

1989

# Guy Erickson v. Wasatch Manor : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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

Eric W. Bjorklund; Attorney for Plaintiff-Respondent.

---

## Recommended Citation

Brief of Appellant, *Erickson v. Wasatch Manor*, No. 890737 (Utah Court of Appeals, 1989).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/2394](https://digitalcommons.law.byu.edu/byu_ca1/2394)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT  
KFU

50

.A10

DOCKET NO.

890737-CA

---

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

---

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

---

CORRECTED APPELLANT'S BRIEF

---

Appeal from Judgment of a Third Judicial District  
Court of Salt Lake County, State of Utah  
Honorable Homer F. Wilkinson

---

ERIC BJORKLUND  
3808 South West Temple, #1D  
Salt Lake City, UT 84115  
Attorney for Plaintiff-  
Respondent

NELSON L. HAYES [A1433]  
MASUDA A. MEDCALF [A5317]  
RICHARDS, BRANDT, MILLER  
& NELSON  
Key Bank Tower, Seventh Floor  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Telephone: (801) 531-1777  
Attorneys for Defendant-  
Appellant Wasatch Manor, Inc.

FILED

APR 19 1990

COURT OF APPEALS

---

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

---

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

---

CORRECTED APPELLANT'S BRIEF

---

Appeal from Judgment of a Third Judicial District  
Court of Salt Lake County, State of Utah  
Honorable Homer F. Wilkinson

---

ERIC BJORKLUND  
3808 South West Temple, #1D  
Salt Lake City, UT 84115  
Attorney for Plaintiff-  
Respondent

NELSON L. HAYES [A1433]  
MASUDA A. MEDCALF [A5317]  
RICHARDS, BRANDT, MILLER  
& NELSON  
Key Bank Tower, Seventh Floor  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Telephone: (801) 531-1777  
Attorneys for Defendant-  
Appellant Wasatch Manor, Inc.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	iii-v
STATEMENT OF JURISDICTION . . . . .	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW . . . . .	1
DETERMINATIVE STATUTES . . . . .	2
STATEMENT OF THE CASE . . . . .	2
I. Nature of the Case . . . . .	2
II. Statement of Facts . . . . .	4
SUMMARY OF ARGUMENTS . . . . .	15
ARGUMENT . . . . .	17

### POINT I:

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY PREVIOUSLY EXCLUDED BY THE COURT'S ORDER IN LIMINE. . . . .	17
----------------------------------------------------------------------------------------------------------------	----

- A. The original Order in Limine  
excluding the prior and subsequent  
slip and falls was a correct ruling  
of law . . . . . 18
- B. The admission of the testimony of  
Rebecca Helms, Jody Christensen, and  
Colleen Mark on the very last day of  
the trial constituted surprise which  
ordinary prudence could not have guarded  
against, and it greatly prejudiced  
Wasatch's defense . . . . . 24

### POINT II:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GIVING JURY INSTRUCTION NO. 20 . . . . .	30
-------------------------------------------------------------------------------------------	----

### POINT III:

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL . . . . .	35
----------------------------------------------------------------------------------	----

CONCLUSION . . . . .	38
ADDENDUM . . . . .	40

## TABLE OF AUTHORITIES

### Cases

<u>American Broadcasting Companies, Inc. v. Kenai Air of Hawaii, Inc.</u> , 686 P.2d 1 (Hawaii 1984) . . . . .	18
<u>Anderson v. Bradley</u> , 590 P.2d 339 (Utah 1979) . . . . .	35
<u>Belden v. Dalbo, Inc.</u> , 752 P.2d 1317 (Utah App. 1988) . . . . .	17
<u>Burgbacher v. Mellor</u> , 112 Ariz. 481, 543 P.2d 1110 (1975) . . . . .	18, 22
<u>Chournos v. D'Agnillo</u> , 642 P.2d 710 (Utah 1982) . . . . .	35
<u>Cornwell v. Barton</u> , 18 Utah 2d 325, 442 P.2d 663 (1967) . . . . .	34
<u>Donohue v. Intermountain Health Care</u> , 748 P.2d 1067 (Utah 1987) . . . . .	36
<u>Evans v. Park</u> , 112 Idaho 400, 732 P.2d 369 (Idaho App. 1987) . . . . .	21, 22
<u>Gregory v. Fourthwest Investments, Ltd.</u> , 754 P.2d 89 (Utah App. 1988) . . . . .	31, 32
<u>Guardian State Bank v. Humphrey</u> , 762 P. 2d 1084 (Utah 1983) . . . . .	23
<u>Hardy v. Hardy</u> , 776 P.2d 917 (Utah App. 1989) . . . . .	17
<u>Harris v. Utah Transit Authority</u> , 671 P.2d 217 (Utah 1983) . . . . .	30
<u>Hyland v. St. Mark's Hospital</u> , 19 Utah 2d 134, 427 P.2d 736 (1967) . . . . .	35
<u>In re Adoption of S.E.</u> , 755 P.2d 27 (Mont. 1988) . . . . .	36

<u>Jacobs v. Commonwealth Highland Theaters, Inc.</u>	
738 P.2d 6 (Colo. App. 1986) . . . . .	18, 19
<u>Johnson v. State,</u>	
636 P.2d 47 (Alaska 1981) . . . . .	18
<u>Kaeo v. Davis,</u>	
719 P.2d 387 (Hawaii 1986) . . . . .	18, 19
<u>Lembach v. Cox,</u>	
639 P.2d 197 (Utah 1981) . . . . .	35
<u>Martin v. Safeway Stores, Inc.,</u>	
565 P.2d 1139 (Utah 1977) . . . . .	32, 34
<u>Matter of Estate of Kesler,</u>	
702 P.2d 86 (Utah 1985) . . . . .	30
<u>Moon Lake Electric v. Ultra Systems Western Constructors, Inc.,</u>	
767 P.2d 125 (Utah App. 1988) . . . . .	35
<u>Rowley v. Graven Brothers &amp; Company</u>	
26 Utah 2d 448, 491 P.2d 1209 (1971) . . . . .	30
<u>Schofield v. Kinzell,</u>	
29 Utah 2d 427, 511 P.2d 149 (1973) . . . . .	31, 32
<u>State v. Johnson,</u>	
748 P.2d 1069 (Utah 1987) . . . . .	37
<u>State v. Jamison,</u>	
767 P.2d 134 (Utah App. 1989) . . . . .	17
<u>State v. Northrup ,</u>	
756 P.2d 1288 (Utah App. 1988) . . . . .	17
<u>State v. Speer,</u>	
750 P.2d 186 (Utah 1988) . . . . .	17
<u>State v. Stewart,</u>	
12 Utah 2d 273, 365 P.2d 785 (1961) . . . . .	18, 19
<u>Thursby v. Reynolds Metals Co.,</u>	
466 So.2d 245 (Fla. App. 1984) . . . . .	18
<u>Webster v. Sill</u>	
675 P.2d 1170 (Utah 1983) . . . . .	23

Statutes and Rules

Utah Code Annotated § 78-2a-3(2)(j)(1988) . . . . .	1
Utah Rules of Civil Procedure, Rule 59 (a)(3) . .	16, 35
Utah Rules of Evidence, Rule 103 (a) . . . . .	17



### 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, Jody Christensen and Colleen Mark, particularly where the court had previously and correctly ruled such testimony inadmissible?

a. Whether the original Order in Limine excluding the prior and subsequent slip and fall accidents was a correct ruling of law?

b. Whether the admission of such testimony on the very last day of trial constituted surprise which ordinary prudence could not have guarded against, and thus prejudiced Wasatch's defense.

2. Whether the trial court committed reversible error by giving Jury Instruction No. 20 over the objection of counsel for Wasatch Manor, Inc., causing the jury to improperly apply a higher standard of care to Wasatch Manor, Inc.?

3. Whether the court committed reversible error by refusing to grant Wasatch Manor, Inc.'s Motion for a New Trial?

### DETERMINATIVE STATUTES

There are no constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation would determine the issues at hand.

### STATEMENT OF THE CASE

#### I. NATURE OF THE CASE

This action was instituted by the Plaintiff-Respondent, Guy Erickson, against Defendant-Appellant, Wasatch Manor, Inc. ("Wasatch"), who operates the Wasatch Manor Apartments in Salt Lake City. Erickson claimed that he was injured on February 9, 1985 when, while a resident of the Wasatch Manor Apartments, he slipped and fell on ice in the upper level of the Wasatch Manor Apartments parking lot.

Prior to the trial of this action, Wasatch moved the trial court (Judge Homer F. Wilkinson) for an Order In Limine excluding from evidence the testimony of four (4) witnesses regarding prior and subsequent slip and fall accidents allegedly occurring on the Wasatch Manor Apartments parking lot. It was Wasatch's contention that the prior and subsequent slip and fall accidents were not admissible because Erickson could not show that they occurred under substantially similar conditions as his own fall. The trial court granted Wasatch's Motion In Limine, and ruled that the testimony would not be admissible

unless Erickson established that the parking structure was defectively designed or constructed.

On the third and last day of trial, however, the court reconsidered its Order In Limine upon the Motion of Erickson's counsel, Eric Bjorklund. Despite the fact that Erickson had made no showing of a defect in the construction of the Wasatch Manor parking lot, the court decided to admit the testimony of prior and subsequent falls against the objections of counsel for Wasatch.

In addition, against the objections of counsel for Wasatch that Jury Instruction No. 20 was an incorrect statement of landlord/tenant law in Utah, the court instructed the jury that a landlord has a duty to exercise ordinary care to maintain the common walkways in a reasonably safe condition for tenants and guests, and that a landlord has a further duty to observe any dangerous condition known to him and to take reasonable steps to remedy or remove any such dangerous condition.

On May 19, 1989 the jury returned a verdict in favor of Guy Erickson, and judgment was entered on June 13, 1989. Thereafter, Wasatch filed a timely motion for a new trial, arguing that the admission of the testimony regarding the prior and subsequent falls constituted surprise and that the trial court erred in giving Jury Instruction No. 20. By Minute Entry dated August 7, 1989, and an Order dated September 19, 1989, Judge Wilkinson denied Wasatch's Motion for a New Trial.

Appellant Wasatch Manor, Inc. filed its Notice of Appeal on October 19, 1989.

## II. STATEMENT OF FACTS

Wasatch Manor, Inc., operates the Wasatch Manor Apartments at 535 South 200 East, Salt Lake City, Utah. (R. 60). Erickson's Complaint (which was amended by Order of the trial court dated May 16, 1989) alleged that on February 9, 1985, while a resident of the Wasatch Manor Apartments, he slipped and fell on ice in the upper level of the Wasatch Manor parking lot. (R. 2, 214). Erickson brought this action to recover for injuries allegedly resulting from the February 9, 1985 slip and fall. (R. 2-7, 214)

According to Erickson's Complaint, the upper level of the Wasatch Manor parking lot is constructed in such a way that water from snow runs down the middle of the parking lot. (R. 3, 75, 214, 444 at p.12). It was alleged that on February 9, 1985, the upper terrace had been cleared of snow, and snow was piled in one area of the upper terrace. (R. 3, 214). Erickson further alleged that on February 9, 1985, the snow pile melted, the water ran down the middle of the parking lot, and froze during the night. (R. 3-4, 214). Further, the Complaint allege that around 11:15 p.m., Erickson fell on this ice which traversed the length of the parking lot, and that due to poor

lighting, Erickson did not see the ice before he fell. (R. 4, 444 at p.12).

Wasatch Manor and Salt Lake County had entered into a contract, whereby Salt Lake County paid Wasatch Manor for the privilege of its employees to park in the Wasatch Manor Apartments' parking lot. (R. 61). Four County employees claimed to have fallen on ice or snow in the parking lot. (R. 61-64, 438, 439, 441). Deposition testimony revealed the following information regarding the alleged falls of these four witnesses.

Colleen Mark, an employee of the Salt Lake County Treasurer's Office, claimed that she fell in November of 1984 on ice in the Wasatch Manor Apartments' parking lot. (R. 439 at p. 6). Ms. Mark claimed that on this occasion she was just getting ready to go to work. (Id. at p. 10.) She parked on the east side of the parking lot and was about an inch away from her car when she fell. (Id. at pp. 6-7.) Ms. Mark did not report her fall to Wasatch Manor, but reported it to her supervisor at the County Treasurer's office. (Id. at 11.)

Wanda Jo Christensen, an employee of Salt Lake County Assessor's office, claimed to have fallen twice at the Wasatch Manor parking lot. Her first fall allegedly occurred sometime between 1968 and 1971. (R. 438 at p. 5). Ms. Christensen alleged that she fell while walking down a ramp, at a time when there was both ice and snow on the ground. (Id. at 6.) Ms. Christensen did not report this fall to Wasatch

Manor. (Id. at 7.) The second fall allegedly occurred between 1984 and 1985. (Id. at p. 5.) Ms. Christensen had parked in a spot alongside of the building, and fell right near the door that goes into the Wasatch Manor Apartments. Ms. Christensen did not report her fall to Wasatch Manor, but asked the manager if she could walk through the lobby instead of walking down the ramp. (Id. at 11.)

Rebecca Helms testified at her deposition that she parked on the west side of the upper-level parking lot along the building. (R. 441 at p. 8). Ms. Helms claims to have fallen several times. Her first fall occurred about thirteen years ago. (Id.). At that time, she was parked on the immediately next available space on the east side of the row of parking spaces alongside the building. Ms. Helms allegedly fell on ice by the side of her car in the morning as she was going to work. Ms. Helms did not report the fall to Wasatch Manor. (Id. at 17, 18.) Ms. Helms' second fall probably occurred within the eight years prior to her October 1987 deposition. (Id. at 8.) This fall allegedly occurred around 8:00 a.m., farther north on the parking lot as Ms. Helms was going down the ramp. (Id. at 14.) The snow had not been removed, but the ice was visible. (Id. at 15.) Ms. Helms did not report it to Wasatch Manor, but believes she spoke to a person who loaded the garbage regarding the treatment of ice. (Id. at 16, 17.) Ms. Helms' most recent fall allegedly occurred in November or December of 1986. (Id.

at 8.) On this particular occasion, Ms. Helms parked on the west side of the parking lot along the building, and she was right behind her car when she fell. (Id. at 8, 10.) This fall also occurred around 8:00 a.m., while there was both snow and ice in the parking lot. It was not reported to Wasatch Manor. (Id. at 11, 13.)

Carol Back claimed that in the late 1970's, she fell by the ramp. She had parked along the east side of the parking lot, and walked towards the ramp, and was quite a distance from her car when she fell. (R. 63-64, 444 at pp.708). Ms. Back could see the ice in the parking lot before she fell. (R. 63-64). Ms. Back failed to report the fall to Wasatch Manor. (Id.)

Based upon the deposition testimony of the four witnesses, Wasatch moved the trial court for an Order in Limine excluding the testimony on the grounds that the prior and subsequent falls did not occur under circumstances substantially similar to Erickson's fall, and therefore were not relevant and or probative of Erickson's theories. (R. 58-59). In its Memorandum in Support of the Motion and at the hearing on the Motion, Wasatch pointed out that the depositions of the four County employees revealed that these witnesses could not pinpoint the dates of their alleged falls, that these falls were remote in time and some of them may have occurred more than thirteen years prior to the depositions, that the falls occurred in areas of the

parking lot other than the depressed area where Erickson allegedly fell, and that none of the witnesses reported any of their falls to Wasatch Manor personnel. (R. 60-71).

The Court ruled that such testimony would not be admitted absent a showing that the design or construction of the parking structure was defective. The Court's Ruling stated:

As far as the last issue is concerned, I have not made a study of the slip and fall cases as far as these prior accidents are concerned. I know I have had some experience as far as an automobile accident where there is a particular location in the highway of where a number of accidents have taken place. And I have not reviewed that either prior to taking the bench on this, but I do remember some of the things they say. And one of this is notice.

I do know that whether notice was given to the city, the highway department, and so forth as far as a dangerous condition is concerned, another thing they look at is the time element, whether it was one month, six months, five years, ten years and so forth. And of course the main thing is whether the condition was the same, the road signs were the same, the designation of the road, the line down the center of the road, and so forth, and things of this sort.

Well, this gets very difficult when you start talking about falls of 13, 15, 18 years ago. And I am going to rule this way: That if the plaintiff has evidence to show that there is, and he claims there is a dangerous condition which exists in that parking lot, engineering, construction where it was negligently constructed, where they made something that was negligent or defective and that people have fallen as a result of that, then I would allow prior falls.



If these prior falls are not in that same location as far as the depressed area of which he alleges is defective, such as going down the ramp or such as the other part of it, I just can't allow it. They are just not relevant as far as the situation is concerned. They may have fallen, and even some of them may have been five or ten years ago.

But if he can tie it in to a defective condition in construction, something of a negligent nature, then I will allow it within the same area. And it sounds like to me there is only one that does this, and that's the one on the west side of where somebody walked out in back of their car and fell.

\* \* \* \* \*

And I won't even allow that unless it can be shown that there was a defect as far as the construction which caused ice to form and people have been falling there. Of course that's even weak because still they didn't give notice to the principle, Wasatch Manor.

. . . . So I hope you understand my ruling. I am saying that I will not allow the prior falls unless it can be established that there was a defective condition there and they were falling as a result of that defective engineered condition.

(Emphasis added R. 443, attached as Appendix A).

On the last day of trial, even though Erickson had not introduced any testimony, expert or otherwise, regarding the design or construction of the parking structure, Erickson's counsel moved the Court to reconsider its prior Order based upon the affidavits of two witnesses. (R. 184-194). The Affidavit of Rebecca Helms stated that she fell into the depressed area of the

parking lot during the month of January 1985 or February of 1985. (R. 188). This statement was in contradiction to her deposition testimony that the most recent fall she had at the Wasatch Manor parking lot was in November or December of 1986, and the fall prior to that was sometime in the eight years prior to her deposition which was taken in October of 1987. (R. 441 at p. 8). Furthermore, Ms. Helms' deposition testimony made no mention of falling into the depressed area of the parking lot. (R. 441 at pp. 8-15). The Helms Affidavit also stated that within days of the supposed fall in January or February of 1985, she notified a man who worked for Wasatch and who was loading garbage at the time that the parking lot was icy and that she had fallen. (R. 188). This statement is again in contradiction to Helms' deposition testimony that she did not report the November or December 1986 fall to Wasatch personnel. (R. 441 at p. 11, 13). Ms. Helms' testified at her deposition that she had fallen three times on the Wasatch parking lot, but the only fall regarding which she spoke to the Wasatch employee who was loading garbage was the fall that occurred within the eight years prior to the taking of her deposition in October of 1987. (R. 441 at pp. 8, 16-17).

Similarly, the Affidavit of Jody Christensen stated that during the last two weeks of December 1984 or during the month of January 1985 she had fallen in the location marked with a dotted line on a diagram attached to the Affidavit. (R. 192,

the Affidavit of Jody Christensen is attached as Appendix B.) The diagram seems to indicate that the fall occurred in the same depressed area in which Erickson allegedly fell. (R. 194, Appendix B). This statement is in contradiction to Ms. Christensen's deposition wherein she testified that she could not recall whether the fall occurred in 1984 or 1985, let alone recall the month in which the fall occurred. (R. 438 at pp. 5, 15). In addition, in her deposition, Ms. Christensen repeatedly testified that she could not recall specifically where the fall occurred, but remembered only that it occurred near the door to the Wasatch Manor Apartments close to the cars parked alongside the west row of parking spaces. (R. 438 at pp. 8-10, 15-16). Christensen's Affidavit further stated that within a few days of her fall in December of 1984 or January of 1985, she told the manager of the Wasatch Manor Apartments that she had fallen and that the parking lot was unreasonably icy. (R. 192). However, at the time of her deposition, Christensen testified that she did not report the fall to anyone at Wasatch Manor. She only asked the manager if she could walk through the lobby instead of walking down the ramp. (R. 438, at p. 11).

The court thereafter held a hearing in the absence of the jury on Erickson's Motion to Reconsider. Nelson Hayes, counsel for Wasatch, vigorously objected to the admission of the testimony, arguing that the affidavits were in contradiction to the prior depositions, and that the admission of the testimony at

that point would be surprise to Wasatch who had relied on the court's prior Order and was not adequately prepared to cross-examine the surprise witnesses and to properly prepare Wasatch's defense. (R. 446 at pp. 52-56). In spite of Wasatch's objections and in spite of the court's prior Order which specifically excluded testimony regarding other falls unless it could be shown that the parking lot was defectively constructed and that the falls occurred around the same time and in the same area as where Mr. Erickson allegedly fell, the court admitted the testimony into evidence. The court stated:

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 principles 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. (Id. at pp. 55-56).

Erickson's counsel then called witnesses Rebecca Helms, Jody Christensen and Colleen Mark, each of whom testified regarding their falls on the Wasatch Manor parking lot. At trial Ms. Helms and Ms. Christensen both pinpointed their falls as having occurred in the same month or the month prior to Erickson's fall. (R. 446 at pp. 64, 87). They

further testified that they had in fact reported their falls to Wasatch Manor. Id. at pp. 62-63, 89). They even went so far as to identify Art Kersey in the court room as the Wasatch Manor employee with whom they spoke. (Id.)

Wasatch's counsel thereafter presented the defense of Wasatch through the testimony of Burton Miller, the manager of the Wasatch Manor Apartments, and Art Kersey, the engineer employed by Wasatch Manor Apartments. (R. 446 at pp. 121-140). Wasatch's counsel did not call any witnesses to rebut the testimony of Rebecca Helms, Jody Christensen and Colleen Mark.

At the trial of this matter, against the objections of Wasatch's counsel, 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.

(Emphasis added, R. 223-256, Jury Instruction No. 20 has been reproduced in its entirety and attached as Appendix C.)

On May 19, 1989, the jury returned a verdict finding Wasatch Manor, Inc. negligent. The jury awarded a total verdict of \$84,820.15 to Erickson. (R. 446 at pp. 201-205).

On June 13, 1989, Judgment was entered on the verdict. (R. 280-281, attached as Appendix D).

On June 23, 1989, Wasatch filed a timely Motion for a New Trial on the grounds that the admission of the testimony of Christensen, Helms, and Mark on the last day of trial constituted surprise which prejudiced Wasatch's defense, and also on the grounds that Jury Instruction No. 20 incorrectly stated the standard of care required of a landlord. (R. 373-386). Wasatch presented its position and arguments to the court by filing a Memorandum of Points and Authorities and thereafter filing a Reply Memorandum in response to Erickson's memorandum objecting to the Motion. (R. 373-384, 409-414). On August 7, 1989, Judge Wilkinson issued a Minute Entry denying Wasatch's Motion for a New Trial. (R. 419, attached as Appendix E). The Minute Entry does not state the reasons for the court's denial of Wasatch's Motion. (Id.). An Order to the same effect was entered on September 19, 1989. (R. 420-421).

Wasatch hereby appeals from the judgment entered against it on June 13, 1989, and from the court's Order dated September 19, 1989, denying Wasatch's Motion for a New Trial.

### SUMMARY OF AGREEMENT

Wasatch appeals from the Judgment entered on September 19, 1989 on the grounds that (1) the testimony of Rebecca Helms, Jody Christensen and Colleen Mark was improperly admitted, and (2) that the Court improperly instructed the jury as to the standard of care required of a landlord. The trial court erred in admitting testimony which it had expressly excluded by its prior Order in Limine. The admission of such evidence was an abuse of discretion, because were it not for the improper admission, the jury would not have returned the verdict that it did against Wasatch. First, the original Order of the trial court excluding the testimony was the correct ruling in light of the law regarding the admissibility of prior and subsequent accidents. Secondly, the admission of such testimony in total contradiction to the prior Order was a complete surprise to appellant Wasatch, whose counsel had prepared Wasatch's defense with reliance upon the court's prior Order. Furthermore, because the trial court had the change of heart on the very last day of trial, at the very end of Erickson's presentation of his case, Wasatch was unable to produce rebuttal witnesses to contradict the surprise testimony.

The Court improperly instructed the jury that the defendant has a duty to exercise ordinary care to maintain the

common walkways in a reasonably safe condition, and had a further duty to observe any dangerous condition known to him and take reasonable steps to remedy the condition. This instruction essentially created a strict liability type of standard for Wasatch, because it imposed an additional duty beyond ordinary reasonable care under the circumstances, and that was the duty to observe specific conditions and remove them. This is an erroneous instruction under Utah landlord/tenant law and it prejudiced Wasatch.

Finally, Wasatch appeals from the trial court's order denying its motion for a new trial. Wasatch argued to the court by memorandums of law that it had met all the elements of Utah Rules of Civil Procedure Rule 59(a)(3), and that it was entitled to a new trial on the grounds of surprise. Wasatch also argued to the court that Jury Instruction No. 20 was improper. The court, however, denied Wasatch's Motion without indicating its reasons therefore. Wasatch was clearly entitled to a new trial. The denial of the Motion was an abuse of discretion.



## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY  
PREVIOUSLY EXCLUDED BY THE COURT'S ORDER IN LIMINE.

The proper standard of review on appeal for a trial court's admission of evidence is abuse of discretion. Rule 103(a) of the Utah Rules of Evidence provides that, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Thus, a trial court's determination of admissibility can be reversed when it is shown that the trial court abused its discretion, and that that abuse of discretion affected a party's substantial rights. Hardy v. Hardy, 776 P.2d 917, 924-925 (Utah App. 1989); State v. Jamison, 767 P.2d 134, 137 (Utah App. 1989). In determining whether a substantial right of the party is affected, an appellate court must decide whether there is a reasonable likelihood that a different result would have been reached absent the error. State v. Northrup, 756 P.2d 1288, 1285 (Utah App. 1988); Belden v. Dalbo, Inc., 752 P.2d 1317, 1319 (Utah App. 1988); State v. Speer, 750 P.2d 186, 189 (Utah 1988).

A. The Original Order in Limine Excluding the Prior and Subsequent Slip and Falls Was a Correct Ruling of Law.

The admissibility of prior accidents is totally within the discretion of the trial judge. American Broadcasting Companies, Inc. v. Kenai Air of Hawaii, Inc., 686 P.2d 1, 5 (Hawaii 1984); Burgbacher v. Mellor, 112 Ariz. 481, 543 P.2d 1110, 1112 (1975). However, the general rule is that evidence of prior similar incidents may be admissible when offered for a valid purpose, when relevant to a material issue, and when its probative value outweighs any prejudice resulting from its admission. Jacobs v. Commonwealth Highland Theaters, Inc., 738 P.2d 6, 9 (Colo. App. 1986). A valid purpose includes attempts to prove a defective or dangerous condition and to establish notice. Before evidence of prior incidents may be admitted, it must be shown that the conditions under which the previous accidents occurred were the same or substantially similar to the one in question. Kaeo v. Davis, 719 P.2d 387, 393 (Hawaii 1986); Burgbacher v. Mellor, 543 P.2d at 1112; State v. Stewart, 12 Utah 2d 273, 365 P.2d 785, 786 (1961). The same is true in determining the admissibility of subsequent accidents. Johnson v. State, 636 P.2d 47 (Alaska 1981); Thursby v. Reynolds Metals Co., 466 So.2d 245 (Fla. App. 1984).

Evidence that would merely prove that many accidents had occurred at a particular place, or that such location was an accident-prone location is properly excludable. State v. Stewart, 36 P.2d at 786. There must be a showing of substantial similarity of conditions. Furthermore, even accidents which are proven to have occurred under substantially similar circumstances may be excluded if the danger of unfair surprise, prejudice, confusion of the issues or the consideration of undue consumption of time is disproportionate to the probative value of the evidence. Kaeo v. Davis, 719 P.2d at 393. The following factors are important in determining whether sufficient similarity of circumstances exists in order to make the prior or subsequent accidents admissible: The nature of the accidents, their location, the time of day, the quality of lighting, the condition of the premises, and the time difference between the prior accidents and the accident in question. Jacobs, 738 P.2d at 10.

Due to substantial differences between Erickson's fall and the alleged slip and falls of the witnesses, the prior and subsequent accidents lacked probative value and should not have been admitted into evidence. The witnesses' deposition testimony indicated that their slip and falls occurred in locations different from the location where Erickson fell. Erickson claimed that he fell on ice collected in a "depressed area" of the parking lot which runs in a north and southerly

direction immediately east of the first row of parking spaces along the west side of the parking lot. Ms. Mark testified that her fall occurred on the far east side of the parking lot. Ms. Christensen allegedly fell once while walking down a ramp, and a second time on the far west side of the parking lot. According to Ms. Helms, she first fell about thirteen years ago on the east w of parking spaces, which would be east of the "depressed area." Ms. Helms' second fall occurred on the north side of the parking lot as she was going down a ramp. Ms. Helms claimed to have fallen a third time after she parked on the far west side of the parking lot and walked behind her car towards the north end of the lot. Ms. Back's fall occurred by the ramp.

Thus, the only fall that might have occurred near the location of Erickson's fall was Ms. Helm's fall as she was walking behind her car. However, none of the witnesses, including Ms. Helms, testified at their depositions that they fell in a "depressed area." None of the witnesses could specify a specific day or even month and only generally a time of day. Therefore, these other slip and falls were not probative of Erickson's theory that the condition of the parking lot created a hazardous depressed area where ice accumulated.

Secondly, the prior and subsequent accidents occurred at a different time of day than Erickson's fall. Erickson testified that he fell at 11:15 p.m. and that due to poor lighting, he did not see the ice upon which he fell. However,

depositions of the witnesses indicated that they all fell during daylight, around 8 a.m. Furthermore, they had all testified their depositions that they saw the ice before they fell. The conditions of the parking lot may vary greatly between 8:00 a.m. and 11:15 p.m. Furthermore, since the witnesses saw the ice upon which they fell, this testimony was not helpful to prove plaintiff's theory that ice accumulated in a depressed area and that he didn't see the ice.

The condition of the premises is another substantial difference between Erickson's fall and the prior and subsequent accidents. In the case of Evans v. Park, 112 Idaho 400, 732 P.2d 369 (Idaho App. 1987), plaintiff was a social guest who suffered injury when he slipped and fell on ice covering the front steps of defendants' residence. At trial, plaintiff attempted to introduce testimony of a woman who allegedly slipped, but did not fall on the same steps approximately one month prior to Evans' accident. 732 P.2d at 371. The court held that the testimony was inadmissible. The court reasoned that changing weather, as well as intervening foot traffic on the steps, would have altered their condition so greatly that any evidence of that condition one month before the accident would lack probative value.

Weather conditions may vary greatly from year to year, month to month, even day to day. In this case, the witnesses claimed that their slip and falls occurred as far as thirteen

years prior to the slip and fall in question. During that time, conditions in the parking lot would have changed dramatically due to changing weather, a change in the amount of snowfall, change in the procedures for removal of snow and icing of the parking lot, and differing amounts of vehicle or foot traffic in the parking lot. According to the Evans v. Park analysis, these alleged accidents lacked probative value and should not have been admitted into evidence.

Finally, the prior and subsequent accidents should not have been admitted into evidence because they lacked a proper foundation. In Burgbacher v. Mellor, plaintiff's decedent died as a result of brain injuries suffered when he slipped and fell while hurrying across a wet exterior sidewalk near the north entrance of a medical building. At trial, the deposition testimony of a former maintenance man was read to the jury. The testimony was to the effect that one day the witnesses' wife almost slipped on the wet sidewalk. The court held that this testimony should not have been admitted into evidence, as proper foundation had not been established. "The fact that the woman almost slipped was put before the jury but when she slipped was not clear and therefore, a proper foundation for the evidence was not laid." 543 P.2d at 1112, emphasis added.

The witnesses in this case could not pinpoint, at the time of their depositions, when their falls occurred. Therefore, Burchbacher dictates that the prior and subsequent

accidents were inadmissible because they lacked proper foundation. The trial court properly ruled such testimony inadmissible unless and until Erickson made a showing that the parking lot was defectively constructed, and even so, only those falls that occurred within the same time period and within the same area of the parking lot as Erickson's fall would be admitted. (R. 443, Appendix A).

The court should not have reversed its prior Order in Limine upon Erickson's Motion to Reconsider. Erickson's Motion for reconsideration was based upon the affidavits of Jody Christensen and Rebecca Helms. As indicated under the Facts Statement of this brief, these affidavits were in contradiction to the prior deposition testimony of Ms. Christensen and Ms. Helms. It is well established that as a matter of general evidence law, a deposition is a more reliable means of ascertaining the truth than an affidavit. Guardian State Bank v. Humphreys, 762 P.2d 1084, 1087 (Utah 1988); Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983). This is because a deponent is subject to cross-examination while an affiant is not. Webster, 675 P.2d at 1172. Secondly, regardless of the existence of the affidavits, the court's Order in Limine had expressly stated that before the slip and falls would be admitted, Erickson had to show a defect in the design or construction of the parking lot. (R. 443, Appendix A). Erickson clearly failed to make such a showing during the

presentation of his case and even upon his Motion for Reconsideration of the Order in Limine. Because the conditions established by the court had not been met, the testimony of Jody Christensen, Rebecca Helms and Colleen Mark should not have been admitted.

- B. The Admission of the Testimony of Rebecca Helms, Jody Christensen, and Colleen Mark on the Very Last Day of the Trial Constituted Surprise Which Ordinary Prudence Could Not Have Guarded Against, and it Greatly Prejudiced Wasatch's Defense.

Assuming, arguendo, that the other falls were substantially similar to Erickson's fall, the trial court committed reversible error in admitting the testimony in contradiction to its prior Order when there was no opportunity for Wasatch to arrange for rebuttal testimony. The admission of such testimony constituted surprise which ordinary prudence could not have guarded against and prejudiced Wasatch's defense. Wasatch's counsel had properly conducted discovery and deposed witnesses Christensen, Helms, and Mark to obtain a complete understanding of the facts and to properly prepare and evaluate Wasatch's defense. Based upon these depositions, Wasatch brought a Motion in Limine to exclude the prior and subsequent falls. After successfully securing the court's Order in Limine, Wasatch's counsel relied upon the guidelines set forth in the court's Order in preparing for trial. However, nothing that Wasatch's counsel could do could have prepared it for the



sudden reversal of the Order in Limine which took place on the last day of trial.

The court's admission of the testimony of Rebecca Helms, Jody Christensen, and Colleen Mark constituted a surprise for several reasons. First of all, Erickson's counsel intentionally waited until the last day of trial to notify Wasatch's counsel and the court that his witnesses had changed their testimony. Although in his opening statements, Mr. Bjorklund told the jury that he might call several witnesses that will talk about the parking lot, Bjorklund refused to reveal to the court and to Wasatch's counsel his theory for overcoming the court's Order in Limine. (R. 445 at p. 13). However, around 11:30 a.m. on the last day of trial, Mr. Bjorklund presented his Motion for Reconsideration of the Order in Limine along with the affidavits of Jody Christensen and Rebecca Helms. It was later learned at trial, upon cross-examination of Ms. Helms, that Mr. Bjorklund knew that Ms. Helms and Ms. Christensen would change their testimony almost three weeks before the trial. (R. 446 at p. 76). Thus, Wasatch's counsel was genuinely surprised that Ms. Helms and Ms. Christensen changed their deposition testimony.

Secondly, the admission of this testimony constituted surprise to Wasatch because it had no way of preparing for the eventuality that the court might reverse its Order, particularly where the guidelines set forth in the Order had not been met. As

stated previously, the court's oral Ruling on Wasatch's Motion in Limine clearly stated that before evidence of the prior slip and falls could be admitted, Erickson had to show that there was a defect in the construction or design of the Wasatch Manor parking lot. The ruling further stated that in the event that Erickson made such a showing, the court would admit into evidence only those falls that occurred within the same time period and the same area of the parking lot as Erickson's fall. (R. 443, attached as Appendix A). Erickson's Motion for Reconsideration and the attached affidavits were mere attempts to show that the prior falls of Christensen and Helms occurred at the same time period and the same area in the parking lot as Erickson's fall. At no time during the trial or upon Erickson's Motion for Reconsideration did he make a showing that the parking lot was defectively constructed.

At the hearing held by the court on Erickson's Motion for Reconsideration, counsel for Wasatch, Nelson Hayes, objected to the admission of such evidence and argued that the admission of the testimony was a complete surprise. Mr. Hayes stated:

Your Honor, our position basically is unchanged from when it was argued before your Honor on April 5, 1989. It's our position that these falls, and particularly as indicated in the affidavit is the reputation of the parking lot, is of no probative value. And he can't lay foundation that it had anything to do whatever in the fall Mr. Erickson had on a specific night and specific day.

As to the remainder of it having to do with some form of impeachment value, the only thing I can say is I would believe that it would at this point and time, for me, constitute surprise. And the reason it does, your Honor, is, I took the depositions of these women and in good faith, relied upon what they were telling me in preparation of this case and in evaluating the case and in doing what I had to do. Then, prior to trial, I brought a motion in limine to determine whether indeed they were going to be able to testify.

The affidavit now states that their testimony has changed from their deposition testimony. Because they have had an opportunity now, within the last few days, to review with plaintiff's counsel the facts of the case. I haven't had--I won't have an opportunity until they get on the stand to understand or know the reasons for their decision to change their testimony.

And in most circumstances, an affidavit offered to rebut one's prior deposition testimony is subject to a motion to strike anyway. And I can't adequately prepare by hearing, even at the beginning of the trial their names that he was still planning to call them and an explanation today that they have now changed their deposition testimony, to adequately prepare to cross-examine them and do what I need to do to defend my clients.

So, I would strictly resist them testifying at this point in the trial. I can't fairly and dutifully as a lawyer agree to it without taking a strong resistance, based on my inability to prepare for some change that I am not aware of.

I went through the process of taking depositions and trying to ascertain what the facts were.

(R. 446 at pp. 51-53).

Wasatch was greatly prejudiced by the admission of the surprise testimony. Because Wasatch was faced with the changed testimony at the last minute, it was not prepared to cross-examine these witnesses and to arrange for rebuttal testimony. Wasatch was precluded from learning the reasons or the inducement for the witnesses' change in their testimony without doing so in front of the jury. It was precluded from knowing what their trial testimony would actually be. Wasatch did not know what questions to ask of these witnesses, because it did not know how the questions would be answered by the witnesses. Thus, Wasatch was required, essentially, to do a discovery deposition in front of the jury. Finally, Wasatch had no opportunity to seek other witnesses who could verify or legitimize the trial testimony of Christensen, Helms and Mark. Prior to trial, Wasatch had not prepared to call any such rebuttal witnesses. Certainly, it would have been a strategic mistake for Wasatch to call witnesses who would discuss the condition of the parking lot and testify regarding the lack of falls on the parking lot. To do so would have been to open the door for the testimony which Wasatch had expressly tried to exclude through its Motion for an Order in Limine.

The admission of the surprise testimony had a material bearing on the case. This testimony brought into doubt the testimony of Wasatch's witnesses Burton Miller and Art Kersey, who had testified that the maintenance personnel of Wasatch Manor

had taken reasonable precautions to make the premises safe for the tenants and that they had no notice of any prior falls occurring on the premises. The testimony of Helms, Christensen and Mark indicated to the jury that the Wasatch's premises may not have been safe and that at least Mr. Kersey had notice of prior falls on the premises. Thus, the surprise testimony impeached the only witnesses called by Wasatch, and Wasatch had no opportunity to try and produce other witnesses to rebut the testimony of Helms, Christensen and Mark.

The jury's decision was undoubtedly influenced by the surprise testimony, especially in light of the fact that in his closing statement Erickson's counsel emphasized that Wasatch had not introduced any testimony of disinterested witnesses.

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 salted. 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.

(R. 446 at p. 154).

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 Wasatch. The jurors interviewed could not understand why Wasatch had not called other disinterested tenants of Wasatch Manor to rebut the testimony of Helms, Christensen and Mark.

Thus, there is certainly more than a reasonable likelihood that Wasatch would have obtained a different result if it had had an opportunity to prepare its defense with respect to the testimony regarding the alleged prior and subsequent falls.

## POINT II

### THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GIVING JURY INSTRUCTION NO. 20.

In determining whether a trial court committed reversible error in giving a particular jury instruction, the Court of Appeals must determine whether in absence of the alleged error a more favorable result would have been obtained by Wasatch. Matter of Estate of Kesler, 702 P.2d 86, 96 (Utah 1985); Harris v. Utah Transit Authority, 671 P.2d 217, 22 (Utah 1983); Rowley v. Graven Brothers & Company, 26 Utah 2d 448, 491 P.2d 1209, 1211 (1971). It is the position of Wasatch that Jury Instruction No. 20 was an incorrect statement of the law, it incorrectly instructed the jury as to the standard of care required of a landlord and misled the jury into applying a strict liability type of standard to Wasatch. Were it not for such improper application of the landlord/tenant law, a reasonable

jury would likely find that Wasatch had not met its standard of care.

It is well established in Utah that the duty owed by a landlord to his tenants and their guests is the duty to exercise ordinary care to maintain the common areas in a reasonably safe condition. 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). However, a landlord is not an insurer of the safety of his tenants, and merely because an injury results from a slip and fall upon ice does not automatically create liabilities. Gregory, 745 P.2d at 91.

At trial, against the objections of Wasatch's counsel, 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.

(Emphasis added, R. 223-256, Appendix C.) The first sentence of the above quoted paragraph in Instruction No. 20 correctly states the standard of care to be applied to a landlord. However, the second sentence of the instruction imposes a

higher duty of care on the landlord, akin to strict liability. It imposes an additional "further" duty on the landlord beyond the duty of ordinary care, and that is a duty to observe dangerous conditions and to take reasonable steps to remedy or remove the dangerous condition.

It is clear, in light of Gregory v. Fourthwest and Schofield v. Kinzell that no such extra duty may be imposed upon a landlord, because a landlord is not a guarantor of the safety of his tenants.

The mere accumulation of snow or 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.

Schofield, 511 P.2d at 151. Therefore, 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. Gregory, 745 P. 2d at 91, citing Martin v. Safeway Stores, Inc., 565 P.2d 1139, 1140-41 (Utah 1977); Schofield, 511 P.2d at 161.

In the case of Martin v. Safeway Stores, Inc., supra, the Utah Supreme Court upheld the trial court's directed verdict for the defendant. In that case, the plaintiff fell on a sidewalk leading from the parking lot of a grocery store to the main entrance of the store. The evidence, taken in the light



most favorable to the plaintiff, indicated that she fell at a place in the sidewalk where there was a slight flaking of the concrete, and where ice had accumulated. 565 P.2d at 1140. The court found the plaintiff had failed to produce any evidence to show that the defendant knew of the dangerous condition and had time to correct it. The court held that it was not the duty of persons in control of buildings to mop the sidewalk dry or to take other steps necessary to prevent accumulation of moisture on the sidewalk that might freeze and create an icy condition. The landowner, said the court, has no duty to seek out and mop dry all depressions in the walkways and approaches to its buildings. Id. at 1141.

Therefore, Jury Instruction No. 20 was improperly given to the jury. This instruction misled the jury into applying a higher standard of care to Wasatch rather than ordinary care under the circumstances. Absent this instruction, a reasonable jury would likely have found that Wasatch met its standard of care. The evidence presented at trial indicates that Wasatch Manor fully performed its duty to Erickson. Wasatch Manor had contracted with an independent contractor for the removal of snow from the parking lot. (R. 446 at p. 26) In addition, Wasatch Manor employees salted and/or de-iced the parking lot and walkways three times a day. (Id. at pp. 37-40) If Wasatch employees found ice covering the entire parking lot, they used a fertilizer spreader to spread the salt or de-icer over the

entire lot. However, if ice was found in spots, Wasatch's employees used a bucket and spread salt or de-icer by hand. (Id. at pp. 38-40). This procedure was a daily routine. (Id. at pp. 34-35, 37-40). This procedure was followed on February 9, 1985, the day that Erickson claims to have fallen. (Id. at pp. 34-37).

These snow and ice removal procedures were more than reasonable under the circumstances. Instruction No. 20 imposed upon Wasatch an additional obligation that was expressly rejected by the Utah Supreme Court in Martin v. Safeway Stores.

It is not the duty of persons in control of such buildings to mop the sidewalk dry or to take other steps necessary to prevent the accumulation of moisture on the sidewalk that might freeze and create an icy condition . . . and it cannot be the duty of persons in control of such buildings to seek out and mop dry all such depressions in the walkways and approaches to such building.

Id. The court improperly instructed the jury as to a landlord's standard of care to his tenants. This instruction was erroneous and was prejudicial to Wasatch. (See Cornwell v. Barton, 18 Utah 2d 325, 442 P.2d 663 (1967) (case remanded for a new trial because trial court committed prejudicial error in giving a jury instruction which misstated the standard of care required of

a landlord.)

### POINT III

#### THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL.

The proper standard of review on appeal for a denial of a motion for new trial is abuse of discretion. Moon Lake Electric v. Ultra Systems Western Constructors, Inc., 767 P.2d 125, 128 (Utah App. 1988); Chournos v. D'Agnillo, 642 P.2d 710, 713 (Utah 1982). The trial court's ruling regarding a motion for a new trial can be overturned 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, 201 (Utah 1981); Hyland v. St. Mark's Hospital, 19 Utah 2d 134, 427 P.2d 736, 738 (1967). In the present case, the trial court acted arbitrarily and abused its discretion in denying Wasatch's Motion for a new trial.

Wasatch's Motion was based on the grounds that it was entitled to a new trial due (1) to the admission of surprise testimony regarding prior and subsequent falls on Wasatch's premises, and (2) because the trial court improperly gave Jury Instruction No. 20. Rule 59(a)(3) of the Utah Rules of Civil Procedure provides that a new trial may be granted to any party on the basis of surprise which ordinary prudence could not have guarded against. See also Anderson v. Bradley, 590 P.2d 339, 341 (Utah 1979). The trial court has broad discretion in

granting or denying a motion for a new trial. Donohue v. Intermountain Health Care, 748 P.2d 1067, 1068 (Utah 1987).

The factors required for a new trial based on surprise are:

(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 a new trial would probably be different.

In re Adoption of S.E., 755 P.2d 27, 31 (Mont. 1988).

In Wasatch's Memorandum in Support of its Motion for a New Trial, Wasatch argued that all the factors required for the granting of a new trial on the grounds of surprise were met, as more particularly briefed in Point I.B. of this Argument (R. 373-384). In addition, Wasatch argued in its Memorandum to the court that Jury Instruction No. 20 was improperly given on the grounds more particularly briefed in Point II of this Argument. (Id.). However, the trial court denied Wasatch's Motion on both grounds. The court's Minute Entry stated only that the court had reviewed the file, read the pleadings and decided to deny the motion. (R. 419). Under the circumstances of this case, and as briefed in detail in the above two arguments, Wasatch was entitled to a new trial. The court's failure to grant Wasatch's Motion, particularly without

providing reasons therefore, was arbitrary and an abuse of discretion.

Erickson will undoubtedly argue, as he did in his Memorandum in Response to Wasatch's Motion for a New Trial, that Wasatch does not have a right to a new trial because it failed to object to the admission of evidence at the time the evidence was offered at trial. However, as Wasatch's Reply Memorandum argued to the trial court, counsel for Wasatch had sufficiently objected to the admission of the testimony of Ms. Helms, Ms. Christensen and Ms. Mark by: (1) filing and arguing a Motion in Limine regarding the admissibility of such testimony before the same judge as the one who presided over the trial, and (2) by objecting and stating its position as to the admissibility of such testimony on the last day of trial during the hearing held on Erickson's Motion to Reconsider. (R. 60-71, 409-414, 444, 446 at pp. 51-56). In State v. Johnson, 748 P.2d 1069, 1071-1072 (Utah 1987), the Supreme Court of Utah held that where a party has prior to trial moved to exclude evidence, he does not need to object at trial or renew his pretrial motion in order to preserve the issue at trial, if the trial judge is also the judge who ruled on the pretrial motion and the record indicates that an evidentiary hearing was held.

### CONCLUSION

Appellant Wasatch seeks reversal of the Judgment entered against it and Judgment in its favor as a matter of law, or that failing, a new trial. The trial court should not have admitted testimony which was previously excluded by the court's Order in Limine. Wasatch had a right to rely upon the guidelines set forth in that Order and to prepare its case for trial accordingly. The admission of this testimony at the last minute greatly prejudiced Wasatch's defense.

Secondly, Instruction Number No. 20 incorrectly stated the standard of care required of a landlord, and essentially created a strict liability type of standard that the jury applied to Wasatch. Such an erroneous instruction is not supported by Utah law.

Finally, the trial court erred in denying Wasatch's Motion for a New Trial. Wasatch was entitled to a new trial due to the improper admission of the surprise testimony and due to the improper jury instruction. Therefore, the trial court's Judgment should be reversed. In the alternative, this Court should remand this case for a new trial.

Respectfully submitted this 19th day of April, 1990.

RICHARDS, BRANDT, MILLER  
& NELSON

Masuda Medcalf  
Nelson L. Hayes  
Masuda A. Medcalf  
Attorneys for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that four (4) true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid on this 19th day of April, 1990, to the following counsel of record:

Eric Bjorklund  
Attorney for Plaintiff  
3808 South West Temple, Suite 1D  
Salt Lake City, Uta 84111

Masuda medcalf

ERICKS2/MAM

## ADDENDUM

APPENDIX A...Bench Ruling on Motions in Limine

APPENDIX B...Affidavit of Jody Christensen

APPENDIX C...Jury Instruction No 20

APPENDIX D...Judgment

APPENDIX E...Minute Entry



## APPENDIX "A"

ORIGINAL

FILED

COURT

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

*Mark Fausch*  
GUY ERYCKSON,

:

Plaintiff,

: Civil No. C86-845

v.

: Transcript of:

WASATCH MANOR, INC., et al.,

: BENCH RULING ON  
MOTIONS IN LIMINE

Defendants.

:

\* \* \*

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  
136 East So. Temple, #1200  
Salt Lake City, Utah 84111

For the Defendant:

NELSON L. HAYES  
Attorney at Law  
50 South Main Street, #700  
Salt Lake City, Utah 84101

REPORTER:

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

CLERK

5781810

1 WEDNESDAY, APRIL 5, 1989; 3:00 P.M.

2 BENCH RULING ON MOTIONS IN LIMINE

3  
4 THE COURT: Well, let me rule then.

5 MR. BJORKLUND: Your Honor, could I have a  
6 brief other word.

7 THE COURT: No. It's his motion. And I think  
8 you have covered your two motions, and he has the last  
9 say. Otherwise I'll have to let him say again.

10 I do grant the motion to amend the  
11 Complaint.

12 As far as the plaintiff's motion for the  
13 report of the expert, as the Court looks at the rule of  
14 which has been brought up, when the defense does obtain  
15 an expert in a field and obtains a report from him that  
16 is going to be used for the case trial, that that  
17 report, itself, when he has used that for his trial  
18 preparation is not discoverable, although the witness  
19 may be deposed. I know in a lot of cases that it is  
20 given, and it saves a lot of expense and I guess time as  
21 far as counsel is concerned.

22 I would indicate this: That if it's sure  
23 that he is going to be used in his case in principle and  
24 the plaintiff is definitely bringing in an engineer to  
25 set forth his position, then I am going to allow or I am

1 going to be ordering that it be produced. And I really  
2 feel I am extending it there, except because of the fact  
3 that you would just end up taking a deposition. But if  
4 it's going to be a rebuttal situation, I am not going to  
5 order it be produced. I would order that you be allowed  
6 to depose him if you wish to do so. I don't think there  
7 is any question on that.

8 As far as the last issue is concerned, I  
9 have not made a study of the slip and fall cases as far  
10 as these prior accidents are concerned. I know I have  
11 had some experience as far as an automobile accident  
12 where there is a particular location in the highway of  
13 where a number of accidents have taken place. And I  
14 have not reviewed that either prior to taking the bench  
15 on this, but I do remember some of the things they say.  
16 And one of them is notice.

17 I do know that whether notice was given to  
18 the city, the highway department, and so forth as far as  
19 a dangerous condition is concerned, another thing they  
20 look at is the time element, whether it was one month,  
21 six months, five years, ten years and so forth. And of  
22 course the main thing is whether the condition was the  
23 same, the road signs were the same, the designation of  
24 the road, the line down the center of the road, and so  
25 forth, and things of this sort.

1 Well, this gets very difficult when you start  
2 talking about falls of 13, 15, 18 years ago. And I am  
3 going to rule this way: That if the plaintiff has  
4 evidence to show that there is, and he claims there is a  
5 dangerous condition which exists in that parking lot,  
6 engineering, construction where it was negligently  
7 constructed, where they made something that was  
8 negligent or defective and that people have fallen as a  
9 result of that, then I would allow prior falls.

10 If these prior falls are not in that same  
11 location as far as the depressed area of which he  
12 alleges is defective, such as going down the ramp or  
13 such as the other part of it, I just can't allow it.  
14 They are just not relevant as far as the situation is  
15 concerned. They may have fallen, and even some of them  
16 may have been five or ten years ago.

17 But if he can tie it in to a defective  
18 condition in construction, something of a negligent  
19 nature, then I will allow it within the same area. And  
20 it sounds like to me there is only one that does this,  
21 and that's the one on the west side of where somebody  
22 walked out in back of their car and fell.

23 And I won't even allow that unless it can be  
24 shown that there was a defect as far as the construction  
25 which caused ice to form and people have been falling

1 there. Of course that's even weak because still they  
2 didn't give notice to the principle, Wasatch Manor.

3 If they had been given notice and didn't go  
4 out and do anything to correct it, that's the bad thing,  
5 And that's where it really becomes material. So what I  
6 am saying is if they didn't give notice.

7 I know Mr. Hayes what he is going to do if  
8 you do put them on and establishes that there was no  
9 notice. So I hope you understand my ruling. I am  
10 saying that I will not allow the prior falls unless it  
11 can be established that there was a defective condition  
12 there and they were falling as a result of that  
13 defective engineered condition.

14 MR. HAYES: Thank you, your Honor.

15 MR. BJORKLUND: Could I ask for just a point  
16 of clarification, your Honor, not a point intended to be  
17 argued.

18 THE COURT: Sure.

19 MR. BJORKLUND: We do not intend at this point  
20 in time to introduce evidence showing that it was  
21 defectively constructed, but that the maintenance of the  
22 parking lot in terms of piling the snow around the  
23 perimeter and the subsequent salting could -- created an  
24 on-going dangerous condition. Now, I understand the  
25 Court's ruling is a dangerous condition regarding the

1 construction. We are saying, okay, it's a parking lot  
2 that's constructed the way it is. Their negligence was  
3 piling the snow the way they did all the way through the  
4 winter and failing to salt. Does that fall within the  
5 same kind of dangerous condition?

6 THE COURT: No. I could not allow that of  
7 where you talk of a fall of 15 -- 10, 15, 18 years ago.  
8 There is no way that it can be tied in that that was  
9 plowed the same way and the same type of conditions  
10 existed. And I would not allow it. Does that clear it  
11 up?

12 MR. HAYES: Thank you, your Honor. I'll  
13 prepare the order.

14 THE COURT: You prepare the order.

15 (This concludes the bench ruling.)

16 \* \* \*

17

18

19

20

21

22

23

24

25

## APPENDIX "B"



Eric W. Bjorklund #0345  
Attorney at Law  
3808 South West Temple, Suite 1D  
Salt Lake City, Utah 84115  
(801) 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,	:	AFFIDAVIT OF
	:	JODY CHRISTENSEN
VS.	:	
	:	
WASATCH MANOR, INC.	:	Civil No. C86-845
	:	Judge Wilkinson
Defendant.	:	

---

Jody Christensen, having first been sworn on oath deposes and hereby states as follows:

1. If called upon to testify in the above captioned matter her testimony would be as follows:

2. She was an employee at the Salt Lake Assessor's office during the 1984-1985 winter (Nov 1984 - March 1985) and parked at the Wasatch Manor parking lot during said time.

3. That the location of her parking slot is marked by the words "Parking Place" on Exhibit A attached hereto which is a drawing of the Wasatch Manor apartment's upper level parking lot.

4. That she parked in said parking lot at least three times a week.

5. That she traveled a course indicated by the dotted line on the attached Exhibit A when she would arrive in the morning between 7:30 a.m. and 8:00 a.m.

and when she would leave work at night between 5:00 p.m. and 5:45 p.m..

6. That during the winter of 1984-85 she observed the conditions along the dotted line and throughout the parking lot as it relates to ice.

7. That during the winter of 1984-85 she observed that the parking lot and the route along the dotted line were usually covered with ice and that she considered the parking lot to be dangerous and negligently maintained.

8. That during the winter of 1984-85 she observed the conditions along the dotted line and throughout the parking lot as it relates to the existence of salting.

9. That during the winter of 1984-85 she observed that the parking lot was rarely, if ever, salted.

10. That during the last two weeks of December, 1984 or during the month of January, 1985 she fell at the location marked "Fall" on the attached Exhibit A.

11. That she fell on black ice which was the same in appearance as that ice that often observed along the dotted line and that she fell notwithstanding her attempts to be reasonably cautious.

12. That she was aware of the Wasatch Manor's parking lot's reputation for ice or danger during the winter of 1984-85 among the employees of the County Assessor's office.

13. That the Wasatch Manor parking lot had a reputation as a dangerous and icy place.

13. That within days after the affiant's fall she talked with the Wasatch Manor manager and indicated that the parking lot was unreasonably icy, that she had fallen and that she would like to have permission to go through the foyer instead of down the ramps when entering and leaving the parking lot.

14. That she did not recal many of the facts indicated above at her deposition in this matter. She did not understand what the deposition was about prior to giving it and had not had any opportunity to consult her records or to talk with others to attempt to refresh her recollection.

Dated this 16<sup>th</sup> day of May, 1989.

Jody Christensen  
JODY CHRISTENSEN

On this 16 day of May, 1989, appeared before me JODY CHRISTENSEN and affirmed the foregoing.

Robert J. Helms  
Notary

Commission Exists: thru April 14, 1993

Notary Address: S.L.C., Ut.

1" = 20'

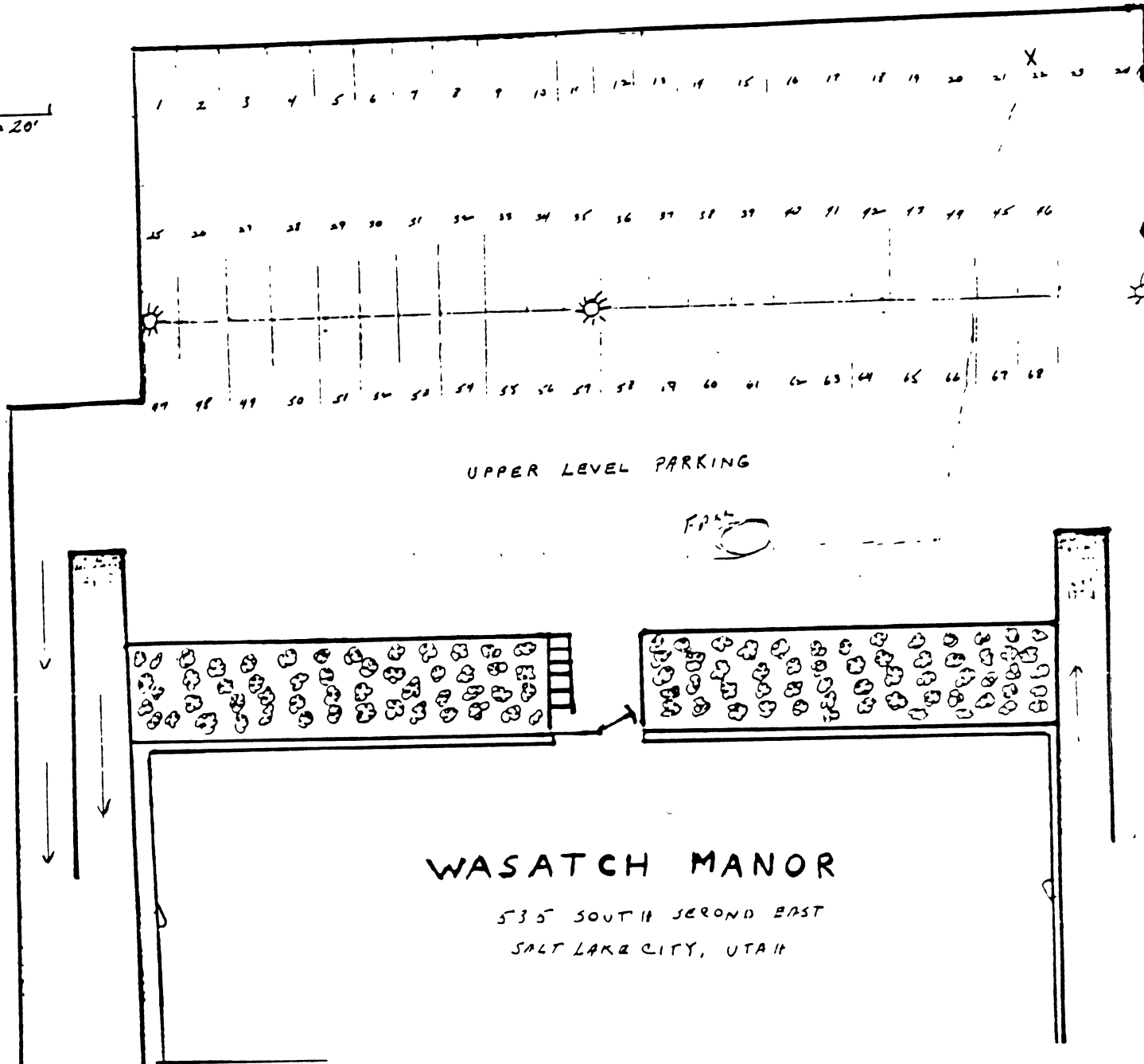


Exhibit A

## APPENDIX "C"

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 "D"

JUN 13 1989

Eric W. Bjorklund #0345  
Attorney at Law  
3808 South West Temple, Suite 1D  
Salt Lake City, Utah 84111  
(801) 262-9904

By A. Blake SALT LAKE COUNTY  
Deputy Clerk

Attorney for Plaintiff

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

---

GUY ERICKSON,	:	
	:	JUDGMENT
Plaintiff,	:	2148654
VS.	:	6-14-89-8.25am.
WASATCH MANOR, INC.	:	Civil No. C86-845
	:	Judge Wilkinson
Defendant.	:	

---

The trial of this matter was held on May 16, 1989 through and including May 19, 1989 before an eight member jury, the Honorable Homer Wilkinson, presiding. The Plaintiff, Guy Erickson was present and represented by his counsel, Eric W. Bjorklund. The director of the Defendant, Wasatch Manor, Burton Miller, was present, together with the Defendant's counsel, Nelson Hayes and Masuda A. Medcalf.

The jury, after due deliberation, entered a judgment in favor of the Plaintiff and against the Defendant for negligence and awarded damages to the Plaintiff as follows: medical expenses of \$9,820.15, lost income of \$45,000.00 and general damages of \$30,000.00, for a total award of \$84,820.15

THEREFORE, JUDGMENT IS GRANTED, in favor of the plaintiff as follows:

1. Payment of special damages for the Plaintiff's medical expenses of \$9,820.15 and for the Plaintiff's lost income of \$45,000.00.
2. Payment of general damages of \$30,000.00.



3. Payment of the Plaintiff's court costs in the amount of \$ 418.20.

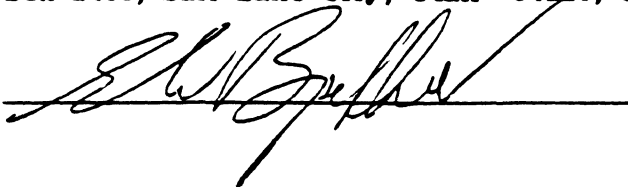
4. Payment of interest at the statutory rate from the date of entry of the judgment.

DATED this 13 day of ~~May~~ <sup>June</sup>, 1989.



CERTIFICATE OF HAND DELIVERY

I hereby certify that a copy of the foregoing Judgment was hand delivered, to Nelson L Hayes, CAB Towers, Suite 700, 50 South Main Street, P.O. Box 2465, Salt Lake City, Utah 84110, this 23rd day May, 1989.



## APPENDIX 'E'

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

100-10333  
4-11-89

---

ERICKSON, GUY	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 860900845 CV
	:	DATE 08/07/89
VS	:	HONORABLE HOMER F WILKINSON
	:	COURT REPORTER
WASATCH MANOR, INC	:	COURT CLERK DAG
DEFENDANT	:	

---

TYPE OF HEARING:  
PRESENT:

P. ATTY. BJORKLUND, ERIC W.  
D. ATTY. HAYES, NELSON L.

---

4-501 RULING

PURSUANT TO DEFENDANT'S REQUEST FOR RULING ON DEFENDANT'S  
MOTION FOR NEW TRIAL DATED JULY 27, 1989, THE COURT HAVING RE-  
VIEWED THE FILE AND READ THE PLEADINGS RULES AS FOLLOWS:

DEFENDANT'S MOTION FOR A NEW TRIAL IS DENIED.  
CC NELSON HAYES, MASUDA MEDCALF, ERIC BJORKLUND