

1989

Guy Erickson v. Wasatch Manor, Inc. : Brief of Appellee

Utah Court of Appeals

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Nelson L. Hayes; Masuda A. Medcalf; Richards, Brant, Miller and Nelson; Attorneys for Defendant-Appellant.

Eric W. Bjorklund; Attorney at Law; Attorney for Plaintiff-Respondent.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

890737-CA

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

GUY ERICKSON,	:	
Plaintiff-Respondent,	:	DC C86-845
VS.	:	CA 890737-CA
WASATCH MANOR, INC.	:	[Priority 14b]
Defendant-Appellant,	:	

APPELLEE'S BRIEF

ON APPEAL FROM THE JURY VERDICT
AND JUDGEMENT OF THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, UTAH,
HONORABLE HOMER F. WILKINSON

Nelson L. Hayes #1433
Masuda A. Medcalf #5317
Richards, Brant, Miller &
Nelson
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
(801) 531-1777
Attorneys for Defendant-
Appellant Wasatch Manor, Inc.

Eric W. Bjorklund #0345
Attorney at Law
3808 S. West Temple, Suite 1D
Salt Lake City, Utah 84115
(801) 262-9904
Attorney for Plaintiff-
Respondent

FILED

MAY 21 1990

Mary F. Nielsen
Clerk of the Court

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Nelson
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
(801) 531-1777
Attorneys for Defendant-
Appellant Wasatch Manor, Inc.

Eric W. Bjorklund #0345
Attorney at Law
3808 S. West Temple, Suite 1D
Salt Lake City, Utah 84115
(801) 262-9904
Attorney for Plaintiff-
Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii-iv
STATEMENT OF JURISDICTION.	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
DETERMINATIVE STATUTES, RULES, ETC.	1
STATEMENT OF THE CASE.	2
STATEMENT OF FACTS	2
PRE-TRIAL FACTS	12
SUMMARY OF ARGUMENT	18
ARGUMENT	19
POINT I. THE ORDER IN LIMINE WAS BASED INCORRECT FACTS	19
POINT II. WASATCH WAS NOT SUBJECTIVELY SURPRISED AT TRIAL	23
POINT III. COUNSEL FOR WASATCH COULD NOT HAVE BEEN REASONABLY SURPRISED	25
POINT IV. ERICKSON MADE NO ATTEMPT TO AMBUSH WASATCH	29
POINT V. REBUTTAL TESTIMONY IS ADMISSIBLE NOTWITHSTANDING SURPRISE	31
POINT VI. TESTIMONY OF FALLS DID NOT CHANGE THE OUTCOME OF THE TRIAL	32
POINT VII. WASATCH'S CLAIMED NEED FOR A RETRIAL IS SPECIOUS	36
POINT VIII. WASATCH FAILED TO OBJECT TO THE TESTIMONY OF THE FALLS	38
POINT IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WASATCH'S MOTION FOR A NEW TRIAL	41
POINT X. POINT II OF WASATCH'S BRIEF IS FRIVOLOUS	43
CONCLUSION	48
ADDENDUM	51

TABLE OF AUTHORITIES

<u>Anderson v. Bradley</u> , 509 P.2d 339 (1979 Utah)	27
<u>Board of Education of Sanpete v. Barton</u> , 617 P.2d 347 (Utah 1980).	31
<u>Cornwell v. Barton</u> , 422 P.2d 663 (Utah 1967).	46, 47, 48
<u>Eames v. Eames</u> , 735 P.2d 395, 397 (Utah App. 1987).	48
<u>Gregory v. Fourthrow Investments</u> , 754 P.2d 89, 91 (Utah App. 1988)	45
<u>Guardianship of Marshall</u> , 731 P.2d 5 (Wash. App. 1986).	41
<u>Hardy v. Hardy</u> , 776 P.2d 917 (Utah App. 1989)	33
<u>Hyland v. St Mark's Hospital</u> , 19 Utah 2d 134, 427 P.2d 736 (Utah 1967).	42
<u>In re Adoption of S.E.</u> , 755 P.2d 27 (Mont. 1988).	42
<u>Jensen v. Thomas</u> , 570 P.2d 695 (Utah 1977).	38
<u>Lembach v. Cox</u> , 639 P.2d 197 (Utah 1981).	42
<u>Martin v. Safeway</u> , 565 P.2d 1139 (Utah 1977).	48
<u>Maughan v. Maughan</u> , 770 P.2d 156 (Utah App. 1989)	49
<u>Menges v. Board</u> , 621 P.2d 562 (Or. 1980).	41
<u>Meyer v. Bartholomew</u> , 690 P.2d 558 (Utah 1984).	38
<u>O'Brien v. Rush</u> , 744 P.2d 306 (Utah App. 1987).	49
<u>Ohl v. Ohl</u> , 637 P.2d 1230 (N.M. 1981)	41
<u>Porco v. Porco</u> , 752 P.2d 365 (Utah App. 1988)	48
<u>Schofield v. Kinzell</u> , 29 Utah 2d 427, 511 P.2d 149, 151 (Utah 1973)	45
<u>Starkings v. Bateman</u> , 724 P.2d 1206 (Ariz. App. 1986)	41
<u>State v. Holyoak</u> , 743 P.2d 791 (Utah App. 1987)	38
<u>State v. Johnson</u> , 784 P.2d 1069 (Utah 1987)	39

<u>State v. Lesley</u> , 672 P.2d 79 (Utah 1983).	38
<u>State v. Mora</u> , 558 P.2d 1335, 1336 (Utah 1977).	32, 41
<u>State v. Northrup</u> , 756 P.2d 1288 (Utah App. 1988)	33
Utah Code Ann. 78-2a-3(2)(j) (1988)1
Utah Rules of Evidence, Rule 103(a)(1).1, 38, 39
Utah Rules of Evidence, Rule 103(d)1, 38
Utah Rules of Evidence, Rule 401.	22
Utah Rules of Civil Procedure, Rule 59(a)(3)	31

STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal pursuant to Utah Code Ann. 78-2a-3(2)(j) (1988).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion in admitting into evidence the testimony of Rebecca Helms and Jody Christensen that:
 - a. They had fallen in Wasatch Manor parking lot, and
 - b. They had told an employee of Wasatch Manor that they had fallen.
2. Whether the trial court committed reversible error by giving Jury Instruction No. 20?
3. Whether the trial court committed reversible error by denying Wasatch Manor's Motion for a New Trial?
4. Whether this appeal is frivolous and taken for delay, thus entitling Erickson to attorneys fees and sanctions?

DETERMINATIVE STATUTES, RULES, ETC.

Utah Rules of Evidence, Rule 103. Rulings on evidence.

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context

* * *

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

STATEMENT OF THE CASE
STATEMENT OF FACTS

Wasatch Manor is an apartment building for elderly, handicapped and disabled individuals which is located at 535 South 200 East, Salt Lake City, Utah. (R. 446 at 5,6). The Manor has 234 residents. The average age of the residents at Wasatch Manor is in the low eighties (Id. at 8). At trial, Wasatch Manor personnel acknowledged that because of the age and infirmities of their tenants, it was their duty to be more careful than other landlords in clearing snow and melting black ice. (R 446 at 14, 49).

At trial the Plaintiff, Guy Erickson, urged that the way in which Wasatch Manor piled snow on the upper level of the parking lot behind its building created a dangerous condition for tenants and that Erickson fell and sustained organic brain damage as a result of Wasatch's negligent failure to cure the dangerous condition. (R. 445 at 12, 13).

The upper level of the parking lot has a very gradual, almost imperceivable grade which descends to a low point. The low point runs from north to south about 25 feet from the western edge of the lot, the edge closest to the building. (R. 446 at 9, 10, 32, Trial Exhibits #1 and #3). This lowest area is sometimes referred to as the "depression" throughout the trial, although it is simply the lowest point of the grade in the lot. There are no drains in the lot and all moisture must run down the southwest ramp. (Id. at 10, 32, 33).

At the time of Mr. Erickson's fall, a majority of the parking stalls on the upper level of the parking lot were leased to Salt Lake County for the cars of employees who worked in the City and County Building. However, most of the parking places along the west row of the lot are posted for guests and tenants. (Id. at 13).

People who parked their cars in the guest or visitor parking (the west row) would, of necessity, need to walk through the depressed area in order to enter the building. The entry to the building is in the center of the row of parking places along the west side of the parking lot. (Id. at 11, P Exhibit #1 and #3).

Wasatch Manor closed off the lower level of parking at 11:00 p.m. each night with large locked gates in order to prevent vandalism. (Id. at 28). Any tenant who has a reserved parking place on the lower level, who arrives after 11:00 p.m. must park in the guest and tenant parking on the upper level and must therefore traverse the "depressed" area to gain access to the building. (Id. at 28, 29).

Wasatch piles snow around the perimeter of the lot during the winter and continued this practice through the winter of 1984-85. (Id. at 9 and P. Exhibit #1). When the temperature raises above freezing, the piled snow melts, sending sheets of water slowly across the lot to the depression. When the temperature lowers below freezing, the water turns to thin sheets of clear ice (black ice). At trial, Wasatch Manor's manager, Mr. Miller and building engineer, Mr. Kersey, acknowledged that this condition existed during the winter of 1984-85, that they were aware of it, and that if left untreated it would create a dangerous condition. (Id. at 8, 14, 15, 42,)

Just such a thaw-freeze cycle occurred the day prior to the night of February 9, 1985, when Erickson fell. (Id. at 24, 25, 27, 28 and Trial Exhibit P #18). At the time, the Plaintiff, Guy Erickson was 66 years old and was a tenant of Wasatch Manor. He had a reserved, covered, parking space on the lower level of the parking lot. At trial, he testified that on the night of February 9, 1985, he arrived at the manor at about 11:15 p.m.

and found the lower level gates closed and locked. He drove to the upper level and parked in the visitor and tenant parking. Mr. Erickson fell on black ice in the depressed area as he was walking to the apartment, hitting his head. (R. 446 at 145). As a result of his fall, Mr. Erickson, developed two subdural hematomas which required surgery to correct. (R. 446 at 149, 150). Expert testimony at trial showed that he suffered permanent organic brain damage, including a loss of 70-80% of his short term memory and a loss of other important mental abilities. (R. 446 at 151).

Mr. Erickson had been a successful realtor. Business associates who had worked with him before and after the fall, indicated that he was capable before the fall. (R. 446 at 143, 144). After the fall they referred to him as senile, incompetent and an embarrassment. (R. 446 at 147, 148).

Two witnesses, a relative and a friend of Mr. Erickson's, testified of changes in his personality where he became less patient, more irritable, less affable and lacking his old sense of humor. (R. 446 at 147, 148). Mr. Erickson and a friend testified of his inability to play his lifelong loves of golf and tennis. (R. 446 at 147, 158, 159).

Wasatch Manor's defense to Erickson's negligence claim was that it had taken reasonable efforts to observe when ice existed on the upper level of the parking lot and had treated it by looking for any ice at least three times a day and salting the ice. Wasatch's system of looking for ice and salting it three times a day was claimed by Wasatch's personnel to be a regular "routine" which they did every day without fail. (R. 445 at 24-27).

Most of the last day of trial was spent in determining the extent or validity of Wasatch's claimed "routine." Mr. Art Kersey is the building engineer for Wasatch Manor. Erickson called him as a witness on the last

day of trail. He testified that he was in charge of snow and ice removal from the common ways and parking lot for Wasatch Manor during the winter of 1984-85. (Id. at 15).

Mr. Kersey testified that he could not remember the specific conditions of the night of February 9, 1985 nor could he remember his specific actions that night. (Id. at 26, 35, 50, 138). He could remember doing his "routine" on the night of February 9, 1985. (Id. at 34, 35, 137, 138). He testified that he performed a "regular routine" for snow and ice treatment every day of the winter of 1984-85. (R. 446 at 36).

Mr. Kersey claimed that his regular routine began first thing in the morning at 6:30 a.m. when he would check the walkways and the parking lot for snow or ice. If it had snowed during the night, he would call a private company who would remove the snow. If patches of ice were present, he testified that he would fill a bucket with ice-melt or salt and treat the ice patches. If ice covered the whole lot, he claimed he would take a fertilizer spreader and load it with salt and spread it over the whole lot. (Id. at 37, 38, 48)

He claimed that his specific purpose for being out on the lot at 6:30 a.m. was to make sure the lot was cleared and de-iced before the county employees arrived to park on the upper level in the morning. (Id. at 48)

The second part of Mr. Kersey's daily routine was to go out to the parking lot "right at knocking off time" at 5:00 p.m. He claimed that he repeated the same steps of clearing any accumulated snow and observing and treating any ice that was present. (Id. at 38, 39).

The third part of Mr. Kersey's daily routine was to go to the lower lot at 11:00 p.m. and lock the gates to the lower parking level. He

testified that immediately after locking the gates he went to the upper lot and repeated the same routine of clearing any accumulated snow and observing and treating any ice with de-ice or salt. (Id. at 40)

Mr. Kersey claimed that as a general rule, ice was not present on the upper lot because of his daily routine. (Id. at 43, 139). He pointed out that he cared for the residents of Wasatch Manor and claimed that he wanted to make sure the lot was safe for them. (Id. at 41, 42).

Mr. Kersey claimed that no one had told him that they had fallen in the parking lot during the 1984-85 winter. (Id. at 44, 139). He claimed that no one had complained about the ice that winter. (Id. at 44). He claimed that no one had told him that the lot needed salting. (Id. at 45).

Mr. Kersey claimed that he was so conscientious about snow and ice removal that he not only cleared the parking lot but also cleared the sidewalk along Second East, "all the way to 6th South and all the way to 4th South, which is one whole block." This sidewalk was in front of a "beer joint" and some other buildings. (R. 446 at 46).

Mr. Kersey claimed that, "the county complemented us on what a good job we did in keeping the walkways and ramps clear." When asked who in the county complimented him about the lot he responded, "Oh, I wish I had kept names in the journal. But as people pass by they said, What a fine job you are doing. This parking lot is the best in town. . ." (Id. at 48).

Mr. Miller, Wasatch Manor's manager, claimed that substantial quantities of salt were purchased to accommodate the extensive salting of Mr. Kersey over such a large parking lot and walk ways. (Id. at 22, 23). He admitted, however, that notwithstanding Erickson's repeated requests for production of documents, he could not find a canceled check, a receipt or

document, evidencing that any salt or de-icer had been purchased for the 1984-85 winter. (Id. at 17, 18).

After Mr. Kersey and Mr. Miller testified about the condition of the lot during 1984-85, Erickson called Rebecca Helms to testify. Mrs. Helms worked for the Tax Abatement Office of Salt Lake County at the City and County building during the winter of 1984-85. (Id. at 57). She parked every working day on the upper level of the parking lot at Wasatch Manor during the winter of 1984-85. (Id. at 58, 59).

Mrs. Helms arrived at her parking place at approximately 7:45 a.m. On her way to work she walked over the general area where Erickson fell. When returning to her car at approximately 5:00 p.m. to 5:30 p.m. she again went over the general area where Erickson fell. (Id. at 59, 60). The times that she was present in the parking lot each day were immediately after the times of day that Mr. Kersey claimed that he salted the lot as a part of his daily routine.

She indicated that regarding the winter of 1984-85, "Quite frequently there was ice on the parking lot. There was a sheet of ice, black ice, if we had a bad storm in the morning when I got there." (Id. at 60). At page 61 of the trial transcript (R. 446) the dialogue with Mrs. Helms states:

Q. Now, was there ice in this depressed area as a general rule during the winter?

A. Yes, there was.

She testified that she did observe salting of the ice down one of the ramps during the winter of 1984-85. However, she indicated that she did not see salt anywhere else in the lot, including the depressed areas, during that winter. (Id. at 60, 61, 62, 81). She indicated that the sidewalk in front of Junior's Bar, from Wasatch Manor to fifth south was never

shoveled during the winter of 1984-85. (Id. at 61, 62).

During Mr. Kersey's testimony he identified himself as the Wasatch Manor employee who raised and lowered a large garbage container from the lower parking level to the upper level every day during the winter of 1984-85. (Id. at 43, 44). At trial, Mrs. Helms testimony was as follows:

Q. Did you ever talk with anybody at Wasatch Manor about the condition in the parking lot?

A. There was a gentleman who used to raise and lower the garbage can every morning. And he most always was there when I came. And after I had fallen that one day, I did say to him they needed to get something on the lot. That it was very, very treacherous.

(R. 446 at 62).

Mrs. Helms went on to identify the garbage man as Mr. Kersey in open court and indicated that the conversation occurred some time during the months of December 1984, January or February 1985. (Id. at 62, 63). Besides direct rebuttal testimony to Mr. Kersey's claim that no one had said to him the lot was icy or needed salting, this dialogue was also the first reference made by Mrs. Helms to a fall she suffered in the lot. Mr. Hayes did not object to Mrs. Helms comment about her fall or move to strike it. (Id. at 64).

As part of laying foundation for the conversation with Kersey, Mr. Bjorklund did not go into a detailed examination of Mrs. Helms fall but only asked the most basic of foundational questions about her fall:

Q. So you talked with him some time in which month would you say?

A. I can't recall. It had to be December, January or February.

Q. Of the winter of 1984 and 1985?

A. Yes. But to specifically say what day it was - - I fell probably closer to February, I would say.

Q. Now, on the day you fell, what were you doing that day?

A. Going to work?

Q. Would you tell us where you parked on this particular day?

A. Right here, in my parking place.

Q. Okay.

A. And I fell right behind my automobile. Right there on that corner.

Q. That was in that depressed area, wasn't it?

A. Right. Because the parking place kind of went up.

Q. And it was shortly after that you told Mr. Kersey that he needed to get salt in the area?

A. Right.

(Id. at 64). Mr. Hayes did not object to any of Mr. Bjorklund's questions regarding her fall nor did he move to strike any of Mrs. Helm's answers.

Upon cross examination Mr. Hayes reviewed Mrs. Helms fall in considerable detail. (Id. at 70-76). During Mr. Hayes' cross examination Mrs. Helms testified that she had also told Mr. Kersey about her fall during the winter of 1984-85. (Id. at 73, 74).

Erickson then called Mrs. Jody Christensen as a witness. She worked for the County Assessor's Office during the winter of 1984-85 and parked on the upper level of Wasatch Manor's parking lot during that time. (Id. at 83). She parked in the lot two to four times a week and traversed over the general area where Erickson fell in the morning before 8:00 a.m. and in the evening after 5:00 p.m. (Id. at 83-86).

When asked about the condition of the lot during the winter of 1984-85 she responded at page 88 of the trial transcript (R. 446):

A. Very dangerous, I thought within myself. It had black ice on black ice. Sometimes you could actually see where it had melted and refrozen.

Q. You mean layer upon layer?

A. Yes.

Q. And during that winter, had you had occasion to observe whether or not there was salt spread on that parking lot?

A. Very few times.

Q. So you did see some salt?

A. Uh-hum.

Q. Very few times. When you say very few times, can you give an estimate of how many times over the course of the winter you saw salt in the parking lot?

A. I would estimate -- now, are you speaking of every winter, or --

Q. No. Just the winter of 1984/'85.

A. I would say maybe two or three.

She indicated that she had to hold onto the back of cars to negotiate the lot. (Id. at 84,). Mrs. Christensen testified that at times the walkway in front of Junior's Bar (along Second East to 5th South) was passable but at times it was worse on the sidewalk than on the street so they would walk in the street. (Id. at 91).

As Mr. Bjorklund asked Mrs. Christensen about the route she walked every morning in the parking lot, she volunteered that her route changed after she had fallen in the parking lot. Mr. Hayes did not object or move to strike her reference to a fall. (Id. at 84).

She indicated that she had told Mr. Kersey that she had fallen, when she asked him if she could walk through the foyer. (Id. at 89, 90, 99, 103). In open court, she identified Mr. Kersey as the man she had talked to about using the foyer and her fall. (Id. at 89).

Mr. Bjorklund asked only foundational question about where she fell, when she fell, the condition of the lot and the weather at the time. (Id. at 87, 88). Mr. Hayes did not object to any of Mr. Bjorklund's questions, nor did he move to strike any of her answers regarding her fall.

During Mr. Hayes's cross-examination he examined Mrs. Christensen in substantial detail regarding her fall and her memory. (Id. at 92-105). In response to one of Mr. Hayes' questions, she commented, "I was petrified of that parking lot. In my estimation and my opinion and in my belief, I think it's a death trap." (Id. at 101).

Erickson then called Mrs. Colleen Mark as a witness. She worked at the City - County Building during the year of 1984-85 in the Treasurer's Office and walked to and from work along the same general area of Mr.

Erickson's fall just before 8:00 a.m. and just after 5:00 p.m. on a nearly daily basis. (Id. at 105-107).

At 107 and 108 of the trial transcript (R. 446) her testimony reads in pertinent part:

Q. And during that winter, did you have a chance to observe the occurrence of ice in that parking lot?

A. Yes, I did.

Q. And how often was it icy?

A. Whenever it froze.

Q. And how often was that, once in the winter?

A. No. Two or three times, I'd say, a month, if it really got cold and frozen.

Q. All right. Did you have a chance to observe whether or not there was salt in the parking lot during the winter?

A. Yes.

Q. And how often did you see salt?

A. I didn't see any salt at all until the winter we left there, the winter before we left there. And we left there in December of '86.

Mr. Bjorklund did not ask Mrs. Mark any questions about a fall and Mrs. Mark did not mention a fall in any of her answers during direct examination. (Id. at 105-108).

Incredibly, upon cross-examination, Mr. Hayes elicited from Mrs. Mark substantial detail about a fall she had in the Wasatch Manor parking lot, even though it had not been raised during her direct examination. (Id. at 108-112). Indeed, at one point she offered that, "Several people in my office have fallen, but they weren't injured. I was injured." (Id. at 112). Mr. Hayes did not move to strike this comment nor did he move to strike any of her comments about her fall.

After Mrs. Mark, Erickson rested its presentation of the case. Wasatch called Mr. Miller, the manager of Wasatch Manor as its first witness. Mr. Hayes asked him to comment on the last three witnesses who had testified that the lot "was nothing but a sheet of ice two or three times a month." (Id. 125). Miller claimed he would have seen the ice and

that he was "absolutely sure" no ice had built up. (Id. 125).

Mr. Miller testified that when Mr. Erickson had applied for an apartment at Wasatch Manor that Miller had talked with him. (Id. 124). Miller testified that in that interview, Erickson indicated to Miller that he was in "retirement status." This statement would have contradicted major parts of the first two days of trial, where Erickson indicated he did not plan to retire at the time of his fall. Mr. Miller's statement could have seriously drawn into question Erickson's credibility. Upon cross examination, in a rather dramatic exchange of questions and answers, Mr. Miller admitted that Erickson had not told him he was retiring. (Id. 133).

The jury found that Wasatch Manor was negligent in failing to treat a dangerous condition which was the proximate cause of Erickson's injuries and granted Erickson a judgement of \$9,820 for medical damages, \$45,000 loss of income and \$30,000 in general damages, for a total judgment of \$84,820.15. (R. 446 at 203).

PRE-TRIAL FACTS

In response to Wasatch's discovery requests of Erickson in 1987, two years before trial, Erickson had listed the names of four women who, it was believed, had fallen in the Wasatch Manor parking lot: Rebecca Helms, Jody Christensen, Colleen Mark and Carol Beck. (Appendix A). The trial testimony of the first three of these women is reviewed above. Mrs. Beck did not testify at trial even though Wasatch subpoenaed her, conferenced with her and had her wait in the hall the last day of trial. (R. 397).

Mr. Hayes subpoenaed all of these ladies to depositions in October of 1987. (R. 438, 439, 441). Neither Mr. Bjorklund or Mr. Hayes had talked to these women before they appeared for their deposition. The witnesses

were unprepared with regard to the subject matter and detail sought during the deposition. (R. 395; R. 444 at 16).

Colleen Mark indicated in her deposition testimony that the parking lot had no drainage (R. 439 at 7), that "there was ice in that parking lot at all times" (Id. at 9), that the condition of the parking lot was "a general joke" in the County offices, (Id. at 11), that the parking lot was "a terrible place" (Id. at 11) and that she never saw any salt in the parking lot during the 1984-85 winter (Id. at 17). Mrs. Mark identified that she had fallen in the parking lot in November of 1984, 2-3 months before Mr. Erickson's fall. (Id. at 15).

Jody Christensen indicated in her deposition testimony that she was "petrified of the parking lot" (R. 438 at 15), that the sun would melt the piled snow and it would turn to a sheet of ice (Id. at 17), that she had often referred to the parking lot as a "death trap" (Id. at 17), that no one liked to park in the lot because it was icy (Id. at 18) and that salt was only occasionally present (Id. at 17).

Mrs. Christensen indicated in her deposition testimony that she had fallen in the parking lot twice. Between 1984 and 1985 she fell in the parking lot behind the cars on the west row, near where the parking lot enters to the doors of the building (in the area of the depression). (Id. at 8, 9 and see footnote 2).

At page 11 of her deposition (R. 438) Mr. Hayes asked her:

Q. Did you report it to anyone?

A. I probably made comment that I had fallen?

Q. To someone at work?

A. Yes.

Q. Did you report it to anybody at Wasatch Manor?

A. No.

Q. Did you ever have any dealings with anyone at Wasatch manor regarding paying for parking or the condition of the parking lot or

anything like that?

A. I know that I talked to the manager there and asked him if I could walk through the lobby and not walk down the ramp, that I was petrified of the ramp, and he said that I could.

Emphasis Added.

Rebecca Helms testified at her deposition that she felt that Wasatch Manor "should have done something", that the parking lot held water and would turn to ice (R. 441 at 22), that it was common to see ice on the lot during the winter (Id. at 26), that water would hang around the depression area and it was icy there (Id. at 27), that it was typical to find black ice in that area ((Id. at 27, 29), that the parking lot had a reputation for being very icy (Id. at 30), and that salt was used on the lot "sparsely" during the 1984-85 winter. (Id. at 29, 31).

Mrs. Helms indicated that she had fallen several times in the lot. (Id. at 9). She initially indicated she could not remember when she fell. However, when Mr. Hayes suggested it was 1986, she indicated she fell in 1986. (Id. at 9 - lines 20, 22 and 25). The fall occurred in the depressed area, behind her car that was parked along the west edge of the lot. (Id. at 11, 27, 28 and see Footnote 2). At page 12 of her deposition transcript (R. 441) Mr Hayes asked:

Q. Did you report this to anybody?

A. I kind of think that I did report it to the office but I don't think an industrial was made up on it. I went on to work.

Q. When you say the office, your office, the Assessor's Office?

A. Right the Assessor's Office.

Q. Did you report it to anybody at Wasatch Manor?

A. No.

Emphasis Added.

Mrs. Helms had fallen another time, within eight years of the deposition. (Id. at 14). This fall occurred, "further north right before I went to go down the ramp." (Id. at 14). Mr. Hayes asked:

Q. And did you report that incident to anybody?

A. I don't remember. Probably not. I don't know.

Q. And did you report it to anybody at Wasatch Manor?

A. No.

Q. To park there at that period of time did you have to come through a gate where someone was monitoring people coming in and out?

A. Never did we do that in the 20 years that I was there. Occasionally there would be a man there that would lower the garbage down every day. Sometimes I'd see him there, and I figured he was from the manor and I spoke to him, but nobody ever monitored us that I was aware of.

Q. You never talked to anybody about the condition of the parking lot?

A. I can remember telling them I thought they ought to put some ice down but I don't know who I talked to or which day it was.

MR. BJORKLUND: You just said you thought they ought to put some ice down.

THE WITNESS: I mean some salt down.

Q. (By Mr. Hayes) When did you do that and to whom?

A. I don't know to whom or which days because I would see this man out there lowering the garbage. There's a big garbage thing that they lowered up and down. I think they put it up so the people could bring their garbage out every day. Then the rest of the day it was lowered down in to park there.

Q. What was his response to you?

A. I can't remember that there was one. I commented on the ice to him a time or two, I know that.

(R. 441 at 16).

On February 1, 1989, Erickson filed Supplemental Answers to Interrogatories indicating which additional witnesses he planned to call at trial. Colleen Mark, Jody Christensen, Rebecca Helms, Carol Beck, Burton Miller and Art Kersey were each listed. (R. 52, 53, Appendix B). Erickson noted explicitly that the ladies would testify "of the general condition of the Wasatch Manor parking terrace" and the Wasatch personnel would be asked to testify regarding the policies and conduct of Wasatch Manor. (R. 52, 53, Appendix B).

On April 3, 1989, Mr. Hayes filed a Motion in Limine with the trial court to keep the County employees from testifying about their falls in the

Wasatch Manor parking lot. (R. 58, 59). The Motion in Limine asked to exclude ONLY testimony of their falls. Wasatch stated in its Motion and its Memorandum In Support of Motion in Limine that the evidence of prior or subsequent falls should not be admitted, ". . . because plaintiff can not show those falls occurred under substantially similar circumstances and are too remote in time from the slip and fall alleged in this case." (R. 64).

Mr. Hayes, in his brief and argument, gave the court the impression that this case was one where there would be testimony from Wasatch about their activities and the specific conditions on the night of February 9, 1985, much the way one would expect the testimony to go in a standard slip and fall case. He failed to inform the trial court that the Wasatch employees did not have specific recollection of the parking lot conditions or their specific acts on the night of the fall and that they would be relying on testimony of "routine." He failed to inform the trial court that said routine was claimed to have begun in 1984 and claimed to have continued through to the trial. (R. 466 at 36, 37).

In said hearing Mr. Bjorklund's oral recitation of the anticipated testimony at trial was squarely accurate. (Appendix C). Mr. Bjorklund indicated that Erickson would testify of the freeze/thaw dangerous condition and his fall. Wasatch would defend by claiming a routine which has lasted from 1984 to the present. Mr. Bjorklund urged that the ladies' falls during the time of the claimed "routine" would be admissible because they would show that, it was more likely that there was an on-going dangerous condition. Second, their falls showed that it was less likely that Wasatch did its claimed routine. (R. 444 at 13-16).

Mr. Hayes' oral response inferred that no depositions of his clients

had taken place and he inferred that Mr. Bjorklund's expectations about the testimony of Kersey and Miller were therefore only conjecture:

Just two items, your Honor. Number one, counsel tells us that the evidence that we have indicated differs from what we have recited. The counsel has recited what my people will say or not say. There is no deposition testimony. So I don't know how he can say, based upon a record. He can say based on what he expects will be the case.

I have recited and pointed to in our memorandum the deposition testimony. I don't know of any other. I come to the court at this point knowing only what testimony there is.

(R. 444 at 17). Emphasis added.

The depositions of Mr. Miller and Mr. Kersey had taken place in February of 1987. Both Mr. Hayes and Mr. Bjorklund were present, but neither counsel could subsequently locate the court reporter who transcribed the depositions and the reports were never produced. (R. 446 at 6). Mr. Hayes' inference that Mr. Bjorklund's comments were simply conjecture was not accurate.

Mr. Bjorklund attempted to correct the misimpression given by Mr. Hayes' comments, but the Court would not allow any further comment.^{1/} (R. 444 at 19). The court granted Wasatch's Motion in Limine. (R. 444 at 19-22).

^{1/} At R. 444 at page 19, line 13 it mistakenly states, "MR. HAYES." It should show "MR. BJORKLUND" which is clear from the court's comments. Mr. Bjorklund had two other motions that day. (R. 89-90, R. 93-94). Mr. Hayes made no attempt to correct his misstatement.

SUMMARY OF ARGUMENT

Wasatch obtained an Order in Limine by a misstatement and an omission of material facts to the court. Wasatch could not reasonably expect the court to enforce the Order in Limine when the court became aware of the actual facts. Ms. Medcalf, co-counsel for Wasatch, admitted that they expected that the women would be able to testify regarding their falls if testimony about the condition of the lot was submitted. They knew such testimony would be submitted. Mr. Hayes' conduct during cross examination was not consistent with a befuddled and surprised attorney. He was not surprised.

The claimed surprise could have been avoided by Wasatch by (1) not misstating and omitting facts to the court in obtaining the Order in Limine, (2) asking further questions during the deposition of the witnesses, and (3) talking to the witnesses before trial.

Mr. Bjorklund did not try to ambush Wasatch. Erickson had no choice but to wait until after Mr. Kersey testified at trial, to raise its Motion to Reconsider the Order in Limine, so the trial judge could hear Kersey's testimony with his own ears. Mr. Bjorklund did not refuse to tell the court what the ladies from the county would say. Mr. Bjorklund explained to the court that they were rebuttal witnesses and Mr. Bjorklund was uncertain as to what Kersey and Miller would say. Moreover, Wasatch had received specific written notice that the ladies from the county would testify and that their testimony would generally relate to the condition of the lot.

The testimony of Mrs. Helms and Mrs. Christensen was in the nature of rebuttal to Mr. Kersey's claim that no one had ever told him that they

had fallen. It is therefore admissible, notwithstanding any claim of surprise.

The testimony of the county employees so totally decimated the credibility of Mr. Kersey and Mr. Miller that the jury would have ruled in Erickson's favor notwithstanding the limited and benign testimony of Helms and Christensen regarding their falls.

Wasatch cannot articulate a plausible way that a retrial would help it prove a negative, i.e., that Helms and Christensen never fell or that they never told Kersey about their falls.

Mr. Hayes chose not to object to or move to strike any of the evidence regarding falls. Wasatch does not claim that the admission of the evidence of falls is "plain error." A substantial portion of the evidence of falls was solicited by Mr. Hayes on cross-examination, even when Mr. Bjorklund had not raised the issue on direct examination.

Instruction No. 20 is a correct statement of the law for dangerous conditions which are neglected by landlords and Wasatch's Point II of its Corrected Brief is frivolous and misleading.

This appeal has no likelihood of success. It mischaracterizes the facts and law. It is frivolous and is constituted for delay. Mr. Erickson is poverty stricken. Erickson is entitled to attorney's fees and sanctions.

POINT I

THE ORDER IN LIMINE WAS BASED ON INCORRECT FACTS

The trial court would have likely denied the motion in limine, had the trial court understood correctly the evidence which would be presented at trial. It is noteworthy that the factual presentation of Mr. Bjorklund to the trial court during the arguments about the Motion in Limine, accurately

reflected the facts as they unfolded during the trial. (Appendix C).

Mr. Hayes also understood the actual nature of the testimony that would be presented at trial. In his opening statement to the jury he indicated that they should have, ". . . empathy with these people in trying to think back to something that you did in February of 1985 and being absolutely exactly sure, unless by habit, by custom, that was your routine and that was your life." (R. 445 at 22). Emphasis added.

Mr. Hayes detailed Mr. Kersey's "routine" for the jury, (Id. at 24, 25). pointing to Erickson's probable attack on Mr. Kersey's routine and indicating it was, "probably the central issue of the case." (Id. at 26, 27). Mr Hayes' view of the case in his opening statement, as one focused on Kersey's "routine" is in stark contrast to his arguments in the Motion in Limine arguments three months earlier where he discredited Mr. Bjorklund's description of the "routine" issue and focused the court on a single occurrence.

Mr. Hayes made another material misstatement during the Motion in Limine Arguments when he indicated to the trial court that none of the women's falls occurred in the depressed area of the lot. (R. 433 at 10, 11). He urged from this misstatement, that the falls were so dissimilar as to not be admissible. In fact, Mrs. Christensen and Mrs. Helms had each indicated

in their depositions that they had a fall in the depression area during the time of Mr. Kersey's routine. 2/

Wasatch has made the same misstatement, about the falls not occurring in the depressed area, to this court in its docketing statement at page 3. Mr. Bjorklund thereafter mailed to Masuda Medcalf, co-counsel for Wasatch, a letter indicating concern with this continued misstatement and other misstatements in the docketing statement. (Appendix D). Mr. Bjorklund even referred her to the specific page of Mrs. Helms' deposition where

2/. Mr. Hayes stated to the trial court during the oral argument of the Motion In Limine, "Unequivocally, none of these women when I took their depositions claimed that they fell in an area that they described as an area of depression in the parking lot." (R. 433 at 10, 11). Mrs. Helms was unsure of the year she fell but estimated it to be in 1986, during a period that Kersey claimed he had followed his routine. (R. 441 at 9; R. 446 at 36). She identified her car as the "sage" or green buick which is in the second parking stall from the end on the south side (left side) of picture #2 of Exhibit #1 of her deposition. (Id. at 6). She indicated that her fall occurred, "Right behind my car where it's parked in that picture." (Id. at 10). Mr. Bjorklund asked, "Okay, so it was typical to find black ice down that depression? She answered, "It was, and this was where we fell, was in that area there." He asked, "In that particular depression?" She responded, "Yes, and the other time I fell here." Mr. Bjorklund sought clarification, "Now, when you first pointed to where you fell you pointed right behind your car? She affirmed, "Right, it was behind my car." (Id. at 27).

Mrs. Christensen testified in her deposition that her 1984-85 fall occurred, "right near the door" (R. 438 at 8). "Still in the parking lot. Now, when I say near the door, I don't mean direct up to the door but I mean opening to the door." (Id. at 9). "I know I stayed close to the cars because I held onto the cars. (Id. at 10). Mr. Bjorklund asked, referring to a car parked along the west edge of the parking lot in Exhibit #1 of Mrs. Christensen's deposition, "Now, when you fell a second time, was it somewhere in the area of that silver car?" She responded, "Somewhere in the area of it, yes." (Id. at 16). The car was identified at being 1 1/2 inches from the right side of picture #2 of Exhibit #1. (Id. at 15, 16). Looking at said picture one can see that her fall would be in the area of the dark line which were indicated by two arrows. The dark line is the lowest point of the depressed area and was a water stain. (Id. at 9). See also R. 190 and Plaintiff's Exhibit #3.

Helms acknowledged her fall was in the depressed area. Notwithstanding Mr. Bjorklund's letter, this misstatement was made again to this court in Wasatch's Corrected Brief at page 20.

After the judge had a chance to hear Mr. Kersey's testimony at trial with his own ears, Erickson moved the trial court to reconsider the motion in limine. (R. 184-194). The difference between the facts which were represented to obtain the Order in Limine and the actual character of the case were apparent to the court. In ruling on the motion to reconsider the judge stated, "And I don't think that when you ask me to reconsider a motion in limine, I don't think it goes to the motion in limine which I heard." (R. 446 at 55).

Rule 401 of the Utah Rules of Evidence provides that relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. Had the court understood that certain falls occurred during the time period that Mr. Kersey claimed he did his routine and occurred in the same depressed area of the lot as Mr. Erickson's fall, the court may have well ruled it was admissible as having a tendency to show that it was more likely that there existed an on-going dangerous condition in the depressed area and, more importantly, that it was less likely that Mr. Kersey performed his claimed routine.

At trial, Mr. Bjorklund did not ask the court to reconsider the Order in Limine regarding Mrs. Mark. (R. 185). Her fall did not occur in the depressed area and in that sense could have been considered too dissimilar to be relevant. At trial, Mr. Bjorklund did not ask her about her fall.

At trial, Helms' and Christensen's claim of having fallen became admissible for an additional reason. Their claim that they had told Mr. Kersey of their falls directly rebutted his testimony that no one had told him of a fall. The ladies communications to Mr. Kersey about their falls was not known to either counsel, however, at the time of the arguments regarding the motion in limine.

Wasatch's Order in Limine was obtained by a misstatement of the facts of the case to the court. Wasatch cannot now claim to have reasonably relied on an Order obtained through misstatements and omissions.

POINT II

WASATCH WAS NOT SUBJECTIVELY SURPRISED AT TRIAL

By affidavit, counsel for Wasatch acknowledged that they should have known to expect the admission of testimony from Helms and Christensen about falls. Moreover, the conduct of counsel for Wasatch was not consistent with his claim of actual surprise.

In the affidavit of Masuda Medcalf, attached to Wasatch's memorandum in support of its Motion for a New Trial, she stated that, "Defendant's counsel also recognized that if they were to elicit any testimony from other Wasatch Manor residents to the effect that the parking conditions at Wasatch Manor during the 1984-1985 winter were safe, this would open the door to the testimony of the County employees." (R. 315, 316).

Of course, it is not the identity of the witnesses such as Wasatch Manor residents or county employees that would make the testimony of the ladies falls admissible. It is the testimony about Kersey's routine and the conditions of the parking lot during the 1984-1985 winter, that makes the

ladies testimony of falls admissible. As Mr. Hayes stated in his opening statement to the jury, this would be the central issue of the case.

At best, counsel for Wasatch must concede that they had just not thought through the anticipated testimony well. At worst, Ms. Medcalf's statement is a frank acknowledgement that Wasatch knew that when the court became aware of their "routine" defense, (which was inevitable) the testimony of the ladies falls would become admissible.

When Mrs. Helms and Mrs. Christensen testified about their falls, Mr. Hayes did not appear to be a befuddled and surprised attorney. After Mr. Hayes elicited on cross examination from Mrs. Mark that she had fallen, he immediately began to question her regarding the weather in November of 1984 and introduced the pre-marked weather report for November 1984 as Defendants Exhibit No. 27. (R. 446 at 109). In Mr. Hayes' closing argument to the jury he urged that the weather report showed that the temperature never got low enough in November for the lot to freeze as Mrs. Mark claimed. (Id. at 176, 177). If Mr. Hayes did not subjectively expect to talk with Mrs. Mark at trial about her fall, why did he have the November 1984 Exhibit marked and ready for submission? It had no other probative or relevant use at the trial.

Moreover, Mr. Hayes had subpoenaed Mrs. Beck, a county employee, to the trial. She could have only testified about her fall and the condition of the lot. If Mr. Hayes did not expect that Erickson would be able to present evidence of the other falls, why did he subpoena Mrs. Beck?

Note also that when Mrs. Christensen and Mrs. Helms were cross-examined by Mr. Hayes, he knew exactly what points to cross examine them on in their depositions. (R. 446 at 69, 73, 74, 75, 76, 81, 92, 95, 98, 99,

100). He did not request a recess or extra time to organize his thoughts. He was prepared. Promptly, he thoroughly cross examined these two witness, pointing out every detail where their trial testimony about their falls was not consistent with his understanding of their depositions.

Admittedly, this might simply be an indication of Mr. Hayes excellent preparation for any eventuality at trial. However, it does not seem consistent with the claim of genuine surprise.

POINT III

COUNSEL FOR WASATCH COULD NOT HAVE BEEN REASONABLY SURPRISED

In the argument regarding the Motion in Limine, Mr. Bjorklund indicated that Helms and Christensen had come to their deposition without any preparation for the subject matter or questions which would be asked them. (R. 444 at 16, 17). Neither Mr. Bjorklund or Mr. Hayes had talked with these women before their depositions. Their depositions (R. 438, 441) showed their uncertainty in remembering the specifics of their falls.

Mrs. Christensen remembered in her deposition testimony that her fall occurred "between 1984-1985". At trial she specified that her fall occurred in January of 1985. (R. 446 at 87). Mrs. Helms initially indicated in her deposition testimony that she could not remember the specific year of her most recent fall, but upon Mr. Hayes suggestion that it might have been 1986, she stated it was in 1986. At the trial she indicated her fall was in December of 1984 or January or February of 1985. (R. 446 at 64).

Given the uncertainty of these ladies in their deposition testimonies it is only reasonable to expect that they could refresh their recollections prior to their testimonies at trial. Their improved specificity in

remembering dates does not indicate a "total contravention" of their prior testimony, as claimed by Wasatch, but only a refinement.

Both Mrs. Helms and Mrs. Christensen denied that they had "reported" their falls to Wasatch Manor in their deposition testimony. One of the most common definitions of "report" provided in "Webster's New Twentieth Century Dictionary," Unabridged, Second Edition, 1978 is, "[A] formal or official presentation of facts or of the record of something, as an investigation, law case, etc." It is reasonably possible from the context of their deposition testimony that when Mr. Hayes was asking if the ladies had "reported" their falls to Wasatch manor, they considered the word "report" to have its normal meaning as something much more formal than "mentioning" the fall to the man who lowers and raises the garbage.

Erickson has recited in the factual recitation of this brief, the passages where this subject was discussed in the ladies' depositions. Pages 13, 14 and 15 herein. Also attached to this brief as Appendix E, are Mr. Hayes' cross examinations of these ladies regarding this same issue. Erickson has underlined the use of the word "report" as opposed to other words used by the ladies to describe their communication.

Note the tendency to correlate "report" with industrial claims by Mrs. Helms. Note also that when the women use their own words to describe the communications to Kersey they do not use "report."

Certainly, Mr. Hayes' reading of the depositions to mean that the women never communicated to anyone at Wasatch Manor about their falls is reasonable and fair. However, it is also reasonable to consider that he might have obtained information from the ladies about their falls had he used a word other than "report"

In the case of Anderson v. Bradley, 509 P.2d 339 (1979 Utah), the court noted that counsel could not claim surprise because an officer's statement at trial was different than during discovery. The Court noted that the officer's statement was not necessarily inconsistent with the officer's prior testimony. Similarly, Helms' and Christensen's testimonies at trial are not necessarily inconsistent with their deposition testimonies.

When Mrs. Christensen explained in her deposition that she asked the Manager if she could go through the lobby because she was petrified of the ramp, it is noteworthy that Mr. Hayes did not ask if she "talked" to the manager about anything else. When Mrs. Helms said she had commented to the Wasatch manor employee who raised and lowered the garbage that the lot was treacherous and needed salting, Mr. Hayes did not ask her if she had "commented" about anything else. He might have obtained their statements of additional communications regarding their falls simply by asking more questions during their deposition.

During the argument regarding the Motion in Limine, Mr. Bjorklund stated to the court his belief that the ladies could substantially improve their recollection, in light of their lack of preparation at their depositions. He urged that because of that and also because of the very different renditions of the potential facts of the case, the court should wait to rule on the issue, to see what the testimony might actually be. (R. 444 at 17).

In response, Mr. Hayes demanded that Mr. Bjorklund proffer the ladies potential refreshed testimony. (R. 444 at 18). Mr. Bjorklund was not aware of the ladies improved recollections until approximately two to three weeks before trial. (R. 446 at 76). To require Mr. Bjorklund to tender testimony, of which he was completely unaware, is not reasonable. Mr.

Bjorklund has no obligation to Mr. Hayes to be clairvoyant.

In Anderson, at 340, the Utah Supreme Court held that, "In any event, surprise as a ground for a new trial is only that which ordinary prudence could not have guarded against." The Anderson court would not allow counsel to simply rest on prior deposition testimony.

During the argument regarding the Motion in Limine, Wasatch tried vigorously to freeze into stone, the unclear and uncertain deposition testimony of Mrs. Christensen and Mrs. Helms, in hopes of subsequently excluding any better recollection of detail at trial. Given the witnesses obvious lack of preparation at their depositions and Mr. Bjorklund's statements at the Motion in Limine of his belief that they could become more specific regarding their testimony, Mr. Hayes did not take the course of "ordinary prudence" to simply sit on their deposition testimony.

Mrs. Helms and Mrs. Christensen are totally independent witnesses from the parties in this matter. Mr. Hayes had as much ability to access them and ask them questions as did Mr. Bjorklund. Indeed, Mr. Hayes subpoenaed to trial Carol Beck, a co-worker of Mrs. Helms and Mrs. Christensen. (R. 98, 397). Mrs. Beck was deposed at the same time as the other ladies and was designated by Erickson as a trial witness just as the other ladies. (R. 52, 53, Appendix B). Mrs. Beck also showed the same uncertainties of memory in her deposition as did the other ladies.

Mrs. Beck appeared during the trial pursuant to Wasatch's request, waited in the hallway and had discussions with Wasatch's Counsel. (R. 397). However, Wasatch chose not to have her testify. Mr. Hayes cannot lay at the feet of Mr. Bjorklund or the trial court his volitional choice to talk to Mrs. Beck before trial but not to talk to Mrs. Helms or Mrs. Christensen.

Mr. Bjorklund has no obligation to do discovery for Mr. Hayes.

The witnesses did not testify at trial to anything which Mr. Hayes could not have discovered by "ordinary prudence" or a simple phone call. Moreover, the testimony of Mrs. Christensen and Mrs. Helms regarding their falls is not necessarily inconsistent with their deposition testimony. Counsel for Wasatch can not claim to have been reasonably surprised.

POINT IV

ERICKSON MADE NO ATTEMPT TO AMBUSH WASATCH

In Wasatch's Corrected Brief, it is emphasized that Mr. Bjorklund waited until the last day, after Mr. Kersey's testimony to ask the court to reconsider the Order in Limine. Mr. Bjorklund had no choice but to wait until after Mr. Miller and Mr. Kersey had testified at trial so that the judge could hear with his own ears their testimony.

It is clear from the Court's comments when ruling on Erickson Motion to Reconsider the Order in Limine, that, as a result of having heard Kersey's testimony for himself, the trial court recognized that the case was substantially different than had been initially represented by Wasatch. The court stated further, "And if these falls took place, and based on what the testimony has been of the two principals of Wasatch manor, if these falls have been during the '84-'85 season, and they were slipped on ice, the Court would allow testimony as far as falls." (R. 446 at 56).

Wasatch's misstatements and omissions forced Erickson to wait until after Miller's and Kersey's testimony to ask the court to reconsider the Order in Limine. It should not now complain of the timing.

Wasatch has also alleged that Mr. Bjorklund refused to disclose the testimony of Helms and Christensen to the judge the day before they

testified. In response to the Judge's inquires about the testimony of the county witnesses regarding their falls, Mr. Bjorklund did not simply refuse to respond as is implied by Wasatch. Mr. Bjorklund indicated that the ladies were intended to be rebuttal witnesses and their testimony would depend on the testimony of Kersey and Miller. The court indicated that in that light Mr. Bjorklund did not need to speculate as to their testimony. (R. 398 and Appendix D).

In light of Mr. Hayes' representations at the Motion in Limine hearing, Mr. Bjorklund was not and could not be certain of the testimony of Mr. Miller or Mr. Kersey. The county employees were primarily rebuttal witnesses. Their testimony must, of necessity, be limited to the direct testimony it seeks to rebut. Mr. Kersey could have taken the stand and claimed that his recollection had improved (there is certainly precedent for that in this case) and he now remembers the specific conditions on the night of Erickson's fall and he also remembers all of his specific acts that night. The testimony of the ladies from the county about the condition of the lot throughout a whole winter might have become inadmissable.

Plaintiff's Motion to Reconsider the Court's Order in Limine was drafted before Kersey testified. Erickson indicated therein, "That evidence of the ladies statements to the Wasatch Manor personnel should be admitted as rebuttal if Mr. Kersey or Mr. Miller claim that they had never had notice of anyone falling or being dissatisfied with ice in the parking lot." (R. 186). Emphasis added. The "if" unmistakably indicated Mr. Bjorklund's lack of prior certainty regarding Mr. Kersey's testimony. Only slight changes in Mr. Kersey's testimony could have altered substantially the things which Mrs Helms or Mrs Christensen could have testified to

Of course, the issue is not if the court was aware of the ladies potential testimony, but if Wasatch was aware. The court is not claiming surprise. Wasatch had already been notified in discovery that Erickson intended to call these ladies to discuss the condition of the lot (R. 52, 53, Appendix B) and Wasatch had also taken their depositions and knew well their opinions about the condition of the lot during winter.

Wasatch's claims of being ambushed are not meritorious.

POINT V

REBUTTAL TESTIMONY IS ADMISSIBLE NOTWITHSTANDING SURPRISE

In Board of Education of Sanpete v. Barton, 617 P.2d 347 (Utah 1980), a witness was allowed to testify as a rebuttal witness even though he was not included as a witness in the court's pre-trial order. Prior to trial, the court had ordered that only those witnesses listed in the pre-trial order would be allowed to testify. The appellant-defendant moved for a new trial citing the surprise language of Rule 59(a)(3) of the Utah Rules of Civil Procedure. The Supreme Court affirmed the trial court's allowance of the surprise witness's testimony, stating that, "Rebuttal evidence is that which tends to refute, or to so modify or explain, as to nullify or minimize the effect of the opponent's evidence." Barton at 349.

Because it is impossible to know the exact specifics of a non-party or adverse witness, it goes without saying that rebuttal testimony can be presented without having previously listed the rebuttal witness as an expected trial witness. The policy consideration of obtaining the truth of an issue is superior to that of restricting testimony to enhance predictability for counsel.

In State v. Mora, 558 P.2d 1335, 1336 (Utah 1977), the Supreme Court held that when a defendant raises a certain defense it becomes a "legitimate subject of inquiry and refutation." Questions are admissible which "seem reasonably calculated to bring out facts which might tend to contradict or weaken the effect of the defendant's assertion." When Mr. Kersey claimed at trial that no one had mentioned to him that they had fallen in the parking lot, it became a legitimate subject of inquiry and refutation. The testimony that Mrs. Helms and Mrs. Christensen had talked with Kersey about their falls was admissible as rebuttal testimony.

When the trial judge ruled on Mr. Bjorklund's motion to reconsider the Order in Limine, he indicated:

But I cannot in any way stop the plaintiff from going into a question as to whether anybody has told principals of the defendant whether they should get some salt on the parking lot.

I could stop it if it was not within the relative time. But it appears that this is within that time limit. So that is just admissible testimony, regardless. And so I can't do anything about it. As far as the falls are concerned, that the falls, if they can be related to the time and similar situations, then that is also admissible.

And if these falls took place, and based on what the testimony has been of the two principals of Wasatch manor, if these falls have been during the '84-'85 season, and they were slipped on ice, the Court would allow testimony as far as falls.

I appreciate what Mr. Hayes says as far as the change from the deposition. That's something that he will have to do what he wants to as far as cross examination.

(R. 446 at 56). The trial judge recognized that relevant rebuttal testimony ". . . is just admissible testimony, regardless."

POINT VI

TESTIMONY OF FALLS DID NOT CHANGE THE OUTCOME OF THE TRIAL

Erickson agrees with Wasatch's statement of the law that in addition to finding that the judge abused his discretion, Wasatch must also demonstrate that there is a likelihood that a different result would have

been reached absent the alleged error. Hardy v. Hardy, 776 P.2d 917 (Utah App. 1989); State v. Northrup, 756 P.2d 1288 (Utah App. 1988).

A review of the testimony of the witnesses as set forth in the factual portion of this brief indicates that the testimony of falls which was elicited during Wasatch's direct examination of Mrs. Christensen and Mrs. Helms was a minor and inconsequential part of their testimony. A different result would not have occurred in this case absent said testimony.

Contrast Kersey's claim that the lot was kept free from ice, with the testimony of the county employees that the lot was always icy. Kersey claimed that he salted the lot, when needed, roughly every 8 to 10 hours, every day, all winter long. The county employees did not see salt at all or rarely during the winter of 1984-85.

How does Kersey's testimony of such substantial use of salt and de-ice on a large parking lot and many walkways, square with Miller's admission that Wasatch could not produce one receipt, canceled check or document to show they had ever purchased salt that winter?

Kersey testified that the lot could not have been icy yet Christensen called it a "death trap." Kersey said the County had congratulated Wasatch on the lot and it was the best in town. But Mrs. Mark indicated the condition of the lot was a joke throughout the county offices and that she considered the lot "treacherous."

Kersey claimed he was so contentious that he cleared the sidewalk to 5th South. Christensen and Helms indicated that said sidewalk was rarely shoveled. Kersey was positive that no-one had ever indicated to him that the lot was icy or that it needed salting. Mrs. Helms was unequivocally certain that she had talked to him "a time or two" about the treacherous

nature of the lot and the need to put salt on the lot. Miller had claimed that Erickson had told him that Erickson was retired, but upon cross-examination admitted that Erickson had not told him that.

Even without any reference to their falls, the testimony of Helms, Christensen and Mark decimated the credibility of Miller and Kersey. The testimony of Miller and Kersey was completely irreconcilable with the testimony of the county employees. The jury had to believe one side or the other. There was no middle ground or shades of grey.

There are several other indicators which speak for the credibility of the county witness and indicate the lack of credibility of Wasatch's personnel. The county witnesses were independent witnesses with no relationship to either party. They had no reason or motive to exaggerate or deceive. They were not controlled by Mr. Hayes who subpoenaed them to their depositions or by Mr. Bjorklund who subpoena them to the trial.

The county witnesses were remarkably strong in their unequivocal condemnation of the parking lot in their deposition testimony, even though they had no forewarning of the nature of the deposition or the subject matter to be covered. They had not talked to either party or either parties' attorneys before their depositions.

Their testimony was consistent with each other even though they came from different offices in the County and they had not talked with each other about their potential testimony in preparation for their depositions. These are all strong indicators of the credibility of the County employees.

In contrast, the evidence at trial indicated that a very dangerous condition had been widely ignored and neglected by Mr. Kersey and Mr. Miller during the winter of 1984-85. In this light they had a motive to

exaggerate or fabricate their testimony regarding Kersey's routine. Their jobs and their places of residence were potentially on the line.

Perhaps the most telling fact indicating Kersey's and Miller's lack of credibility is that Wasatch did not produce anyone else to confirm their story about their routine or their version of the condition of the lot in the winter of 1984-85. Where were the other custodians, the county employees who supposedly deluged Mr. Kersey with compliments, or the happy and satisfied residents?

Erickson had notified Wasatch that it intended to ask the county employees about the condition of the lot four months before trial. (R. 52, 53, Appendix B). Mr. Hayes had told the jury in opening argument that Erickson's attack on Kersey's routine would be the main issue of the trial. Mr. Hayes reviewed for the jury Mr. Kersey's routine and said Mr. Kersey would be put under a microscope during the trial. (R. 445 at 21). Wasatch knew what was coming. So where were the other witnesses to support Kersey and Miller regarding the condition of the lot and Kersey's routine?

Curiously, Wasatch makes this same point at page 29 of its Brief where it quotes Mr. Bjorklund's comments in closing argument to the jury:

Did we hear from anybody in the defense camp about the condition of that parking lot all through that winter other than the manager and the man who is supposed to salt it? Did they bring anybody from their apartment to come here to their aid and say, hey, it was always slated. [How] About did they bring anybody from the county. I don't think you can reach any other conclusion but that that place was always icy.

In its brief, Wasatch rightly points out that it is likely that Mr. Bjorklund's argument was persuasive to the jury. However, it is important to note that Mr. Bjorklund did not reference anyone's fall in the quoted comment.

This quote from Mr. Bjorklund's closing argument and Wasatch's

conclusion about it do not logically support or even relate to Wasatch's claimed issue of surprise testimony of falls. One must question whether Wasatch has carefully considered its basis for taking this appeal or if it is purposefully attempting to confuse all of the county employees' testimony with their testimony of their falls.

Wasatch can not show that it would be likely that the trial outcome would be different. The court did not therefore abuse its discretion.

POINT VII

WASATCH'S CLAIMED NEED FOR A RETRIAL IS SPECIOUS

The only error claimed by Wasatch regarding the evidence of the ladies falls is that Wasatch was unable to call rebuttal witnesses because of alleged surprise. Wasatch does not claim that the testimony of the falls was prejudicial, in and of itself. Indeed, the evidence of the falls may have weighed in the jury's mind against Erickson. They may have lessened their appraisal of the ladies' credibility due to Mr. Hayes' claim that the ladies contradicted their deposition testimony.

Nevertheless, the only testimony that could be offered by Wasatch's theoretical rebuttal witnesses would be that:

1. Helms and Christensen never fell, as claimed at trial, and
2. Helms and Christensen never mentioned their falls to Kersey.

It is impossible that such witnesses exist. No one was stationed at the Manor parking lot twenty-four hours a day during the winter of 1984-85, who could testify that Helms and Christensen never fell or that they never mentioned their falls to Kersey. At best, a witness could simply say they were not aware of the asserted occurrences and comments.

Indeed, the only people who could testify if Mrs. Helms and Mrs. Christensen talked to Mr. Kersey about their falls are the three of them. They were each asked directly about the subject at trial. Both parties were free to examine and cross-examine the issue to their heart's content. What more could be gained by redoing the trial again, except for delay. Wasatch has not proffered any witness with anything material to add to what was said at trial.

Mr. Hayes had available to him climatological data at trial (Trial Exhibits No. 17, 18, 27) which he used to impeach Mrs. Marks testimony about her fall. He also skillfully used the depositions of Christensen and Helms to point out any differences in their deposition testimony and their trial testimony. He had also subpoenaed Mrs. Beck to trial as a potential rebuttal witness but chose not to call her.

Mr. Hayes did everything he could do to meet the evidence of Mrs. Helms and Mrs. Christensen's fall. Even assuming he was totally surprised and unprepared, he could not have done more to counter the ladies evidence of falls than he did, with the exception that it might have helped his case not to have asked Mrs. Mark about her fall. In any event, no amount of additional fore warning would have helped.

The case should not be retried simply to allow Wasatch to search for the mythical witness to prove a negative, i.e., the falls never happened or the communications regarding the falls never happened. In light of Wasatch's failure to articulate even one plausible way a retrial could help it deal with the alleged surprise testimony of falls, one must ask if Wasatch has carefully considered its basis for this appeal.

POINT VIII

WASATCH FAILED TO OBJECT TO THE TESTIMONY OF THE FALLS

Rule 103(a)(1) of the Utah Rules of Evidence requires that a "timely objection or motion to strike" which states the specific ground of the objection must appear in the record in order to preserve the error for subsequent review. This rule allows the court and counsel the opportunity to know specifically what evidence is being objected to so that counsel can reconsider its questions and so that the court can appropriately rule.

This court and the Utah Supreme Court have strictly applied this rule. State v. Lesley, 672 P.2d 79 (Utah 1983); Meyer v. Bartholomew, 690 P.2d 558 (Utah 1984); Jensen v. Thomas, 570 P.2d 695 (Utah 1977); State v. Holyoak, 743 P.2d 791 (Utah App. 1987).

The only exception to this rule is the occurrence of "plain error." Utah Rules of Evidence 103(d). Wasatch does not claim in its brief that the court's ruling was plain error but recognizes instead that a trial court has broad discretion regarding the admission of prior or subsequent falls.

In a hearing on the last day of trial, without the jury present, counsel argued Erickson's Motion to Reconsider the Court's Order in Limine. Mr. Hayes said that reconsidering the motion would constitute surprise to him. He stated that he ". . . would strictly resist them testifying at this point in the trial." (R. 446 at 51-53). However, not once during the whole trial did the words "object" or "move to strike" leave Mr. Hayes' mouth regarding this issue. Nor was there any attempt on his part to reserve his objection as was suggested as a possibility in footnote 1 of the Lesley case, supra at 82.

In Wasatch's brief, it attempts to excuse Mr. Hayes' choice not to

object to the offered testimony of Helms' and Christensen's falls, by citing State v. Johnson, 784 P.2d 1069 (Utah 1987). In Johnson, the Supreme Court held that when a party has prior to trial moved to exclude evidence, he does not need to object at trial in order to preserve the issue for appeal, if the trial judge is also the judge who ruled on the pretrial motion and the record indicates that an evidentiary hearing was held.

In an evidentiary hearing, counsel for the parties and the court have an opportunity to hear the testimony of a witness, outside of the jury's presence. During such a hearing respective counsel state their objections in compliance with Rule 103(a)(1) to the questions posed or the testimony given. The court can thereby make appropriate rulings to insure that errors are not committed when the evidence is given in the jury's presence. Counsel for the parties can adjust their questioning appropriately. A record is transcribed so that the items that are objected to are clearly identifiable for an appellate court.

State v. Johnson, is not applicable to this case. No evidentiary hearing was held or requested in this case.

Wasatch's choice to not object to the testimony of falls placed the trial court, counsel for Erickson and this court in an impossible position of not knowing exactly what parts of the record are being appealed from. It also left the trial court and Mr. Bjorklund without any opportunity to cure claimed errors. For example, at trial both Mrs. Helms and Mrs. Christensen volunteered references to their falls before Mr. Bjorklund had laid any foundation for them. Their answers at that point were not direct rebuttal to Mr. Kersey's claim that no one had told him of a fall.

The trial court's ruling of allowing evidence of the falls was subject

to Mr. Bjorklund laying a foundation that the falls "could be related to the time and similar situations." (R. 446 at 56). Mr. Hayes could have moved to strike the voluntary statements of Helms and Christensen with a strong likelihood of success. He chose not to. He had a chance to allow the trial court to rule on other comments about falls and allow Mr. Bjorklund to adjust his questions to avoid issues on appeal. He chose not to. It is impossible to now know how the course of questioning may have changed had Mr. Hayes made timely objections.

We are left completely to conjecture as to which questions and to which ladies' falls Mr. Hayes now objects to as having surprised him. How are we to know if Mr. Hayes also objected to the testimony he solicited about the falls on cross-examination, especially relating to Mrs. Mark who said nothing about a fall on direct examination.

In Meyer, supra at 559, the Utah Supreme Court noted that without a timely objection or motion to strike, an objecting party cannot raise the issue of surprise regarding testimony that was elicited at trial by the objecting party. Wasatch, cannot now raise claims of error regarding Mrs. Mark's testimony of her fall and her testimony of the falls of others in her office. Nor can Wasatch raise claims of error regarding the new information it sought regarding the falls of Helms and Christensen during cross-examination.

Mr. Hayes is an experienced trial attorney who must have recognized the consequences of his choice not to even once mention the words "object" or "move to strike" regarding the testimony of falls. It was incumbent on Mr. Hayes to give both the trial court and Mr. Bjorklund, the opportunity to cure potentially erroneous questions or testimony as they occurred.

Perhaps, Mr. Hayes did not object to avoid flagging the testimony of falls for the jury. This is a common defense strategy. This does not seem consistent, however, with his extended cross-examination of Mrs. Helms and Mrs. Christensen about their falls or his eliciting from Mrs. Mark that she had fallen even though it was not mentioned during her direct examination. It is as though he was attempting to maximize the alleged damage of his claimed surprise. Whatever his reasons for his choice, it is not fair nor equitable to now raise these issues on appeal.

In State v. Mora, 558 P.2d 1335, 1337 (Utah 1977), the court stated, "If the defendant chooses as a matter of strategy to have his case submitted on the 'all or nothing' gamble, when he loses, he should not be permitted to do an about face and claim that the trial court committed error in going along with his request" Evidence that is admitted without objection becomes competent evidence for all purposes. Starkings v. Bateman, 724 P.2d 1206 (Ariz. App. 1986); Ohl v. Ohl, 637 P.2d 1230 (N.M. 1981); Menges v. Board, 621 P.2d 562 (Or. 1980); Guardianship of Marshall, 731 P.2d 5 (Wash. App. 1986).

Mr. Hayes' failure to make timely and specific objections to the evidence of the falls offered at trial is dispositive of Point I of Wasatch's appeal. One must question again whether Wasatch has carefully considered its basis for taking this appeal.

POINT IX

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WASATCH'S MOTION FOR A NEW TRIAL

The trial court has broad discretion in granting or denying a motion for a new trial. The trial court's ruling can be overturned only if there is

a showing that the trial court's action was arbitrary, or that it clearly transgressed any reasonable bounds of discretion. Lembach v. Cox, 639 P.2d 197 (Utah 1981); Hyland v. St Mark's Hospital, 19 Utah 2d 134, 427 P.2d 736 (Utah 1967).

Wasatch cites the case of In re Adoption of S.E., 755 P.2d 27 (Mont. 1988) as providing guidance for seven conclusions a trial court must reach regarding claimed surprise evidence, before the trial court can grant a motion for a new trial:

(1) actual surprise, (2) the facts had a material bearing on the case, (3) the court's decision mainly rested on these facts (4) the surprise did not result from the moving party's inattentiveness or negligence, (5) the motion for new trial was promptly filed, (6) the moving party acted reasonably at the time of the surprise, and (7) the result of the new trial would probably be different.

In re Adoption of S.E., supra, at 31. To determine if the trial court acted arbitrarily, this court must look to the record to see if there are any facts which would tend to support the trial court's decision that Wasatch does not qualify in at least one of the seven points. If such facts exist, the court's decision was not arbitrary and must be sustained.

Facts exist which would justify the trial court in finding that Wasatch failed to qualify under every one of the seven In re Adoption of S.E. criteria, with the exception that it promptly filed its motion. For example the trial court could have concluded that: (1) Mr. Hayes was not surprised but expected the testimony of the falls, (2) the testimony of the falls was minor given the other rebuttal testimony of the condition of the lot, (3) there was overwhelming evidence upon which the jury could have found that Wasatch had grossly neglected the icy parking lot without referencing the falls, (4) Mr. Hayes could have avoided the surprise by accurately informing the trial court of the character of the case in his Motion in

Limine, asking additional questions at the depositions of Helms and Christensen or simply calling them on the phone before trial, (6) Mr. Hayes acted unreasonably by choosing not to object to the evidence of the falls, and (7) that the testimony of the county employees so totally destroyed the credibility of Kersey and Miller that the jury would have reached the same verdict, notwithstanding the limited testimony of two falls by Mrs. Helms and Mrs. Christensen.

The trial court had every reason for denying Wasatch's motion for a new trial. It did not abuse its discretion.

POINT X

POINT II OF WASATCH'S BRIEF IS FRIVOLOUS

In POINT II of Petitioner, Wasatch Manor's Corrected Brief, it is urged that the trial court committed reversible error in giving jury Instruction No. 20. Incredibly, in its argument Wasatch omits from its quote of the jury instruction the very same points of law it urges on the court. Moreover, Wasatch fails to articulate any basis in fact or logic to support its assertion that Instruction No. 20 creates "strict liability."

Instruction No. 20 was the trial court's statement of the law regarding a landlord's treatment of a dangerous condition. Instruction No. 20 includes five separate sentences, each giving important meaning and guidance. A copy of Instruction No. 20 in the form it was given to the jury is attached as Appendix F. For purposes of clarification, Erickson has separated the instruction into five parts as follows:

PART ONE: "The defendant has a duty to exercise ordinary care to maintain the common walkways in reasonably safe condition for tenants and guests."

PART TWO: "The defendant has a further duty to observe any dangerous condition known to him or which by the use of reasonable diligence would have become known to him and to take reasonable steps to remedy or remove any such dangerous condition."

PART THREE: "However, the landlord is not a guarantor for the safety of his tenants as they proceed along the common ways."

PART FOUR: "The mere accumulation of ice does not automatically make the landlord liable."

PART FIVE: "He must be given a reasonable time after the creation of the dangerous condition developed, to take such measures as will make the common areas reasonably safe from those conditions which pose an unreasonable risk of harm to the user."

In Point II of Wasatch's Corrected Brief, counsel quotes to this court only the first two parts of Instruction No. 20, then proceeds to urge that Instruction No. 20 creates reversible error because it creates a standard of strict liability. Wasatch urges that it creates "strict liability" because it lacks the same points of law that are cited in Parts Three, Four and Five of instruction No. 20 and which are omitted from Wasatch's quoted instruction to the Court.

Wasatch never cites to this Court that three other Parts of the instruction were given at trial and that those Parts are exactly the same points of law that Wasatch is urging on the court in its brief. Wasatch attaches the complete Jury Instruction No. 20 as Appendix "C" to its Corrected Brief but any reference to Appendix "C" is conspicuously absent from its argument regarding the issue in Point II.

In the context of Wasatch's argument the omission of Parts Three,

Four and Five of Instruction No. 20 is highly questionable. In the second paragraph of page 31 Wasatch urges upon the Court that, "The landlord is not an insurer of the safety of his tenants," citing the cases of Gregory v. Fourthwest Investments, 754 P.2d 89, 91 (Utah App. 1988) and Schofield v. Kinzell, 29 Utah 2d 427, 511 P.2d 149, 151 (Utah 1973). This is simply a restatement of Part Three of the Instruction.

On page 32 of its corrected brief, Wasatch urges the Court that, "The mere accumulation of snow and ice does not, ipso facto make the landlord liable, he must be given a reasonable time after the storm has ceased to remove the accumulations or to take such measures as will make the common areas reasonably safe for those conditions which pose an unreasonable risk of harm to the user" citing Schofield, at 151. This quote is a restatement of Parts Four and Five of Instruction No. 20.

Next, Wasatch concludes that Part Two of the instruction creates strict liability because of the quotes from Gregory and Schofield, inferring that the trial Court had overlooked those points of the law. Wasatch then urges that the correct statement of the law is that, ". . . in order to recover, the plaintiff must demonstrate that defendant knew, or in the exercise of ordinary care should have known, that a dangerous condition existed and that sufficient time had elapsed to take corrective action."

Compare Wasatch's urged statement of the law to Part Two of Instruction No. 20 with a similar preface: In order to recover, the plaintiff must demonstrate that the defendant failed ". . . to observe any dangerous condition known to him or which by the use of reasonable diligence would have become known to him and to take reasonable steps to remedy or remove any such dangerous condition." Emphasis added. When

one adds the further clarifications of Part Five of Instruction No. 20, indicating that the landlord must have time to correct the condition, one cannot find a relevant and substantive distinction between Wasatch's urged statement of the law and Instruction No. 20.

One irrelevant difference between the two statements is that one refers to "ordinary care" as the objective standard for knowledge and the other refers to "reasonable diligence". Wasatch does not mention this in its arguments, however, and it is not an issue because Wasatch acknowledged at trial that it was aware of the dangerous condition. Its defense was that it took reasonable actions to cure the dangerous condition.

Perhaps, however, Wasatch is urging that the standard of "reasonable diligence" equals "strict liability." This is quite a leap without providing even one ounce of logic or detail as to how Wasatch would reach such a conclusion.

Had Wasatch cited for the Court all of Instruction No. 20, it could not have made its arguments without appearing nonsensical or absurd. Rather than deleting the argument because it is frivolous and misleading, Wasatch chose to omit most of the instruction in its citation to this court.

The real rub is that Wasatch made the same partial disclosure and frivolous argument in its Motion for a New Trial. (Appendix G). Erickson responded by pointing out to the trial court the inappropriateness and nonsensical nature of Wasatch's argument. (Appendix H).

Although not stated in Wasatch's brief (for obvious reasons), the effect of Wasatch's argument is to ask this court to directly overturn the Utah Supreme Court case of Cornwell v. Barton, 422 P.2d 663 (Utah 1967). In the Cornwell case the Plaintiff, a tenant, sought damages from his

landlord, for injuries suffered from a slip on ice which formed in a depression of a common area. Just as Erickson claimed in this case, the plaintiff's theory in the Cornwell case was that the ice created a dangerous condition and that the landlord was negligent in failing to correct it.

At page 664 of the Cornwell case, the Utah Supreme Court stated, "The court instructed the jury that the defendant had a duty to exercise ordinary care to maintain the common walkways in a reasonably safe condition for tenants and guests, and that he had a further duty to observe any dangerous condition known to him or by use of reasonable diligence would have become known to him and further to remedy or remove any such dangerous condition. The forgoing is a correct statement of the law." Emphasis added. The supreme court reversed the jury's ruling in favor of the defendant because the trial court had given other instructions which the Supreme Court indicated were prejudicial to the Plaintiff.

Compare the Supreme Court's language in Cornwell to Parts One and Two of Instruction No. 20:

The defendant has a duty to exercise ordinary care to maintain the common walkways in reasonably safe condition for tenants and guests. The defendant has a further duty to observe any dangerous condition known to him or which by the use of reasonable diligence would have become known to him and to take reasonable steps to remedy or remove any such dangerous condition.

The only difference between the trial Courts Instruction No. 20 and the Cornwell language is that the trial court in this case tempered the landlord's duty to remedy a dangerous condition by adding the words "reasonable steps." This change was requested by Wasatch and granted by the trial court. Erickson cannot improve on the Supreme Court's own statement from Cornwell that, "The foregoing [Instruction No. 20] is a correct statement of the law."

To justify Wasatch's frivolous allegations of Point II of its brief, Wasatch cites two cases far beyond the holdings that could be reasonably twisted out of them. Amazingly, Wasatch at page 34 of its brief sites Cornwell as authority that, "The court improperly instructed the jury as to a landlord's standard of care to his tenants." On the preceding page of Wasatch's brief, it claims that, "Instruction No. 20 imposed upon Wasatch an additional obligation that was expressly rejected by the Utah Supreme Court in Martin v. Safeway Stores." Martin v. Safeway, 565 P.2d 1139 (Utah 1977) is a case dealing with the law of snow accumulations as it relates to business invitees. The decision never comments on dangerous conditions in the context of landlord tenant law, nor does it reference Cornwell. There is nothing in the Martin case which is inconsistent with the law espoused by the Cornwell decision, let alone "expressly rejecting" the decision.

To read Instruction No. 20 as creating "strict liability" is patently absurd. To urge that it is "strict liability" because it does not include the exact same points of law which Wasatch omits from its quote of the instruction is sanctionable.

CONCLUSION

When there is no basis for the argument presented and when the evidence or law is mischaracterized and misstated, the Court must question the parties motives and attorney's fees and sanctions can be provided to the appellee. Eames v. Eames, 735 P.2d 395, 397 (Utah App. 1987). Sanctions should be imposed when an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing, and results in delaying implementation of the judgment of the lower court. Porco v. Porco, 752 P.2d 365 (Utah App. 1988). Since a party has had the benefit of

one ruling, the decision to appeal should be reached only after careful consideration by the party and counsel. O'Brien v. Rush, 744 P.2d 306 (Utah App. 1987).

The Order in Limine was obtained due to Mr. Hayes' misstatements and omissions. Wasatch failed to object at trial to the testimony it now urges as error and does not raise plain error as an exception. Wasatch fails to articulate even one plausible way a retrial could help it deal with the alleged surprise testimony of falls. The testimony which destroyed the credibility of Mr. Kersey and Mr. Miller was overwhelming, even without reference to Helms' and Christensen's fall. Wasatch mischaracterized Instruction No. 20 to the trial court and this court and bases a frivolous argument upon said mischaracterization.

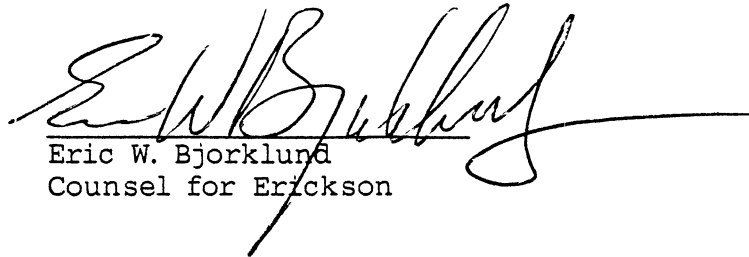
It is permissible for the Appellate court to take into consideration the Appellee's financial condition when considering the appropriateness of awarding attorney's fees and sanctions. Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989). The affidavit of Mr. Erickson (Appendix I) indicates that although he had timely paid his rent to Wasatch Manor, he was evicted by Wasatch Manor, after the jury ruled in his favor.

The evidence presented at trial showed graphically the devastating effect his loss of memory and mental abilities had upon his ability to earn income. (R. 446 at 147-152, 161-163 and Exhibit 4a - Tax Returns). His affidavit also explains that, at age 71, he is largely without income, except for social security and temporary menial jobs. A major portion of the judgment provided by the jury was intended to compensate Mr. Erickson for this loss of income. This frivolous appeal has no likelihood for success and has simply acted to delay the intent and judgment of the jury. Mr.

Erickson's fall occurred more than five years ago. Mr. Erickson should be granted attorney's fees and sanctions because of the taking of this appeal by Wasatch.

Dated this 19th day of May, 1990.

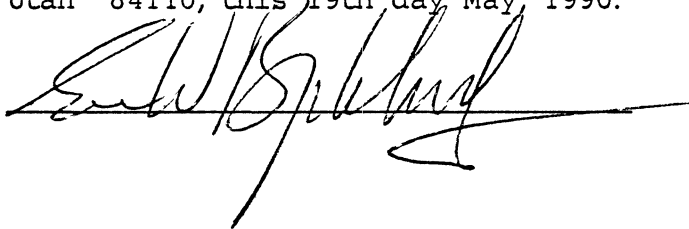
Respectfully submitted.



Eric W. Bjorklund
Counsel for Erickson

CERTIFICATE OF DELIVERY

I hereby certify that four copies of the foregoing Appellee's Brief was mailed first class with proper pre-paid postage, to Nelson L. Hayes, CAB Towers, Suite 700, 50 South Main Street, P.O. Box 2465, Salt Lake City, Utah 84110, this 19th day May, 1990.



ADDENDUM

- Appendix A: Bjorklund's Letter to Nelson Hayes regarding
Discovery
- Appendix B: Erickson's Supplemental Answers to Interrogatories
- Appendix C: Portions of Mr. Bjorklund's argument at Motion in
Limine. (R. 444 at 11-17).
- Appendix D: Bjorklund's Letter to Masuda Medcalf re:
misstatements in docketing statement.
- Appendix E: Excerpts of Mr. Hayes' cross examination of Mrs.
Helms and Mrs. Christensen at trial. (R. 446 at
74-76, 98-101).
- Appendix F: Trial Jury Instruction No. 20.
- Appendix G: Point II of Wasatch's Amended Memorandum of Points
and Authorities in Support of Defendant's Motion
for a New Trial.
- Appendix H: Point VII of Plaintiff's Verified Reply to
Defendant's Motion for a New Trial.
- Appendix I: Affidavit of Appellee/Plaintiff Guy Erickson.

Appendix A

Bjorklund's Letter to Nelson Hayes regarding Discovery

PACE & PARSONS
ATTORNEYS AT LAW
350 SOUTH 400 EAST #101
SALT LAKE CITY, UTAH 84111
(801) 364-1300

LORIN N. PACE
WILLIAM B. PARSONS III

July 10, 1987

of council
ERIC W. BJORKLUND
G. RANDALL KLIMT

Nelson Hayes
Attorney at Law
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110

RE: Guy Erickson vs. Wasatch Manor Hotel

Dear Nelson:

You have previously requested that we provide you with the names of individuals that we are aware of who have slipped and fallen on ice at Wasatch Manor:

Becky Helm (County Assessors Office)
Jody Christensen (County Assessors Office)
-Ann Erickson (County Assessors Office)
Colleen Marsh (County Treasurers Office)
-Carol Back (County Treasures Office)

We may call any of these individuals as witness. Additionally, we may call the following individuals who were individuals working with Mr. Erickson at the time of his accident to testify regarding the damage caused to their project by Mr. Erickson's accident and Mr. Erickson's competence after the accident:

Rick Miles 272-6280
Stanley Johnson 1-649-6373
Ken Chytraus 2120 Marwood Creek, Salt Lake City, Utah

Enclosed are copies of written information of Mr. Erickson's regarding the Hotel Suite project he was in charge of at the time of his accident. There are several architectural drawings (blue prints) that I would be happy to make available to you for your review but which are too troublesome to copy.

In the depositions of Arthur Kersey and Burton Miller, they indicated that there was a written job description provided to Mr. Kersey. You agreed to provide a copy of said description to me. Please provide it as soon as possible.

I have not yet received the depositions of Mr. Kersey and Mr. Miller. Do you still have the originals? I would appreciate it if those depositions could be processed.

I intend to file a motion of readiness for trial in the near future.

Thank you for your cooperation in this regard.

Very truly yours,

A handwritten signature in black ink, appearing to read "Eric W. Bjorklund". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Eric W. Bjorklund

cc: Guy Erickson

Appendix B

Erickson's Supplemental Answers to Interrogatories

Eric W. Bjorklund #0345
Attorney at Law
350 South 400 East, Suite 101
Salt Lake City, Utah 84111
(801) 364-1300/262-9904

Attorney for Plaintiff

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

GUY ERICKSON,	:	
	:	
Plaintiff,	:	SUPPLEMENTAL ANSWERS TO
	:	INTERROGATORIES
VS.	:	
	:	
WASATCH MANOR, INC.	:	Civil No. C86-845
	:	Judge Wilkinson
Defendant.	:	

The Plaintiff hereby answers the Defendant's Interrogatories by providing the following Supplemental Answers to Interrogatories numbers 37 and 38:

INTERROGATORY NO 37: What is the name and last known address of each person you intend to call as a witness in your behalf in any part of the trial of this action.

ANSWER: In addition to the witnesses listed in the Plaintiff's previous Answer to Defendants Interrogatories the Plaintiff intends to call the following individuals:

Guy Erickson
Wasatch Manor
Salt Lake City, Utah

He will testify regarding the circumstances of his fall, his health and the consequences of his fall.

Coleen Mark
700 Colorado Street
Salt Lake City, Utah 84116

She will testify of the general condition of the Wasatch Manor parking terrace.

Carol Back
4597 Namba Way
Salt Lake City, Utah

She will testify of the general condition of the Wasatch Manor parking terrace.

Rebecca Ruth Helms
1527 South 1900 East
Salt Lake City, Utah

She will testify of the general condition of the Wasatch Manor parking terrace.

Wanda Jo Christensen
2360 Campus Drive
Salt Lake City, Utah

She will testify of the general condition of the Wasatch Manor parking terrace.

Mr. Kersey
Wasatch Manor

He will testify regarding the policies and conduct of Wasatch Manor.

Mr. Miller
Wasatch Manor

He will testify regarding the policies and conduct of Wasatch Manor.

INTERROGATORY NO. 38: Identify each person you and your attorney expect to call as an expert witness at trial. With respect to each persons state their present address and telephone number, the subject matter on which each is expected to testify, and expected to testify as grounds for each opinion.

ANSWER: In addition to the witnesses listed in the Plaintiff's previous Answer to Defendants Interrogatories the Plaintiff intends to call the following individuals:

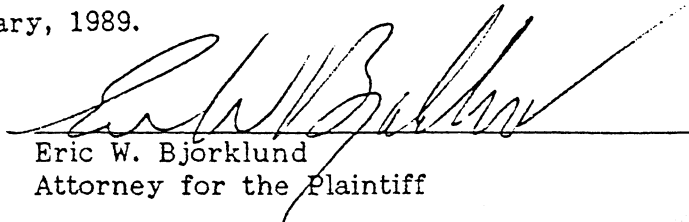
Dr. Sam Goldstein
670 E 3900 South
Salt Lake City, Utah

He will testify regarding his examination of the Plaintiff and opinions expressed in the report provided to Defendant.

Jack Redd or others
in Redd & Assoc. Engineers
925 E. 900 South
Salt Lake City, Utah

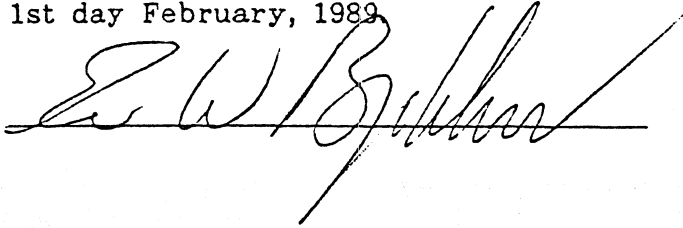
He (or others in his firm) will testify regarding the construction of the parking lot and the quantities of melting agents needed to reasonably melt ice on the lot.

Dated this 1st day of February, 1989.


Eric W. Bjorklund
Attorney for the Plaintiff

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Supplemental Answers to Interrogatories was mailed, postage pre-paid, to Nelson L Hayes, CSB Towers, Suite 700, 50 South Main Street, P.O. Box 2465, Salt Lake City, Utah 84110, this 1st day February, 1989

A handwritten signature in cursive script, appearing to read "E. W. Bickner", is written over a horizontal line.

Appendix C

Portions of Mr. Bjorklund's argument at Motion in Limine.
(R. 444 at 11-17).

COPY

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

* * *

GUY ERICKSON, :
Plaintiff, : Case No. 860900845
v. : Transcript of:
WASATCH MANOR, INC., : ORAL ARGUMENTS ON
Defendant. : MOTION IN LIMINE

* * *

BEFORE THE HONORABLE HOMER F. WILKINSON, JUDGE

Salt Lake City, Utah

Wednesday, April 5, 1989

APPEARANCES

For the Plaintiff: ERIC W. BJORKLUND
Attorney at Law
3808 So. West Temple, #1D
Salt Lake City, Utah 84115

For the Defendant: NELSON L. HAYES
Attorneys at Law
50 South Main Street, #700
Salt Lake City, Utah 84144

REPORTER: SUZANNE WARNICK, CSR, RPR-CM
Official Court Reporter
240 East 400 South, #534
Salt Lake City, Utah 84111
801-535-5479

1 they fell in an area that they described as an area of
2 depression in the parking lot. And to allow that
3 evidence I just think is inherently unfair in this
4 case.

5 And we would ask the Court to rule in limine
6 precluding the plaintiff's attorney from introducing it
7 in opening statements, introducing it by witnesses or
8 arguing in closing arguments these woman's four falls.
9 Thank you.

10 THE COURT: Mr. Bjorklund.

11 MR. BJORKLUND: Your Honor, we don't propose
12 testimony of these ladies' falls for purposes of showing
13 that Mr. Erickson fell on ice. We propose it to show
14 that there existed a dangerous condition. The facts, as
15 we think that they will be presented from the
16 plaintiff's case, I think vary considerably from the
17 facts that have been presented by defense counsel.

18 Mr. Erickson in falling in this area, the
19 thing that he did not recall was the actual fall,
20 itself. He does recall coming around his car. He does
21 recall approximately the area he fell. He doesn't
22 recall the fall, itself.

23 He recalls simply waking up on ice. He
24 remembers feeling the ice that night as he felt for his
25 keys. He remembers coming back earlier the next

1 morning.

2 Now, his fall was 11:15 p.m. at night, after
3 the time when the defendant's custodian testified he
4 habitually salted this area. The next morning he came
5 out and he did identify the small patch of ice that he
6 slipped on.

7 It's true that he did not pay any attention
8 to the rest of the parking lot. But he did identify
9 that patch of ice that he slipped on, and he did
10 identify it in this depressed area.

11 But it's important to recognize that the
12 depressed area is not like an inch or a half-inch kind
13 of hole in the driveway or parking lot area. This
14 parking lot has a very gradual sloping to a center point
15 that is very gradual.

16 And the difference between a slip here and
17 here isn't that much as far as perceiving what a
18 depression is or isn't. We are not talking about a
19 half inch depression where there is a ledge or all of a
20 sudden there is a hole there. What we are talking
21 about, this area is lower than that area.

22 I would dispute that there is any evidence in
23 the depositions to show that those ladies would not in
24 that context have noticed a depression relative to this,
25 just as he didn't consider this a depression relative to

1 that. In the context of a hole, true, they did not slip
2 on a hole in the sense of depression holes in this
3 parking lot.

4 The key issue I think is that the plaintiffs
5 will show that there is an on-going dangerous condition
6 in the parking lot. The snow is always piled around the
7 rim of it, your Honor, and along this edge. And every
8 time the sun comes out and every time it warms up, a
9 sheet of black ice covers the whole parking lot, not
10 this area but the whole parking lot.

11 Mr. Erickson is going to be able to testify
12 about that since his observations since this accident.
13 What happens hasn't changed one wit. Mr. Kersey
14 testified to it in his deposition, the manager they have
15 had. What's furthermore, they indicated, your Honor,
16 that they were aware of its dangerous condition. They
17 were aware of its on-going nature.

18 So this is very different from the usual kind
19 of slip and fall case where you have a storm that comes
20 in and puts down some snow on the ground. Then you are
21 going to have to ask the jury, did the landlord have
22 enough notice of this storm, of the ice that formed
23 after the snow.

24 This is very different. This is ice that
25 forms habitually, continually through the winter due to

1 this freeze/thaw cycle. The evidence will show that the
2 day before this ice was formed there was a thaw cycle.
3 The temperature went way up to the 40s and went crashing
4 back down into freezing. And you had everything perfect
5 for this on-going dangerous condition that all of the
6 people involved with the defense were aware of and
7 testified they know existed.

8 The defense has no one who knows anything
9 about what they did on the day Mr. Erickson fell. All
10 they can say is that they had a course of conduct, and
11 that their course of conduct was to habitually go out at
12 certain predetermined times every night and sand as a
13 result of their knowledge of this dangerous condition.

14 So we have here the plaintiff saying, I
15 slipped on that night on that ice. He can identify the
16 ice. It was in the same area where ice forms. It was
17 in the area that ice forms on this parking lot and ice
18 forms generally all over this parking lot. The defense
19 is going to say we salt every time every night because
20 we are aware of this freeze/thaw kind of cycle.

21 In the context of a long-term dangerous
22 condition, these falls would certainly tend to show the
23 likelihood of that dangerous condition. And that's what
24 relevant evidence is, evidence that will tend to show
25 the likelihood of a crucial, consequential fact. These

1 falls tend to show the likelihood of that on-going
2 dangerous condition.

3 More importantly, when they testified that
4 they went out and salted every night, all the time
5 through all the winters, this definitely tends to show
6 that their course of conduct was less likely that they
7 really didn't do that. And the key point of the
8 plaintiff's case is that there was an on-going dangerous
9 condition that the defendants ignored in large part.

10 And these ladies' fall in that context is
11 plenty close. We can identify three falls within the
12 season that Mr. Erickson fell and the preceding season
13 which Mr. Erickson didn't fall in but which Mr. Kersey,
14 the custodian, was still the man maintaining the parking
15 lots. The custodian testified in deposition that he
16 maintained these parking lots the exact same way both of
17 those year; that he has done it all along the same way.

18 So the thing that the evidence is intended to
19 show, that, yes, it's more likely that there was an
20 on-going dangerous condition. Second, it's much less
21 likely that they took the kind of course of conduct
22 defense that they are claiming.

23 Now, with regards to prejudicial, I can see
24 where if we had a gruesome picture of Mr. Erickson lying
25 on the parking lot with blood dripping from his mouth,

1 that there would be such emotional shock that counsel
2 for the defense could not rationally present any other
3 kind of contraveiling evidence to the jury. But there
4 is nothing to keep him from pointing out to the jury
5 exactly what he has pointed out to the Court today, the
6 difference in location, the difference as far as time,
7 the difference as -- I guess those are really the only
8 two differences there is nothing to keep him from
9 pointing those items out.

10 And if there is just an isolated one-time
11 dangerous condition, then I can see his point. Whereas
12 if it's an on-going condition, I can't -- I think it's
13 then something they need to consider. And if he wants
14 to point out how different it was that preceding season
15 or that very season, the jury can take that into
16 consideration. They are intelligent people.

17 Last but not least, I think the Court has
18 heard a fairly good rendition of the facts in this case
19 between two counsel. The ladies, when they were called
20 to these depositions, had not talked with me at all. I
21 had not prepared them. I had not asked them to go to
22 their diaries. I had not asked them to talk with their
23 friends or do anything else that they might otherwise do
24 to refresh their recollection. They came into those
25 depositions absolutely cold.

1 And while it's true they may not be able to
2 recall a lot of detail that may change a jury, and their
3 testimony may be more specific and foundation may be
4 easier to lay on that before the jury. So I think there
5 is nothing to keep the Court from making this ruling at
6 a point in time when the evidence is proffered. I don't
7 have any problem in approaching the bench before I ask a
8 lady, Did you fall in the parking lot, saying I intend
9 to ask the lady this, and what is the Court's ruling on
10 this. And I don't have a problem in withholding the
11 evidence of their falls in opening statement.

12 THE COURT: Any response, counsel.

13 MR. HAYES: Just two items, your Honor.
14 Number one, counsel tells us that the evidence that we
15 have indicated differs from what we have recited. The
16 counsel has recited what my people will say or not say,
17 and there is no record of what they will say or not
18 say. There is no deposition testimony. So I don't know
19 how he can say, based upon a record. He can say based
20 on what he expects will be the case.

21 I have recited and pointed to in our
22 memorandum the deposition testimony. I don't know of
23 any other. I come to the Court at this point knowing
24 only what testimony there is.

25 Now, if I am getting the suspicion that he

Appendix D

Bjorklund's Letter to Masuda Medcalf
re: misstatements in docketing statement.

ERIC W. BJORKLUND
ATTORNEY AT LAW
3808 South West Temple, Suite 1D
Salt Lake City, Utah 84115
(801) 262-9904

November 9, 1989

Masuda A. Medcalf
Attorney at Law
P.O. Box 2465
Salt Lake City, Utah 84110

Dear Masuda,

I noted with concern, some of the representations made in your Docketing Statement. In several factual statements you have misstated material facts to the case. I am assuming that this is because you were not present at the depositions and at other discovery. However, I am writing this letter to request that similar misrepresentations not be restated in your brief.

In paragraph 4 d. of your Docketing Statement you indicate that ". . . their falls might have occurred more than 13 years prior to their depositions." A review of the depositions and a review of Nelson's Memorandum in Support of Motion in Limine indicates that at least one of the falls of Rebbecca Helms and Jody Christensen happened in immediate proximity to the time period in question (1984-85 Winter). Your statement that they could not pinpoint their falls is accurate. Your statement that their falls (inferring all of their falls) occurred more than 13 years before is incredible.

In paragraph 4 d. you indicate that the ladies deposition testimony indicated that their falls were in areas other than the "depressed area." That is incorrect. Please reread the depositions. Both Helms and Christensen indicated that one of their falls was in what I defined as the depressed area. See, for example, page 27 of the Helm's deposition.

In paragraph 4 h. you fail to note that I had indicated to the Court that the testimony of the three witnesses would depend on what Mr. Kersey and Mr. Miller stated on the stand. You also fail to note that the court specifically indicated that in that light I need not speculate as to their testimony. I believe it is incumbent on your to provide a fair representation of the whole conversation and not just the first half of it.

In paragraph 4 j. you indicate that Ms. Helms and Christensen's affidavits were in total contradiction to their deposition testimony. Pinpointing dates within a two year period can hardly be called "total

contradiction." Particularly in a Docketing Statement, such extreme and argumentative statements are inappropriate. Although you may wish that Helms and Christensen's depositions did not talk about a fall during the time period in question, wishing does not give license to mislead.

I will not stand by and allow misstatements and gross exaggerations. I urge that the focus on the appeal ought to be on the issues. Continued misstatements would give me no alternative but to make your misstatements an additional issue of the appeal. Making accurate statements will make for a much more enjoyable process for both of us.

Sincerely,



Eric W. Bjorklund
Attorney at Law

Mailed
11/27/84
EWB

Appendix E

Excerpts of Mr. Hayes' cross examination of Mrs. Helms
and Mrs. Christensen at trial.
(R. 446 at 74-76, 98-101).

COPY

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

* * *

GUY ERICKSON, :
Plaintiff, : Case No. 860900845
v. : Transcript of:
WASATCH MANOR, INC., : TRIAL PROCEEDINGS
Defendant. : FINAL DAY

* * *

BEFORE THE HONORABLE HOMER F. WILKINSON, JUDGE

Salt Lake City, Utah

Thursday, May 18, 1989

APPEARANCES

For the Plaintiff: ERIC W. BJORKLUND
Attorney at Law
3808 So. West Temple, #1D
Salt Lake City, Utah 84115

For the Defendant: NELSON L. HAYES
MASUDA A. MEDCALF
Attorneys at Law
50 South Main Street, #700
Salt Lake City, Utah 84144

REPORTER: SUZANNE WARNICK, CSR, RPR-CM
Official Court Reporter
240 East 400 South, #534
Salt Lake City, Utah 84111
801-535-5479

1 this fall to Mr. Kersey; is that right?

2 A I told him. I can remember telling him,
3 yes. That I had fallen and that I thought they should
4 do something about it.

5 MR. HAYES: I would like to publish the
6 deposition of Rebecca Helms, your Honor.

7 Q Let me show you that, Mrs. Helms. You had an
8 opportunity, did you, to read that deposition at some
9 point in time and make corrections and sign it before a
10 notary?

11 A I don't remember that I made corrections. I
12 guess.

13 Q You had an opportunity?

14 A I had an opportunity to read it.

15 Q You were told that you could do that?

16 A Right.

17 Q And I'd like you to go with me, if you
18 would, to page 12 of your deposition. If you would
19 look just for a reference as to what we were talking
20 about, there on line 1 you were answering,

21 "A The whole parking lot was a sheet of
22 ice. It had probably rained and the parking
23 lot seemed to hold the water. And it was
24 frozen. As a matter of fact, I remember we
25 walked down the in-coming entrance. Rather

1 than walk through the parking lot, we went
2 down through."

3 A That's right. We did. I had forgotten that.

4 Q We went through talking about it. And on
5 line 23 I asked you the question,

6 "Q Did you report this to anyone,
7 anybody."

8 And on line 24 you said,

9 "A I kind of think I reported it to the
10 office, but I don't think an industrial was
11 made up on it. I went on to work."

12 When you are talking about an industrial,
13 what are you talking about?

14 A A claim that I had been hurt.

15 Q And you don't know if you did or not, whether
16 you reported it to the office?

17 A The man who handled the industrial claims is
18 a very good friend of mine. I'm sure I told him I fell,
19 but whether anything else was done, I doubt very
20 seriously there was.

21 Q Question, this is now on page 13.

22 A Yeah.

23 Q "Q When you say the office, your
24 assessor's office?"

25 "A The assessor's office."

1 Then,

2 "Q Did you report it to anybody at

3 Wasatch Manor?"

4 What did you answer there?

5 A I don't see where you are.

6 Q Line 6.

7 A I said, "No."

8 Q When did you have your recollection refreshed

9 as to seeing Mr. Kersey?

10 A Well, I saw Mr. Kersey lots. He was there

11 ever morning.

12 Q And so you recognized Mr. Kersey. Not

13 because necessarily that you had reported to him that

14 there had been a fall. You recognized him, isn't it

15 true, because every morning you saw him out there?

16 A I remember telling Mr. Kersey. And I don't

17 know which day, or when, telling him they needed to do

18 something about it. That it was very icy and that I had

19 fallen.

20 Q Had you forgotten about that when we took

21 your deposition?

22 A I guess I had.

23 Q Have you met recently with Mr. Bjorklund?

24 A Yeah, we did.

25 Q To review what your testimony would be here

1 Q Have you seen snow piled everywhere in the
2 Salt Lake Valley during the winter?

3 A Yes, sir, there was.

4 Q Now, this particular time that you indicate
5 that you had fell, do you remember whether it appeared
6 to you that the parking lot had been plowed or shoveled?

7 A I do not think that it had been.

8 MR. HAYES: Could we publish the deposition of
9 Mrs. Christensen.

10 Q You have had an opportunity to read and sign
11 that, haven't you; do you remember?

12 A Yes, sir.

13 Q And turn to page 10 with me, line 17. I
14 asked the question,

15 "Q Had the parking lot been plowed or
16 cleared?"

17 You answered,

18 "A It had been plowed or it had been
19 shoveled, I guess. And then maybe it had
20 been a day or two or so after the snow where
21 the ice had accumulated."

22 That was your testimony; is that right?

23 A Uh-huh.

24 Q Yes?

25 A Yes.

1 Q Okay. I then asked you,
2 "Q Had it been salted?"
3 And your answer?
4 A I could not recall.
5 Q Is that your testimony? On direct I
6 understood it was different than that. That you
7 indicated that you had memory there was no salt the day
8 that you fell. Is that right?
9 A I could not remember seeing any.
10 Q And you also indicated the day that you fell
11 that you reported that to Mr. Kersey who we had come in
12 here. Isn't that right?
13 A It may have not been that very same day that
14 I reported it to him.
15 Q But you did report it to him?
16 A But I did report it.
17 Q You reported your fall to him?
18 A I told him that I had fallen, and asked his
19 permission to walk through the lobby and out the front
20 door.
21 Q Turn to page 11 of your deposition there,
22 line 5,
23 "Q Were you injured?"
24 Line 6,
25 "A No more than just a jar."

1 Question, line 7,
2 "Q Did you report it to anyone?"
3 Line 8,
4 "A I probably made comment that I had
5 fallen.
6 "Q To someone at work?
7 "A Yes.
8 "Q Did you report it to anybody at Wasatch
9 Manor?"
10 Line 12, what was your answer?
11 A "No." May I say something?
12 Q Please.
13 A The reason I don't go around and tell
14 everybody that I have fallen or I am going back to see
15 the doctor or anything like this is because I keep this
16 to myself. This is something personally to me.
17 And they are not interested in any injuries
18 that I have had or the problems that I have gone
19 through. If I could have kept the coma from the people
20 in the county building, I would have done that. But
21 when it was life and death to me, they knew.
22 So I don't go around and tell everybody
23 everything that has happened to me.
24 Q Do you recall the sequence of the
25 maintenance of the parking lot between the years of '81

1 when you went back there through '85? Can you tell us
2 in any particular year whether the maintenance in your
3 opinion was any better than any other year?

4 A I was petrified of that parking lot. In my
5 estimation and my opinion and in my belief, I think it's
6 a death trap.

7 Q Isn't it true, Mrs. Christensen, that prior
8 to this you had even fallen in your own -- on your own
9 sidewalks at your house and broken your arm?

10 A Yes, sir, it is.

11 Q You had fallen again running to catch a bus?

12 A Yes, sir.

13 Q You were afraid of falling; is that right?

14 A No. I am not afraid of falling.

15 Q Did you put salt on your sidewalks when you
16 fell?

17 A On my sidewalks, when I fell in my driveway?

18 Q Yeah. Did your sidewalks have salt on it
19 when you fell and broke your arm?

20 A Yes, sir, it did have.

21 Q Now, isn't it true that at the time that you
22 fell on this occasion, that you were able to see the ice
23 in front of you, and you were walking along in the
24 parking lot and then lost your footing and then went
25 down?

Appendix F

Trial Jury Instruction No. 20.

JURY INSTRUCTION NO

20

The defendant has a duty to exercise ordinary care to maintain the common walkways in reasonably safe condition for tenants and guests. The defendant has a further duty to observe any dangerous condition known to him or which by the use of reasonable diligence would have become known to him and to take reasonable steps to remedy or remove any such dangerous condition.

However, the landlord is not a guarantor for the safety of his tenants as they proceed along the common ways.

The mere accumulation of ice does not automatically make the landlord liable. He must be given a reasonable time after the creation of the dangerous condition developed, to take such measures as will make the common areas reasonably safe from those conditions which pose an unreasonable risk of harm to the user.

Appendix G

Point II of Wasatch's Amended Memorandum of Points and
Authorities in Support of Defendant's Motion for a New Trial.

Sixth, defendant's counsel acted reasonably at the time that the surprise testimony was offered into evidence. Upon plaintiff's Motion for Reconsideration, a hearing was held, and defendant's counsel argued to the Court that the admission of such testimony constituted surprise. See Affidavit of Masuda Medcalf at para. 14.

Finally, the result of the trial would have been different had it not been for the admission of the testimony of Ms. Helms, Ms. Christensen, and Ms. Mark. A brief interview of two jurors after the trial indicated that the jury was greatly influenced by the testimony of these witnesses, and that without such testimony the jury would not have been able to enter a verdict of negligence on the part of the defendant. The jurors interviewed could not understand why the defendant had not called other disinterested tenants of Wasatch Manor to testify in contradiction to the testimony of Helms, Christensen and Mark. Because all the factors have been met, defendant is entitled to a new trial.

II. THE DEFENDANT IS ENTITLED TO A NEW TRIAL ON THE GROUNDS THAT THE COURT INCORRECTLY INSTRUCTED THE JURY AS TO THE STANDARD OF CARE REQUIRED OF A LANDLORD.

It is well established in Utah that a landlord has duty to exercise ordinary care in maintaining the common areas in a reasonably safe condition for tenants and guests. Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89, 91 (Utah App. 1988); Schofield v. Kinzell, 29 Utah 2d 427, 511

P.2d 149, 151 (1973). A landlord is not a guarantor for the safety of his tenants and their guests. Id.

At trial of this matter, the Court gave Jury Instruction No. 20, which states in pertinent part:

The defendant has a duty to exercise ordinary care to maintain the common walkways in reasonably safe condition for tenants and guests. The defendant has a further duty to observe any dangerous condition known to him or which by the use of reasonable diligence would have become known to him and to take reasonable steps to remedy or remove any such dangerous condition.

(Empasis added). This instruction fails to correctly state the law that a landlord need only exercise reasonable care in maintaining the premises for the safety of his tenants. The second sentence of the instruction creates a higher duty on the landlord, akin to strict liability and contrary to Utah law. It is clear that no such extra duty may be imposed upon a landlord, because a landlord is not a guarantor of the safety of his tenants. Jury Instruction No. 20 should not have been given.

CONCLUSION

This case presents a situation of complete and unavoidable surprise first because defendant was not notified until the last day of trial of the change in testimony, and second because the defendant could not have foreseen that the Court would rule in violation of its prior Order. Rule 59(a)(3) and public policy require that a defendant have

Appendix H

Point VII of Plaintiff's Verified Reply to
Defendant's Motion for a New Trial.

even if counsel was reasonably surprised by Ms. Helms and Ms. Christensen's testimony that they told Kersey about their falls.

POINT VII

INSTRUCTION 20 IS A CORRECT STATEMENT OF THE LAW

Plaintiff's pleadings and the evidence produced at trial indicate that Plaintiff's theory of the case is as a "dangerous condition" case and not an "accumulation of snow" case. The Utah Supreme Court in the case of Cornwell v. Barton, 422 P.2d 663, 664 (Utah 1967) indicated that the "further duty" language of Instruction 20 (even without the addition of the word "reasonable") "is a correct statement of the law."

Incredibly, the Defendant in its memorandum cites the Court to two points of law about a landlord's "duty to exercise ordinary care" and that the "landlord is not a guarantor" as if to infer that these points were overlooked by the Court. The Defendant then partially quotes Instruction 20, deliberately omitting said same two points of law from the quoted portion of Instruction 20.

After incorrectly quoting only a portion of Instruction 20, the Defendant concludes, without logic or specification, that Instruction 20 creates a standard of strict liability. The following is the complete text of Instruction 20:

The defendant has a duty to exercise ordinary care to maintain the common walkways in reasonably safe condition for tenants and guests. The defendant has a further duty to observe any dangerous condition known to him or which by the use of reasonable diligence would have become known to him and to take reasonable steps to remedy or remove any such dangerous condition.

However, the landlord is not a guarantor for the safety of his tenants as they proceed along the common ways.

The mere accumulation of ice does not automatically make the landlord liable. He must be given a reasonable time after the creation of the dangerous condition developed, to take such measures as will

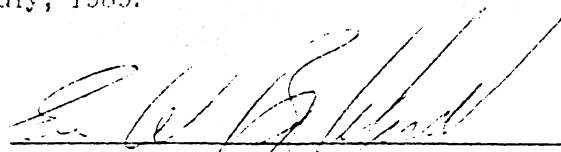
make the common areas reasonably safe from those conditions which pose an unreasonable risk of harm to the user.

To read this Instruction as creating "strict liability" is absurd. It is no wonder that Defendant fails to indicate the specifics or logic of how Instruction 20 creates "strict liability".

The Court's Instruction is a correct statement of the law regarding dangerous conditions in landlord-tenant cases. If anything, it favors the Defendant more than it needed to.

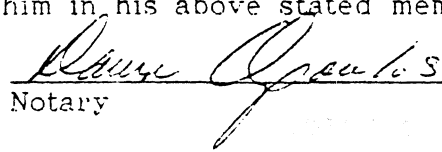
Respectfully submitted.

Dated this 5th day of July, 1989.

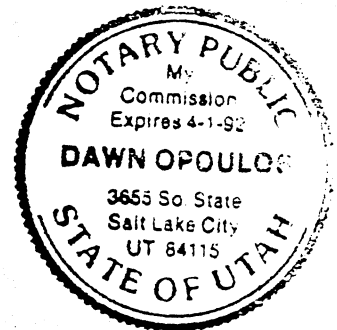

Eric W. Bjorklund
Attorney for the Plaintiff

NOTARY

On this 5th day of July, 1989 Eric W. Bjorklund appeared before me and attested to those facts asserted by him in his above stated memorandum.


Notary

Residing at: *Salt Lake County*
Expires at: *4-1-92*



CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed, postage pre-paid, to Nelson L Hayes, CSB Towers, Suite 700, 50 South Main Street, P.O. Box 2465, Salt Lake City, Utah 84110, this 5th day of July, 1989.



Appendix I

Affidavit of appellee/plaintiff Guy Erickson.

Eric W. Bjorklund #0345
Attorney at Law
3808 South West Temple, Suite 1D
Salt Lake City, Utah 84115
(801) 262-9904
Attorney for Plaintiff-Respondent

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

GUY ERICKSON,	:	AFFIDAVIT OF PLAINTIFF-
	:	RESPONDENT
Plaintiff-Respondent,	:	GUY ERICKSON
VS.	:	
	:	DC C86-845
WASATCH MANOR, INC.	:	
	:	CA 890737-CA
Defendant-Appellant,	:	

Guy Erickson, having been first duly sworn, hereby deposes as follows:

1. That he is the Plaintiff-Respondent in the above entitled action.

2. That after he obtained a judgment against Wasatch Manor in the above entitled matter, he was evicted without explanation by Wasatch Manor.

3. That he has not failed to timely pay his rent to Wasatch Manor since moving there and that Mr. Erickson is unaware of any other facts or reasons for his eviction, except for the spitefulness and vindictiveness of Wasatch Manor.

4. That he is no longer able to function as a realtor as a result of the injuries sustained to his head from his fall.

5. That he currently lives in the basement of a friend.

6. That his income is limited to social security and

income from temporary periodic employment, such as passing out telephone books, helping with the U.S. census for six weeks, etc.

7. That he has a contingency fee arrangement with Mr. Bjorklund.


8. That as a result of the Appeal of Wasatch Manor, he will be paying Mr. Bjorklund a greater percentage of any recovery to be made in the above entitled action.

9. That as a result of his poverty, he has been unable to pay for the majority of the costs of the trial or the appeal. He has had to rely on Mr. Bjorklund to pay most of the costs of the trial and this appeal.

10. That he does not have sufficient funds to provide for himself and that he ought not to have to pay out additional attorney's fees as a result of Wasatch Manor's frivolous appeal.

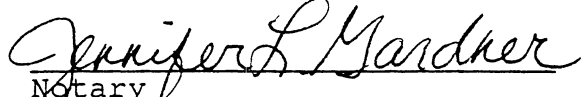
11. That he must rely on the money to be recovered from the above-entitled action to provide for his needs now that he is not as competent as he once was to earn income.

DATED this 19th day of May, 1990.


Guy Erickson

NOTARY

Appeared before me Guy Erickson on this 19th day of May and affirmed that he is the signer of the above stated instrument.


Notary

