense in any way. In identifying D&K as the employer (Rec. 1010 p. 27, 1012 p. 5:2) the witnesses merely provided additional information that was entirely consistent with Mr. McNeil's answer to the complaint. In short, they testified that Dan was not the employer, but D&K was. Because this undermines an element of plaintiff's prima facie case, it is not an affirmative defense, as defined by our Supreme Court in *Prince v. Bear River Mutual Insurance*.

**2.) The corporate shield was not used as an affirmative defense by Mr. McNeil in this case.**

At the center of Ms. Ottens' claim that the trial court erred in allowing Mr. McNeil to use the corporate shield as a defense (without expressly setting it out in his pleadings) lies a fundamental misunderstanding of what the corporate veil is. The doctrine is, in reality, merely a logical inference drawn from the fact that corporations and their individual shareholders, officers and directors are different juridical persons. *Black's Law Dictionary* describes it as "the legal assumption that the acts of a corporation are not the actions of its shareholders, so that shareholders are exempt from liability for the corporation's action." *Black's Law Dictionary* 341 (7<sup>th</sup> ed. 1999).

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<sup>18</sup> Similar testimony was given in Jake's deposition.



Under established Utah law, this means that the veil operates to protect an individual shareholder or officer of a corporation from responsibility for corporate torts, if the only basis of his alleged liability is her position with the company. This would include liability that is predicated on the accusation that the general duties of an officer include oversight of the company's operations. *Armed Forces Insurance Exchange v. Harrison* 2003 UT 14, ¶¶ 19, 21, 70 P.3d 35. It is equally well established, however, that the doctrine does not immunize an officer or shareholder from liability, if he or she personally participated in the tortuous act in question. *Id.*, ¶ 19, quoting 3A William Meade Fletcher, *Fletcher Cyclopedic of the Law of Private Corporations* §1137, at 209 (rev. ed. 2002)

Here, Mr. McNeil did not argue that the corporate veil immunized him from liability for damages caused by his personal acts, because those acts were taken on behalf of the corporation. In fact, when this issue was raised by counsel for Ms. Ottens, the trial court made specific inquiries about what was being argued.

The court stated:

“Let’s ask Mr. Glauser, because he’s aching to tell us, are you bringing up the shield?”

And counsel for Mr. McNeil replied:

“No your honor...” and then explained : “Their sixth paragraph said, “Dan hired” “Dan paid”, okay, are you with me? We deny that Dan didn’t hire, and Dan didn’t pay.”  
(Rec. 1014 p. 30:4-18)

Then later in the argument, counsel clarified again, when he stated:

“ I mean, we’re — this defense isn’t “We’re hiding behind the corporate shield”, the defense is, “It wasn’t me. It was D&K”

Upon hearing this clarification, the Court stated:

“Yeah, I think that’s the problem. We’re confusing someone pointing to someone else to using the corporation and saying “I was acting for the corporation”.”

(Rec. 1014 p. 31:5-12)

There is only one way to read this exchange, Mr. McNeil was not attempting to use the corporate entity to shield himself from responsibility for acts he personally committed. The corporate entity was brought up to bolster the argument that Dan McNeil did not hire or pay Jake McNeil, i.e., to counter the claim of vicarious liability that was levied in Ms. Ottens’ complaint. It may not be said too many times; this line of evidence was intended to prove “it wasn’t me, it was someone else.” As set out above, such an argument attacks the plaintiff’s prima facie case, and is not, therefore, an affirmative defense that must be set out or waived.

Accordingly, Ms. Ottens’ extensive review of cases showing that a corporate officer or shareholder might be held liable for a tort under certain circumstances is misplaced. Mr. McNeil acknowledges that the personal commission of tortuous acts might lead to liability for which the corporate shield is no defense. As shown in the opening sections of this brief, however, this was not the case here, and this was not the purpose of identifying D&K as the employer of Jake McNeil.

**3.) Mr. McNeil had no affirmative duty to designate D&K under Rule 9 of the *Utah Rules of Civil Procedure*.**

Ms. Ottens also asserts that if Mr. McNeil was going to argue that D&K was Jake's employer, then he was obligated to designate it as a party to whom fault should be allocated under Rule 9(1) of the *Utah Rules of Civil Procedure*. This argument reflects a fundamental misunderstanding of the purpose and requirements of rule, which are best discerned by looking at the rule itself. It states, as follows:

**“(1) Allocation of fault.**

(1)(1) A party seeking to allocate fault to a non-party under Title 78B, Chapter 5, Part 8 shall file:

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

(1)(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.

...

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

The plain language of 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 when making its findings. The rule does not create an affirmative obligation to name all persons who might have caused a particular accident; rather, it merely provides that you must identify the individual, if you wish the finder of fact to allocate fault to that person.

Here the defendant met that obligation by identifying Jake McNeil, who was operating the truck at the time of the accident. And it made that designation in both the answers to the initial complaint and to the amended pleading filed years later. (Rec. 65-74, 422-428)

Again, it is instructive to note that the rationale for this decision was explored during the Motions hearing that was held after the close of evidence. When addressing this issue with the trial court, Mr. McNeil's counsel stated that there 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%. (Rec. 1014 pp. 54:11-25, 55:1-14) Since no additional fault would be allocated to D&K, there was no practical reason to name them under Rule 9.

**V) Ms. Ottens has failed to marshal the evidence on the evidentiary rulings issued by the court in this matter. This is ample reason to deny the requested relief.**

Under long established Utah law, a trial court is vested with broad discretion to determine the admissibility of evidence. And absent an abuse of discretion, rulings on admissibility will not be disturbed. *State v. Whittle*, 1999 UT 96 ¶ 20, 989 P.2d 52. As set out in earlier portions of this brief, where a party alleges that the trial court made an error of this sort, it is incumbent it to marshal all of the evidence, on both sides of the question, to demonstrate the presence of an abuse. *Kealamakia, Inc., v. Kealamakia* 2009 UT App 148 ¶ 10, 213 P.3d 13. Even a cursory review of the brief filed by Ms. Ottens shows that this did not occur with respect to the evidentiary issues raised on appeal. She did not order the transcripts of the hearings on the motions in limine, her statement of facts makes no reference to any portion of the record on appeal, and the argument section of the brief is also devoid

of any such reference. Instead, Ms. Ottens merely argues that the court could have made a different decision. This is insufficient.

It is well established that when a party fails to fulfill its obligation to marshal the evidence, the appellate courts may simply decline to consider the issues on appeal. *Traco Steel Erectors v. Control, Inc.* 2009 UT 81, ¶¶ 17-19. It would be proper for the court to take this action in this case.

**VI) The trial court did not abuse its discretion when it declined to admit evidence that Mr. Dan McNeil was cited for a moving violation and that he paid the ticket. The evidence had no probative value to the prosecution of the case.**

While acknowledging that courts traditionally have been loath to permit the introduction of evidence of traffic citations or convictions in civil matters, Ms. Ottens has argued that the trial court abused its discretion when it declined to do so in this case. She argues the evidence, which would generally be precluded by Rule 416 of the *Utah Rules of Evidence*, was intended to prove that Dan McNeil was the actual driver of the vehicle at the time the chair flew out of the pick-up truck. Accordingly, Ms. Ottens believes the evidence was permissible because it was not intended to demonstrate negligence on Mr. McNeil's part, nor was it intended to impeach his credibility. (These are both impermissible purposes under Rule 416.)

There is a fatal flaw in this reasoning, however, which arises out of the fact that the relevant pleadings did not make that allegation, and the question of who was driving was not at issue. Ms. Ottens filed her second amended complaint on November 13, 2007. (Rec. 429-

434) Nowhere in that pleading is it alleged that Dan was operating the vehicle at the time of the accident, rather the claims were that he negligently secured the chair at issue and that he was vicariously liable for the loss because he was the employer of Jake McNeil, who was driving the pick-up. (Rec. 429-434). In his answer, Mr. McNeil admitted that Jake was the driver (Rec. 422-428). For purposes of trial, therefore, the identity of the driver had been established by the pleadings. Accordingly, any evidence that was intended to demonstrate 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. Rule 401 *Utah Rules of Evidence*, see also, *State v. Johns* 615 P.2d 1260, 1263-64 (Utah 1980).

While the transcript of the hearing on the motion to preclude evidence of the citation was not made part of the record on appeal, the trial court's views on this question are clear. On the last day of trial, Ms. Ottens argued a similar motion, when she sought to introduce the investigating officer's report into evidence. The court refused to permit this, stating that in order to allow evidence that Dan was the driver of the vehicle Ms. Ottens would need to amend her complaint once again, because the theory of the case presented in pleadings, and even on the proposed jury instructions, did not include the claim that Dan was the driver of the vehicle. (Record 1014 p. 6:6-8) Rather, it was that Jake was acting on behalf of Dan. (Record 1014 p. 11:1-3). Consequently, the court ruled that such evidence did not fit the theory of the case. It also held that to amend the complaint to present the new theory, and

possibly allow such evidence to be introduced, would be highly prejudicial, unfairly prejudicial, and too late. (Record 1014 12:1-20)

As set out above, this same line of reasoning would apply to the evidence of the citation and payment. It does not fit with the theory of case set out in the pleadings, and is therefore not probative in any way. And to allow Ms. Ottens to amend her pleadings at such a late stage of the case would be improper due to its prejudicial effect<sup>19</sup>. *Daniels v. Gamma West Brachytherapy* 2009 UT 66 ¶ 57. In either case, the court was well within its discretion to find either that the evidence was irrelevant or that its relevance was outweighed by undue prejudice. Rule 401 of the *Utah Rules of Evidence*, Rule 403 of the *Utah Rules of Evidence*. Accordingly, this court should not disturb the lower court's ruling. *Jensen v. IHC Hospital, Inc.*, 2003 UT 51, ¶57, 82 P.3d 1076.

**VII) The Trial Court did not abuse its discretion in allowing Mr. McNeil to ask when Ms. Ottens retained counsel.**

Ms. Ottens also contests a second evidentiary ruling issued by the court, which allowed Mr. McNeil to ask when she retained counsel. During the course of the trial, this question was raised directly and briefly. Ms. Ottens was asked if she retained him within two

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<sup>19</sup> Ms. Ottens had the opportunity to explore this matter fully in the deposition of Mr. McNeil, and he answered questions about the citation and guilty plea at that time. This deposition occurred in August 2006. (Rec. 780). More than a year later, she amended her complaint and abandoned the claim that Dan was the driver of the vehicle. (Rec. 429-434) Counsel for the defense objected to Ms. Ottens' attempt at trial to change the theory of the case to name Dan as the driver (Rec1014 p. 9:5-6), and the trial court agreed that it was improper. (Rec. 1014 p. 12:1-20) There is not even the hint that the trial court abused its discretion in keeping out this type of evidence.

months of the accident, and she answered that she believed so. (Rec. 1011 p. 139:6-11) After the question was answered, no further inquiries were made.<sup>20</sup>

In papers filed just prior to the start of trial, in particular the appellant's fourth motion in limine, Ms. Ottens requested that the trial court preclude the defense from introducing a variety of evidence, including any line of questioning, concerning when she retained an attorney. The appellant simply argued that such questions were irrelevant under all circumstances. (Rec. 764).

Counsel for the defense pointed out two potential reasons why such evidence might be relevant. First, as the Supreme Court recognized in the case of *Pennington v. Allstate* 973 P.2d 932 (Utah 1998), early attorney involvement in a case, and possible counsel initiated referrals to healthcare providers can support an inference that medical bills and treatment are inflated or unreasonable. (Rec. 806). Additionally, the defense anticipated that Ms. Ottens would attempt to portray Mr. McNeil as dishonest with respect to the information contained in the police report, and assert that she was prejudiced as a result of those actions<sup>21</sup>. The fact that Ms. Ottens retained counsel almost immediately after the accident tends to undermine the claim of prejudice. As pointed out in the memorandum filed in connection with that motion, early attorney involvement could imply that there was adequate opportunity to clarify

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<sup>20</sup> The same information was contained in a letter written by Ms. Otten's counsel dated May 22, 2002, which were part of records introduced at trial. (Exhibits 1: Tab 7, 006, Rec. 1011 p. 139:22)

<sup>21</sup> This proved to be the case. (Rec 1014)



the statements in the report, and therefore lead to the conclusion that any prejudice suffered was the fault of the appellant. (Rec. 806-807)

Rule 401 of the *Utah Rules of Evidence*, and the cases that interpret its provisions, make clear that the threshold for finding relevance is very low. In *State v. Smedley* 2003 UT App. 79, 67 P.3d 1005, this Court held that evidence with even the slightest probative value is relevant. Clearly, this standard is met here.

A fundamental question in this case, had it gone to a jury, was whether the plaintiff treated reasonably and whether the treatment was related to the injuries claimed. Since the Supreme Court has recognized that early attorney involvement may imply, under the right circumstances, that the treatment was not reasonable, then the simple question of when one retained an attorney is relevant. If the evidence could be misused in argument at a later time, as Ms. Ottens seems to suggest might happen (Rec. 828), then a timely objection could be made. This does not mean, however, that the inquiry should not be made.

Similarly, the question was directly relevant to the question of prejudice asserted by counsel at trial. If one claims that one is deceived, the amount of time one had professional help to clear up disputed facts is certainly relevant to that issue. Again, the question about when counsel was retained helps clarify that issue.

In both cases, the evidence was relevant under the terms of Rule 401 of the *Utah Rules of Evidence*, and in neither case was it used in the manner suggested by Ms. Ottens in

her pretrial motions. Simply put, the probative value outweighed the potential for prejudice, and therefore the evidence was admissible under Rule 403 of the *Utah Rules of Evidence*.

### **Conclusion**

For the reasons set out above, this court should uphold the directed verdict entered in favor of Dan McNeil. It should also uphold the ruling that denied the plaintiff the right to amend its complaint to add Jake McNeil as a party after the statute of limitation had run. It should also uphold the denial of the motions to amend the complaint to add D&K as a party, and to change its theory of liability to allege that Dan McNeil was the driver of the vehicle. These motions were made after the close of evidence and were therefore untimely. Finally, the court should uphold the evidentiary rulings made, as the court was clearly within its rights to determine what evidence was presented at trial.

DATED this 28<sup>th</sup> day of December, 2009.

**SMITH & GLAUSER, P.C.**

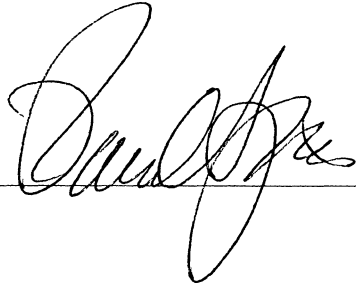
A handwritten signature in black ink, appearing to read "Michael Wright", is written over a horizontal line.

RICHARD K. GLAUSER  
MICHAEL W. WRIGHT  
Attorneys for Appellee

**CERTIFICATE OF SERVICE**

I, certify that on the 28<sup>th</sup> day of December, 2009, I hereby certify that two true and correct copies of the foregoing *BRIEF OF APPELLEE* was mailed, postage prepaid to :

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



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## Addendum No. 1

**COPY**

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

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

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DEPOSITION OF: JACOB McNEIL



August 10, 2006  
10:13 a.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



Q & A REPORTING, INC

**CD ENCLOSED**

1           Q     Do you recall on the day if your father was at  
2 all supervising the loading of the -- his possessions?

3           A     Yes, that's pretty much all he was doing.

4           Q     And do you recall if he, your sister -- or  
5 your half sister, Kaedee, or Kim McNeil helped load the  
6 pickup truck that you drove?

7           A     I would imagine everybody probably helped. I  
8 don't know if they directly loaded that or -- we were  
9 all helping.

10          Q     Do you know if your father owned the home at  
11 Pony Express, Bluffdale?

12          A     I believe he rented or leased. I'm not  
13 positive.

14          Q     Do you know if he had -- and you may not --  
15 any homeowner's or rental insurance?

16          A     I'm not sure.

17          Q     And you indicated that this was a workday that  
18 he asked you and the other employees to help work -- to  
19 load his home?

20          A     Yes.

21          Q     And did he pay you from company funds for  
22 doing that that day?

23          A     Yes, I believe so.

24          Q     And you may not know any of this, but I'll ask  
25 anyway. Do you know if he treated these employees as

1           A     I didn't help finish. I just helped during  
2 the eight-hour period that I was there for work and then  
3 that was it.

4           Q     So did you work a whole eight hours helping  
5 the move?

6           A     Honestly, I can't say it was an exact eight,  
7 but as far as he wanted our help, then I helped. When  
8 he said that you guys are done, then we were done.

9           Q     How were you paid for that day?

10          A     I believe it was just on our paychecks.

11          Q     So you didn't receive, like, a separate check  
12 for that particular day?

13          A     No, no.

14          Q     I don't think I have any more questions. Let  
15 me just look over my notes.

16                 Does the name Kirk Gilger mean anything to  
17 you?

18          A     Yes, it means a lot to me.

19          Q     Who is Kirk?

20          A     Kirk is a contractor, a building contractor  
21 who we used to do work for.

22          Q     Do you know if he was working for your father  
23 as a contractor back during the March 29th, 2002 time  
24 frame?

25          A     We would have been working for him. We're

1 A No.

2 Q Were you able to get any of the money back?

3 A Nope.

4 Q Did you ask your father about that situation?

5 A Yes, I asked him and Kirk.

6 Q Nothing became of it, I assume?

7 A Nope.

8 Q At the time that this accident occurred, how  
9 long had you had that truck?

10 A It was a short period of time. Maybe six  
11 months.

12 Q And how long afterward did you have the truck  
13 until he came and got it?

14 A That's until he came and got it, so I didn't  
15 have it any time after that. He came and got it at  
16 night. I was in bed.

17 Q What I mean is after March 29th, 2002, how  
18 long did you have the truck?

19 A I don't know. I don't recall.

20 Q Was it a couple months or several years?

21 A Probably a month or two, maybe. A couple  
22 months.

23 Q Do you remember any of the -- I already asked  
24 you if you remembered the names of any of the employees  
25 at that time that were helping move. Just in general,



1 do you remember the names of any of the employees that  
2 worked for D&K around the winter, spring of 2002?

3 A No, not that I can tell you, you know,  
4 honestly and accurately.

5 Q Did you ever have any friends that worked for  
6 D&K? What I mean by friends is people that you either  
7 knew prior to them working for D&K or people that you  
8 formed a friendship or a relationship with --

9 A I have before, yes.

10 Q And what are the names of those friends?

11 A My friend Daniel Garamendi worked there for a  
12 little while.

13 Q Do you remember during what period of time?

14 A I don't.

15 Q Is it possible he worked during the winter and  
16 spring of 2002?

17 A I don't know.

18 Q Do you know how he can be reached?

19 A I don't.

20 Q Do you know how to spell Garamendi?

21 A I don't. G-A-R-A -- I don't know. It's a  
22 hard one.

23 Q Do you know the name of his parents?

24 A I don't.

25 Q Do you know the name of any of his brothers,

## Addendum No .2

**COPY**

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



**Q & A REPORTING, INC**

**CD ENCLOSED**

1 there on the side of the road.

2 Q So you just saw it and you didn't stop,  
3 correct?

4 A Huh-uh, I was -- no. No. Sorry.

5 Q And then when you called Jake, were you still  
6 traveling?

7 A Oh, yes.

8 Q And then did you continue on until you got to  
9 the apartment on 13th?

10 A Yes.

11 Q Did you at any time talk to any police  
12 officers?

13 A I don't ever recall talking to a police  
14 officer.

15 Q Did you ever retrieve the chair?

16 A No. The chair never got back with me, no.

17 Q What caused you to surmise when you saw the  
18 chair, or conclude that it was one of yours?

19 A Because my chairs are very distinct. They are  
20 black with a white seat on them.

21 Q And is that what you saw when you drove past  
22 this chair?

23 A Yes.

24 Q I gather based upon your testimony, then, you  
25 ended up with just three chairs and you didn't ever

1 doing that sort of during a normal workday and that, in  
2 effect, you were paying him to help move by, you know,  
3 giving him a regular paycheck as you would for any other  
4 day of work that he would do for you. Does that sound  
5 correct? Does that sound familiar?

6 A I don't know. I don't remember what day it  
7 was.

8 Q Yeah. He probably remembers better because he  
9 was the one getting the money.

10 A Probably. I don't know. To be really honest  
11 with you, I couldn't tell you if he was on the payroll  
12 or...

13 Q So if he has a firm recollection of that,  
14 you'd probably be more willing to trust his recollection  
15 than yours?

16 A Yes, I would have to go with what he says  
17 because I can't remember the day, let alone...

18 Q Why didn't you -- when you saw your chair on  
19 the side of the freeway, why didn't you go back and get  
20 it?

21 A Well, when you're going 50 miles an hour or 55  
22 miles an hour down the freeway and you glance and you  
23 see something, you don't go like, Oop, I've got to stomp  
24 on the brakes right here.

25 Q Why not wheel off on the next exit and go

## Addendum No .3

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

---

JENNIFER OTTENS,	]	Civil No. 050911123
	]	Telephonic
Plaintiff,	]	Deposition of:
vs.	]	ROGER LEE
	]	TAKEN: January 30, 2007
NICKOLAS COLEMAN, an	]	
individual and DAN McNEIL,	]	
an individual,	]	
	]	Judge J. Dennis Frederick
	]	
Defendant.	]	
	]	

\* \* \* \*

Telephonic Deposition of ROGER LEE, taken on  
behalf of the Plaintiff, at the offices of Loren Lambert,  
Arrow Legal Solutions Group, 266 East 7200 South, Midvale,  
Utah, before Cathy Gallegos, Certified Court Reporter and  
Notary Public in and for the State of Utah, pursuant to  
Notice.

\* \* \* \*

1           A       At the very top, where it has the accident  
2 location, date of the accident, the time, direction of  
3 travel. Then everything below that, that's not my  
4 handwriting.

5           Q       So where it says "D & K Finish Carpentry,"  
6 and "Driver's name: Dan McNeil," you don't recognize that  
7 handwriting?

8           A       No. That's not my handwriting.

9           Q       Typically when these accident information  
10 forms are filled out, who puts the information there?

11          A       Specifically, it would be the owner of that  
12 vehicle, the driver. In cases where somebody is having  
13 medical treatment, then we would gather that information,  
14 I would fill it out myself. In this case, the top portion  
15 looks likes my handwriting. The remainder is not my  
16 handwriting.

17          Q       If you could go back to the accident  
18 information form where it has the driver's name as "Jen  
19 Ottens" and take a look at that.

20          A       Sure. One moment. I am turning there.

21          Q       Keep your thumb on the Dan McNeil, because I  
22 am going to go back to that.

23          A       Okay. I am there at that page.

24          Q       Is the handwriting in the Utah Highway Patrol



1       that Dan McNeil was the driver of the vehicle with the  
2       chair?

3               A       I thought quite a lot about this. From my  
4       memory, I remember being given a license plates of the  
5       vehicle that dropped the chair. If my memory serves me  
6       correctly, that is how I got Dan McNeil's name -- would be  
7       from a license plate.

8               Q       Do you know if you or any other officer ever  
9       spoke with Dan McNeil?

10              A       I did. But if I remember correctly, it was  
11      over the phone. I don't remember. I may or may not have  
12      spoken to him directly. It is really weird. I don't have  
13      a specific memory of actually standing in front of him. I  
14      did at one point have a telephone conversation with him.

15              Q       Do you recall whether or not Dan McNeil  
16      communicated that he was the driver of the vehicle?

17              A       No, I don't specifically remember him saying  
18      that. The only thing I remember about the conversation,  
19      if you want me to tell you that, I will, or wait for the  
20      question.

21              Q       Go ahead and tell me what you remember.

22              A       The specific memory I have of the  
23      conversation with -- I believe it would have been Dan  
24      McNeil was telling me that he was moving and moving stuff

1       that storage, or wherever the stuff was being dropped off,  
2       that he was missing a chair when he got there.

3               Q       Anything else?

4               A       No, but that's just the one thing that sticks  
5       in my mind, because I felt like I had the correct person  
6       at that point in time.

7               Q       And based upon your earlier testimony again,  
8       you don't know if the information filled out on the Utah  
9       Highway Patrol Accident Information Form was filled out by  
10      Dan McNeil or any other individual?

11              A       No. I don't remember. I remember having  
12      gone to the address down in the south end of the valley  
13      several times. Couldn't get in contact with him, so I  
14      left a card. One of the other experienced troopers gave  
15      that suggestion to me to leave a card on their vehicle  
16      requesting contact. Then I was contacted by that  
17      individual. I can't remember if I sent the form to him in  
18      the mail or if I actually went down and handed it to him.  
19      I don't have a specific memory of that.

20              Q       Do you know or do you recall any of the  
21      demeanor of any of the persons in the accident? And what  
22      I mean by "demeanor" is nervous, angry, confused, upset,  
23      dazed; any of those physical signs that you noticed on any  
24      of the participants in the accident?

25              A       No, I don't.

1 do you ever recall anyone bringing it to your attention  
2 that a son of Dan McNeil had any involvement or anything  
3 to do with the moving of that chair?

4 A No, I don't.

5 Q Do you ever recall Mr. McNeil or it being  
6 brought to your attention that Mr. McNeil, at least as far  
7 as his representations to you, or the highway patrol, that  
8 he was the driver of the vehicle? What I mean by "Mr." is  
9 Dan McNeil as noted on the accident information form.

10 A Do I remember he represented that he was the  
11 driver in the situation?

12 Q Correct.

3 A I don't have a specific memory of that. Like  
4 I said, I would just have to go off the police report,  
5 showing that the statement that I received showed that Dan  
6 McNeil was the driver under the driver information, but I  
7 don't remember him specifically telling me, "Yes, I was  
8 the driver of the vehicle."

9 MR. LAMBERT: I don't have anything further.  
0 There may be a follow-up.

1 FURTHER EXAMINATION

2 BY MR. WRIGHT:

3 Q I have a few follow-ups. My name is Michael  
4 Wright again. Let me ask you briefly two things because I  
5

## Addendum No .4

## C

West's Utah Code Annotated Currentness

Constitution of Utah

☞ Article I Declaration of Rights

→ Sec. 7. [Due process of law]

No person shall be deprived of life, liberty or property, without due process of law

## CROSS REFERENCES

Abortion, findings and policies of legislature, see § 76-7-301 1

Crimes involving civil rights, penalties for hate crimes, see § 76-3-203 3

Eminent domain, generally, see § 78B-6-501

## LAW REVIEW AND JOURNAL COMMENTARIES

Constitutionality of Utah's Medical Malpractice Damages Cap Under the Utah Constitution Magleby, 21 J Contemp L 217 (1995)

Eyewitness Identification in Utah A Changing Perspective, Hale, 1988 Utah L Rev 113 (1988)

If the Postman Always "Stings" Twice. Who is the Next Target? - An Examination of the Entrapment Theory, Zabriskie, 19 J Contemp L 217 (1993)

*KUTV v. Wilkinson* Another Episode in the Fair Trial/Free Press Saga, Hagen, 1985 Utah L Rev 739 (1985)

Rethinking Utah's Death Penalty Statute A Constitutional Requirement for the Substantive Narrowing of Aggravating Circumstances, Weron, 1994 Utah L Rev 1107 (1994)

State Constitutions as a Source of Individual Liberties Expanding Protection for Abortion Under Medicaid, Vuernick 19 J Contemp L 185 (1993)

State ex rel B.R. A guide to properly considering rehabilitation evidence in parental rights termination proceedings Cory J Hill 9 J L & Fam Stud 341 (2007)

*State v. Herrera* The Utah Supreme Court Rules in Favor of Utah's Controversial Insanity Defense Statute 22 J Contemp L 221 (1996)

*State v. Ramirez* Strengthening Utah's Standard for Admitting Evidence Identification Evidence, Whitehead, 1992 Utah L Rev 647 (1992)

Termination of Parental Rights Statute in Utah An Argument for Statutory Specificity, Kendell, 13 J Contemp L 341 (1987)

## **United States Constitution Amendment XIV**

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**UTAH CODE, 1953**  
**TITLE 72. TRANSPORTATION CODE**  
**CHAPTER 7. PROTECTION OF HIGHWAYS**  
**PART 4. VEHICLE SIZE, WEIGHT, AND LOAD LIMITATIONS**

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**72-7-409** Loads on vehicles --Limitations --Confining, securing, and fastening load required --Penalty

(1) As used in this section

(a) "Agricultural product" means any raw product which is derived from agriculture, including silage, hay, straw, grain, manure, and other similar product

(b) "Vehicle" has the same meaning set forth in Section 41-1a-102

(2) A vehicle may not be operated or moved on any highway unless the vehicle is constructed or loaded to prevent its contents from dropping, sifting, leaking, or otherwise escaping

(3) (a) In addition to the requirements under Subsection (2), a vehicle carrying dirt, sand, gravel, rock fragments, pebbles, crushed base, aggregate, any other similar material, or scrap metal shall have a covering over the entire load unless

(i) the highest point of the load does not extend above the top of any exterior wall or sideboard of the cargo compartment of the vehicle, and

(ii) the outer edges of the load are at least six inches below the top inside edges of the exterior walls or sideboards of the cargo compartment of the vehicle

(b) The following material is exempt from the provisions of Subsection (3)(a)

(i) hot mix asphalt,

(ii) construction debris or scrap metal if the debris or scrap metal is a size and in a form not susceptible to being blown out of the vehicle,

(iii) material being transported across a highway between two parcels of property that would be contiguous but for the highway that is being crossed, and

(iv) material listed under Subsection (3)(a) that is enclosed on all sides by containers, bags, or packaging

(c) A chemical substance capable of coating or bonding a load so that the load is confined on a vehicle, may be considered a covering for purposes of Subsection (3)(a) so long as the chemical substance remains effective at confining the load

(4) Subsections (2) and (3) do not apply to a vehicle or implement of husbandry carrying an agricultural product, if the agricultural product is

(a) being transported in a manner which is not a hazard or a potential hazard to the safe operation of the vehicle or to other highway users, and

(b) loaded in a manner that only allows minimal spillage

(5) (a) An authorized vehicle performing snow removal services on a highway is exempt from the requirements of this section if the vehicle's load is screened to a particle size established by a rule of the department

(b) This section does not prohibit the necessary spreading of any substance connected with highway maintenance, construction, securing traction, or snow removal

(6) A person may not operate a vehicle with a load on any highway unless the load and any load covering is fastened, secured, and confined to prevent the covering or load from becoming loose, detached, or in any manner a hazard to the safe operation of the vehicle, or to other highway users

(7) Before entering a highway, the operator of a vehicle carrying any material listed under Subsection (3), shall remove all loose material on any portion of the vehicle not designed to carry the material

(8) Any person who violates this section is guilty of a class B misdemeanor

**History:** L 1963, ch 39, § 146, 1990, ch 88, § 4, 1996, ch 58, § 1, 1997, ch 50, § 1, 1998, ch 224, § 1, C 1953, 27-12-146, renumbered by L 1998, ch 270, § 202

#### NOTES, REFERENCES, AND ANNOTATIONS

**Amendment Notes.** --The 1997 amendment, effective May 5, 1997, deleted Subsection (2)(b)(i) which read "coal" and redesignated former Subsections (2)(b)(ii) to (2)(b)(v) as (2)(b)(i) to (2)(b)(iv)

The 1998 amendment by ch 224, effective May 4, 1998, added Subsections (1) and (4), redesignating the other subsections accordingly and making related changes

The 1998 amendment by ch 270, effective March 21, 1998, renumbered this section, which formerly appeared as § 27-12-146

This section is set out as reconciled by the Office of Legislative Research and General Counsel

**Cross-References.** --Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301

#### NOTES TO DECISIONS

Negligence

-- Effect of violation

Trial court ruling that violation of former section requiring loads on vehicles to be securely fastened and covered was negligence as a matter of law and that the trial should be had on the issue of damages alone was erroneous since, in Utah, violation of a safety statute is regarded as prima facie evidence of negligence, and the presumption arising therefrom is rebuttable by a showing of justification or excuse *Klafta v Smith*, 17 Utah 2d 65, 404



**C**

Formerly cited as UT ST § 78-12-25

West's Utah Code Annotated Currentness

Title 78B. Judicial Code

▣ Chapter 2. Statutes of Limitations

▣ Part 3. Other Than Real Property

→ § 78B-2-307. **Within four years**

An action may be brought within four years:

(1) after the last charge is made or the last payment is received:

(a) upon a contract, obligation, or liability not founded upon an instrument in writing;

(b) on an open store account for any goods, wares, or merchandise; or

(c) on an open account for work, labor or services rendered, or materials furnished;

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1); and

(3) for relief not otherwise provided for by law.

CREDIT(S)

HISTORICAL AND STATUTORY NOTES

Prior Laws:

**C**

West's Utah Code Annotated Currentness

State Court Rules

⌘ Utah Rules of Civil Procedure (Refs &amp; Annos)

⌘ Part III. Pleadings, Motions, and Orders

→ **RULE 8. GENERAL RULES OF PLEADINGS**

**(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

**(b) Defenses; Form of Denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

**(c) Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

**(d) Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

**(e) Pleading to Be Concise and Direct; Consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.


**(f) Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.

#### LAW REVIEW AND JOURNAL COMMENTARIES

Living with Twombly John H. Bogart, 22 Utah B.J. 23 (March/April 2009)

The Recovery of Attorney Fees in Utah: A Procedural Primer for Practitioners Magleby, 23 J. Contemp. L. 379 (1997)

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Pleading  34, 48, 50, 53, 78, 87, 112 to 129, 142

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C.J.S. Pleading §§ 81 to 82, 84 to 89, 116 to 124, 132 to 133, 147 to 151, 156 to 157, 160 to 162, 183 to 196, 201

#### RESEARCH REFERENCES

##### ALR Library

84 A.L.R. 2d 1077, Recovery on Quantum Meruit Where Only Express Contract is Pleaded, Under Federal Rules of Civil Procedure 8 and 54 and Similar State Statutes or Rules

##### Forms

Am. Jur. Pl. & Pr. Forms Accord and Satisfaction § 9, Procedural Rules References

Am. Jur. Pl. & Pr. Forms Automobiles & Hwy Traffic § 603, Procedural Rules References

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Am. Jur. Pl. & Pr. Forms Duress and Undue Influence § 1, Introductory Comments

Am. Jur. Pl. & Pr. Forms Estoppel and Waiver § 5, Procedural Rules References



West's Utah Code Annotated Currentness

State Court Rules

⌕ Utah Rules of Civil Procedure (Refs & Annos)

⌕ Part III Pleadings, Motions, and Orders

→ **RULE 9. PLEADING SPECIAL MATTERS**

**(a)(1) Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. A party may raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity by specific negative averment, which shall include facts within the pleader's knowledge. If raised as an issue, the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

**(a)(2) Designation of unknown defendant.** When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name, provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

**(a)(3) Actions to quiet title, description of interest of unknown parties.** In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

**(b) Fraud, mistake, condition of the mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

**(c) Conditions precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

**(d) Official document or act.** In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

**(e) Judgment.** In pleading a judgment or decision of a domestic or foreign court, judicial or quasi judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter

showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

**(f) Time and place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

**(g) Special damage.** When items of special damage are claimed, they shall be specifically stated.

**(h) Statute of limitations.** In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

**(i) Private statutes; ordinances.** In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

**(j) Libel and slander.**

(j)(1) *Pleading defamatory matter.* It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(j)(2) *Pleading defense.* In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

**(k) Renew judgment.** A complaint alleging failure to pay a judgment shall describe the judgment with particularity or attach a copy of the judgment to the complaint.

**(l) Allocation of fault.**

(l)(1) A party seeking to allocate fault to a non-party under Title 78B, Chapter 5, Part 8 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.

CREDIT(S)

[Amended effective November 1, 2003; May 2, 2005; November 1, 2008.]

#### CROSS REFERENCES

Joinder of defendants, allocation of fault to non-party, description of factual and legal basis on which fault can be allocated and information identifying non-party, see § 78B-5-821.

#### LIBRARY REFERENCES

Damages ☞ 142.

Limitation of Actions ☞ 176 to 192.

Pleading ☞ 46, 18, 59.

Westlaw Key Number Searches: 302k46; 302k18; 302k59; 115k142; 241k176 to 241k192.

C.J.S. Damages §§ 225 to 228.

C.J.S. Limitations of Actions §§ 269 to 285, 287 to 290.

C.J.S. Pleading §§ 70 to 71, 96, 136 to 138, 162, 165.

#### RESEARCH REFERENCES

Forms

Am. Jur. Pl. & Pr. Forms Labor and Labor Relations § 3, Procedural Rules References.

#### UNITED STATES SUPREME COURT

##### **Standing,**

Challenging constitutionality of legislation, see *Diamond v. Charles*, U.S. Ill.1986, 106 S Ct. 1697, 476 U.S. 54, 90 L.Ed.2d 48.

**C**

West's Utah Code Annotated Currentness  
State Court Rules

☞ Utah Rules of Civil Procedure (Refs & Annos)

☞ Part III Pleadings, Motions, and Orders

→ **RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS**

**(a) Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

**(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 subserved 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.

**(d) Supplemental Pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

**LIBRARY REFERENCES**

Limitation of Actions ☞ 127, 124

Parties ☞ 54, 62



West's Utah Code Annotated Currentness

State Court Rules

☞ Utah Rules of Evidence (Refs & Annos)

☞ Article IV. Relevancy and Its Limits

→ **RULE 401. DEFINITION OF "RELEVANT EVIDENCE"**

"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.

#### ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is comparable in substance to Rule 1(2), Utah Rules of Evidence (1971), but the former rule defined relevant evidence as that having a tendency to prove or disprove the existence of any "material fact." Avoiding the use of the term "material fact" accords with the application given to former Rule 1(2) by the Utah Supreme Court. *State v. Peterson*, 560 P.2d 1387 (Utah 1977).

#### LAW REVIEW AND JOURNAL COMMENTARIES

*United States v. Downing*: Novel Scientific Evidence and the Rejection of *Frye*. Walden, 1986 Utah L. Rev. 839 (1986).

#### LIBRARY REFERENCES

Criminal Law ☞ 338.

Evidence ☞ 99.

Westlaw Key Number Searches: 110k338; 157k99.

C.J.S. Criminal Law §§ 710, 730.

C.J.S. Evidence §§ 2 to 5, 197 to 199, 204, 206.

#### RESEARCH REFERENCES

##### Forms

Am. Jur. Pl. & Pr. Forms Evidence § 19, Procedural Rules References.

##### Treatises and Practice Aids

Wharton's Criminal Evidence § 25:46, Utah.

#### NOTES OF DECISIONS





West's Utah Code Annotated Currentness

State Court Rules

☞ Utah Rules of Evidence (Rcfs & Annos)

☞ Article IV. Relevancy and Its Limits

→ **RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

#### ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that “surprise” is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since “surprise” would be within the concept of “unfair prejudice” as contained in Rule 403. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with “surprise.” See also *Smith v. Estelle*, 445 F.Supp. 647 (N.D.Tex.1977) (surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect *Terry v. Zions Coop Mercantile Inst.*, 605 P.2d 314 (Utah 1979); *State v. Johns*, 615 P.2d 1260 (Utah 1980), *Reiser v. Lohmer*, 641 P.2d 93 (Utah 1982).

#### CROSS REFERENCES

Pretrial disclosure of evidence, see Rules Civ. Proc., Rule 26.

#### LAW REVIEW AND JOURNAL COMMENTARIES

*Chapman v. State*, Hypnotically Refreshed Testimony-An Issue of Admissibility or Credibility? Callister, 1983 Utah L. Rev. 381 (1983).

Enhancing Penalties by Admitting “Bad Character” Evidence During the Guilt Phase of Criminal Trials-*State v. Bishop*. Prince, 1989 Utah L. Rev. 1013 (1989).

Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference. Cassell and Strassberg, 1998 Utah L. Rev. 145 (1998).

*State v. Rimmasch*: Utah's Threshold Admissibility Standard for Child Sexual Abuse Profile Evidence. Mundt-Larsh, 1990 Utah L. Rev. 641 (1990).

*United States v. Downing*: Novel Scientific Evidence and the Rejection of *Frye*. Walden, 1986 Utah L. Rev. 839 (1986).

C

West's Utah Code Annotated Currentness

State Court Rules

⌘ Utah Rules of Evidence (Refs & Annos)

⌘ Article IV. Relevancy and Its Limits

→ **RULE 416. VIOLATION OF TRAFFIC CODE NOT ADMISSIBLE**

Evidence that a person was convicted under a provision of Utah Code Annotated Title 41, Chapter 6a, of an infraction or class C misdemeanor is not admissible on the issue of whether the person acted negligently or otherwise wrongly, or to impeach the person's testimony on those issues.

CREDIT(S)

[Adopted effective March 1, 2006.]

Rules of Evid., Rule 416, UT R REV Rule 416

Current with amendments received through October 1, 2009.

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