

1989

Guy Erickson v. Wasatch Manor : Reply Brief

Utah Court of Appeals

Follow this and additional works at: 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 at Law; Attorney for Plaintiff-Respondent.

Recommended Citation

Reply Brief, *Erickson v. Wasatch Manor*, No. 890737 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/2395

This Reply Brief 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. Please contact the Repository Manager at 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.)	

REPLY BRIEF

Appeal from Judgment of the 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

JUL 6 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.)	

REPLY BRIEF

Appeal from Judgment of the 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

	<u>Page</u>
TABLE OF AUTHORITIES	iii
DETERMINATIVE RULES	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
POINT I: THE APPELLEE'S BRIEF SHOULD BE STRICKEN, BECAUSE IT CONTAINS IMPROPER REFERENCES TO IMMATERIAL, IRRELEVANT, BURDENSOME AND PREJUDICIAL MATTERS WHICH ARE NOT PART OF THE TRIAL RECORD	3
POINT II: THE ORDER IN LIMINE WAS NOT BASED ON MISSTATEMENTS OF FACT	6
POINT III: WASATCH WAS SUBJECTIVELY AND REASONABLY SURPRISED AT TRIAL	9
POINT IV: ERICKSON'S CONDUCT RESULTED IN TRIAL BY AMBUSH	13
POINT V: THE TESTIMONY OF THE COUNTY EMPLOYEES WAS NOT REBUTTAL TESTIMONY	15
POINT VI: THE TESTIMONY OF THE COUNTY EMPLOYEES AFFECTED THE OUTCOME OF THE TRIAL	18
POINT VII: WASATCH SUFFICIENTLY OBJECTED TO THE ADMISSION OF THE SURPRISE TESTIMONY AND PROPERLY PRESERVED THE RIGHT TO APPEAL ITS ADMISSION INTO EVIDENCE	19
POINT VIII: THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WASATCH'S MOTION FOR A NEW TRIAL	21
CONCLUSION	23
CERTIFICATE OF MAILING	25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Cornwell v. Barton,</u> 18 Utah 2d 325, 442 P.2d 663 (1967)	22
<u>Ellis v. Gilbert,</u> 19 Utah 2d 189, 429 P.2d 39 (1967)	9
<u>Gregory v. Fourthwest Investments Ltd.,</u> 754 P.2d 89, 91 (Utah App. 1988)	22
<u>Hyland v. St. Mark's Hospital,</u> 19 Utah 2d 134, 427 P.2d 736, 738 (1967)	21
<u>Lembach v. Cox,</u> 639 P.2d 197, 201 (Utah 1981)	21
<u>Martin v Safeway Stores Inc.,</u> 565 P.2d 1139 (Utah 1977)	23
<u>Maughan v. Maughan,</u> 770 P.2d 156 (Utah App. 1989)	5, 6
<u>O'Brien v. Rush,</u> 744 P.2d 306, 310 (Utah App. 1987)	23
<u>Porco v. Porco,</u> 752 P.2d 365, 369 (Utah App. 1988)	24
<u>Schofield v. Kinzell,</u> 29 Utah 2d 427 511 P.2d 149, 151 (1973)	22
<u>Soliz v. Ammerman,</u> 16 Utah 2d 11, 395 P.2d 25, 26 (1064)	16
<u>State v. Holyoak,</u> 743 P.2d 791 (Utah App. 1987)	20
<u>State v. Lesley,</u> 672 P.2d 79 (Utah 1983)	20, 21
<u>Wells v. C.M. Mays Lumber Co., Inc.,</u> 754 P.2d 888, 889 (Okla. App. 1987)	15, 16
<u>Wirth v. Commercial Resources, Inc.,</u> 96 N.M. 340, 630 P.2d 292, 298 (1981)	15, 17

DETERMINATIVE RULES

Utah Rules of Appellate Procedure:

-- Rule 24(a)(7)

A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record

-- Rule 24(e)

References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

-- Rule 33(b)

Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

SUMMARY OF ARGUMENT

Wasatch moves to strike the entire Appellee's Brief. Appellee's Brief contains references to burdensome, irrelevant, immaterial and prejudicial matters which were not previously made a part of the trial record. Under Rule 24(k) of the Utah Rules of Appellate Practice, briefs which are not "free from burdensome, irrelevant, immaterial or scandalous matters" may be "stricken or disregarded." The insertion of Appendices A, D and I into Appellee's Brief violate

Rule 24(k). The Court should strike the Appellee's Brief in its entirety.

Erickson has implied in his Brief that Wasatch has acted improperly and misstated facts to the trial court and the Court of Appeals, and that the Order in Limine was based on misstatements of fact. First, this issue was not raised at any time during the proceedings before the Third District Court, and cannot now be decided by the Court of Appeals as a matter of first instance. Even if the Court of Appeals were to decide this issue, Wasatch's position is that Wasatch acted in good faith throughout the entire proceedings below and also in bringing this appeal. It is unclear how Wasatch could possibly mislead the trial court, or for that matter the Court of Appeals, when it has supported the statements made in the memoranda prepared below and in the Brief filed on appeal with specific references to the depositions of the county employees, and other relevant portions of the trial record. If facts had been misstated to the trial court during Wasatch's Motion in Limine, it was the obligation of counsel for Erickson to inform the court of such misstatements at that time, or at least at some point during the trial proceedings. Furthermore, Judge Wilkinson's Ruling on Erickson's Motion to Reconsider the Order in Limine indicates that he was changing the prior Order due to the change of testimony of the county employees and not because of any alleged misstatements.

Wasatch was legitimately surprised by the admission of the county employees' testimony. Wasatch had moved for an Order in Limine excluding their testimony. Having obtained

that Order, Wasatch had a right and obligation to rely upon the Order. The admission of the testimony of these witnesses constituted surprise to Wasatch for several reasons: (1) These witnesses had changed their prior deposition testimony which had revealed that they either could not recall the dates of their prior and subsequent falls or that their falls were remote in time to that of Erickson's fall; (2) they changed their prior deposition testimony that they did not report their falls to anyone at Wasatch Manor; (3) this testimony was admitted despite the fact that the standards set by the prior Order in Limine for the admissibility of this testimony had not been met by Erickson; and (4) Wasatch did not learn that the witnesses had changed their testimony until the very last day of trial, just three to four hours before the case was submitted to the jury for decision.

Wasatch's appeal is based upon two independent and alternative grounds; first that the trial court erred in admitting surprise testimony and second that the court further erred in giving Jury Instruction No. 20. This appeal is well grounded in fact and warranted by existing law. Thus, the appeal is not frivolous and does not warrant a grant of attorney's fees to Erickson.

ARGUMENT

POINT I: THE APPELLEE'S BRIEF SHOULD BE STRICKEN, BECAUSE IT IT CONTAINS IMPROPER REFERENCES TO IMMATERIAL, IRRELEVANT, BURDENSOME AND PREJUDICIAL MATTERS. WHICH ARE NOT PART OF THE TRIAL RECORD.

Wasatch moves to strike the Appellee's Brief in its entirety. In his extensive, yet largely irrelevant

Statement of Facts and Summary of Argument, Erickson has referred to and attached as Appendices two letters from Erickson's counsel to counsel for Wasatch. See Appellee's Brief at pp. 12, 21, Appendices A, and D. The Appellee's Brief also contains the Affidavit of plaintiff-respondent Guy Erickson. See Appellee's Brief at p. 49 and Appendix I. These documents were never made a part of the trial record. In fact, Appendices D and I were documents that were generated during the appeal process. Rule 24(a)(7) of the Utah Rules of Appellate Practice requires that all statements of fact and references to the proceedings below be supported by citations to the record. Furthermore, Rule 24(e) specifies that references shall be made to the pages of the original record, or to the pages of the reporter's transcript. The attachment of Appendices A, D and I to Appellee's Brief has rendered the Brief violative of Rules 24(a)(7) and Rule 24(e).

Furthermore, the insertion of the above documents into Appellee's Brief is a blatant attempt to affect the outcome of the appeal by improper facts and inferences that have nothing to do with the legal issues raised by Wasatch's appeal. Appendices A, D and I are mere attempts to confuse the issues and to insert improper and sensitive information into this appeal.

In particular, Wasatch objects to Appendix I of Appellee's Brief, which is the Affidavit of Guy Erickson. First, the Affidavit does not meet the procedural requirements of an Affidavit, because it contains argumentative statements rather than facts based upon the affiant's personal knowledge.

(See para. 3 of Appendix I to Appellee's Brief.) Secondly, the Affidavit attempts to generate sympathy, passion and prejudice against Wasatch by stating that Erickson was wrongfully evicted, and that he is destitute. Thus, the Affidavit attempts to incite the sympathy and passion of the Court. It is prejudicial to Wasatch, and taints the entire brief of Appellee.

The Utah Rules of Appellate Procedure provide that briefs which are not in compliance with the rules provided therein may be disregarded or stricken. Rule 24(k) provides:

All briefs under this Rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.
(Emphasis added.)

The Utah Court of Appeals has applied Rule 24(k) to strike an entire reply brief in Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989). In that case, Thomas Maughan had petitioned for modification of the divorce decree granting custody of his four-year-old son to the child's mother. The trial court denied the Petition for a Modification, and increased Thomas Maughan's monthly child support payments. On appeal, Thomas Maughan included in his reply brief documents supporting his argument that he had suffered a loss of income from farming activities. 770 P.2d at 161, fn. 1. The respondent, Mrs. Maughan, moved to strike the supporting documents, because they were not previously admitted into evidence. Id. The

Utah Court of Appeals granted the Motion to Strike, stating that "all briefs which are not free from irrelevant or immaterial matter may be 'disregarded or stricken.'" Id., citing R. Utah Ct. App. 24(k).

Erickson's Brief contains documents which are "irrelevant" and "immaterial" to the consideration of the issues on appeal, and contain "scandalous" matters which are inserted simply to generate sympathy on the part of the Court. Under the authority of Maughan v. Maughan, and Rule 24(k) Wasatch Manor respectfully requests the Court to disregard and strike the Appellee's Brief in its entirety, or at the least, those portions of the Appellee's Brief which refer to the above-mentioned documents that have not previously been made part of the trial record.

POINT II: THE ORDER IN LIMINE WAS NOT BASED ON MISSTATEMENTS OF FACT.

For the first time, on appeal, Erickson has argued that the Order in Limine excluding the testimony of the three county employees was based on misstatements of fact. First, it is Wasatch's position that this matter was not raised by Erickson at any time during the trial court proceedings, and cannot properly be determined on appeal. Erickson waived this issue by failing to raise it during the trial court proceedings. He cannot now raise this issue on appeal.

Even if the Court of Appeals was inclined to determine this issue, the Order in Limine was not based on any misstatements of fact. Erickson argues that at the time of Wasatch's Motion in Limine, counsel for Wasatch misrepresented

facts in two ways. First, it is argued that counsel did not inform the court of Wasatch's defense that Wasatch Manor employees cleared the snow and ice on the date in question as they always did pursuant to their habit and routine. Appellee's Brief at p. 20. Thus, Erickson argues that the trial court should have been informed of the "routine" defense. Wasatch's response to this rather vague argument is that Wasatch's counsel did not purposely or strategically leave out any information regarding the "routine" defense in its arguments to the court. Furthermore, if Erickson's counsel believed that counsel for Wasatch was omitting material facts that were relevant to the trial court's determination of the Motion in Limine, it was his duty to inform the court of any such facts. In fact, Erickson's counsel did point out the "routine" defense to Judge Wilkinson during oral argument on the Motion in Limine. Counsel for Erickson stated to the court:

"The defense has no one who knows anything about what they did on the day Mr. Erickson fell. All they can say is that they had a course of conduct, and that their course of conduct was to habitually go out at certain predetermined times every night and sand as a result of their knowledge of this dangerous condition . . . the defense is going to say we salt every time every night because we are aware of the freeze/thaw kind of cycle.

(R. 444 at 14). Thus, the trial court was informed of the "routine" defense, and nevertheless granted the Motion in Limine.

Erickson further argues that counsel for Wasatch made misrepresentations or misstatements to the effect that none of the three county employees fell in the "depressed area" of the

Wasatch Manor parking lot. Appellee's Brief at pp. 20-22. In the Memorandum in Support of Wasatch's Motion in Limine, Wasatch expressly cited to the relevant portions of the county employees' depositions, and summarized their testimony regarding their prior and subsequent falls. It is unclear how Wasatch could possibly mislead the court when all of its arguments and statements of fact were supported by references to the depositions of the witnesses.

If Erickson believed that Wasatch was misrepresenting the facts, it was incumbent upon his counsel to clarify the record and notify Judge Wilkinson about any misstatements that were allegedly made by Wasatch's counsel. However, Erickson's counsel did not object to Wasatch's characterization of the evidence as stated in Wasatch's Memorandum or as stated by Wasatch's counsel during oral argument on that Motion. Indeed, at the time of the oral argument on the Motion in Limine, Erickson's counsel agreed with Wasatch's statement of facts. Counsel for Erickson stated to the court:

"Last but not least, I think the Court has heard a fairly good rendition of the facts in this case between two counsel.

(R. 444 at 16).

Furthermore, Erickson failed to later challenge the Order in Limine on the grounds that it was improperly obtained. At no time during the trial court proceedings did Erickson's counsel indicate to the trial court that its Order in Limine was based on misstatements of fact. Erickson's references to ambiguous and innocuous testimony in his Brief on appeal cannot correct his failure to raise this issue prior to

this appeal. The trial court was informed by the two parties of all the then-existing facts, and accordingly entered its Ruling granting Wasatch's Motion and excluding the testimony of the county employees.

POINT III: WASATCH WAS SUBJECTIVELY AND REASONABLY
SURPRISED AT TRIAL.

The Utah Rules of Civil Procedure provide the ground rules and guidelines for preparation of a case for trial. These rules contain provisions for discovery, designation of witnesses, motions in limine, and pre-trial orders in order to prevent trial by ambush and generate fair trials for all parties. (Ellis v. Gilbert, 19 Utah 2d 189, 429 P.2d 39 (1967) (The purpose of discovery rules are to make discovery as simple and efficient as possible by eliminating any unnecessary technicalities, and to remove elements of surprise or trickery so that the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible.) Wasatch followed these rules of procedure in deposing the county employees, moving for an order in limine excluding such testimony, and thereafter relied upon that Order in preparing its defense. If Wasatch were not entitled to rely upon the Order, the Rules of Civil Procedure allowing for broad discovery, motions in limine, pre-trial orders, etc. would be superfluous and serve no purpose.

The scope of Judge Wilkinson's Order was clear. The testimony of the county employees would not be admitted unless it could be shown that there was a defect in the construction or design of the Wasatch Manor parking lot, and that the

witnesses' prior and subsequent falls occurred within the same time period and the same area of the parking lot as that of Erickson's fall. (R. 443, at 20-23.) After the trial court ruled on the Motion in Limine, counsel for Erickson requested a clarification of the Ruling. He specifically stated to the court that he did not intend to introduce evidence showing that the parking lot was defectively constructed, but he intended to show that the parking lot presented a dangerous condition because of Wasatch's negligence. (R. 444 at 23.) However, Judge Wilkinson ruled that Erickson could not compel the admission of the testimony by showing negligence on the part of Wasatch. That exchange was as follows:

Mr. Bjorklund: We do not intend at this point in time to introduce evidence showing that it [the parking lot] was defectively constructed, but that the maintenance of the parking lot in terms of piling the snow around the perimeter and the subsequent salting could--created an on-going dangerous condition. Now, I understand the Court's ruling is a dangerous condition regarding the construction. We are saying, okay, it's a parking lot that's constructed the way it is. Their negligence was piling the snow the way they did all the way through the winter and failing to salt. Does that fall within the same kind of dangerous condition?

The Court: No. I could not allow that of where you talk of a fall of 15, 10, 15, 18 years ago. There is no way that it can be tied in that that was plowed the same way and the same type of conditions existed. And I would not allow it. Does that clear it up? Id.

As a result of the Order in Limine, Wasatch did not expect the testimony of these witnesses to be admitted unless Erickson called an expert witness at trial to testify regarding

the defective design or structure of the parking lot. However, Erickson failed to proffer any testimony regarding the construction of the parking lot. Thus, Wasatch was surprised that the trial court would reconsider its Order and allow the testimony into evidence despite the fact that the standards in the prior Order had not been met. Wasatch was surprised because it did not know why the ladies had changed their testimony, what the new testimony of the witnesses would be, what questions to ask on cross-examination, and what answers would be generated by cross-examination of the ladies.

Wasatch was particularly surprised with the ladies' testimony regarding Wasatch's notice of the alleged dangerous condition of the parking lot. At the time of their depositions, the three county employees testified that they did not report their falls to Wasatch Manor employees, or could not recall whether they reported their falls to Wasatch Manor. (R. 438 at 7, 11; R. 439 at 11; R. 441 at 13, 16, 18.) During the oral argument on the Motion in Limine, counsel for Wasatch indicated to the court his understanding that due to the testimony of these witnesses, there was no claim being made that Wasatch had notice of the prior falls. Mr. Hayes stated:

Not one of them, not one of them claim ever giving notice to Wasatch Manor or its employees or its manager or anybody that they had fallen on the parking lot or that they considered it was dangerous to them. So that issue of notice, I think, is agreed. There is no claim in this matter that these people that he wants to call in the case claim some kind of notice to Wasatch Manor There is no claim in this case, and if there is, it's news to

me, that any of these people claim to have given notice to Wasatch Manor.

(R. 444 at 4-5, 8.)

Counsel for Erickson did not at that time, or at any time prior to the third day of the trial inform counsel for Wasatch that a claim for prior notice would be made against Wasatch. Erickson's Brief admits that Ms. Helms and Ms. Christensen testified in their depositions that they had not reported their falls to Wasatch Manor. (Appellee's Brief at p. 26.) Erickson's attempt to distinguish between "report" and "communicate" fails, because that is a distinction without a difference.

A further element of the surprise experienced by Wasatch is that Wasatch did not know until the very last day of trial that there was a change in testimony. On the other hand, evidence indicates, and Erickson admits, that counsel for Erickson knew as far back as three weeks prior to the trial that there might be a change in testimony. (R. 446 at 77; Appellee's Brief at p. 27.) Nevertheless, Erickson's counsel failed to inform the court or counsel for Wasatch of this new information. Erickson claims that his counsel had no obligation to be "clairvoyant," and to conduct discovery on behalf of Wasatch. Erickson fails to recognize his counsel's obligation as an officer of the court to supplement discovery and to prevent surprise, trickery, or trial by ambush.

Furthermore, Wasatch's counsel had properly conducted its discovery. There was no obligation, and certainly no reason, for Wasatch's counsel to continue questioning the

county employees where the Order in Limine specifically excluded their testimony. Certainly, if Erickson had designated someone who would testify regarding the alleged defective construction of the parking lot, it would have been necessary for Wasatch to depose and question that witness in order to prepare its defense. That particular situation was within the realm of the Order in Limine. However, in light of the Order, there was no logical reason to further question the county employees.

POINT IV: ERICKSON'S CONDUCT RESULTED IN TRIAL BY AMBUSH.

The surprise suffered by Wasatch occurred during the three weeks after Erickson's counsel learned of the change in testimony, yet failed to inform Wasatch of this development. The only reason that one can possibly imagine for this failure to inform Wasatch is that Erickson and/or his counsel were attempting to conduct this trial by ambush. Erickson argues in his Brief that Wasatch's alleged misstatements and omissions forced Erickson to wait until the last day of trial to request the court to reconsider the Order in Limine. Even if Erickson was correct in his argument that the Order was based on misstatements and omissions, Erickson still had a duty to supplement discovery and inform Wasatch of the new testimony, and Erickson had the opportunity to challenge the propriety of the Order during the three weeks prior to the trial after he learned of the change in testimony.

Rather, what seems to have happened is that counsel for Erickson knew that the ladies would change their testimony

even at the time of oral argument on the Motion in Limine. At that time, counsel for Erickson, Mr. Bjorklund, stated to the court:

The ladies, when they were called to these depositions had not talked to me at all. I had not prepared them. I had not asked them to go to their diaries. I had not asked them to talk to their friends or do anything else that they might otherwise do to refresh their recollection. They came into those depositions absolutely cold.

(R. 444 at 16.) Suspecting that Mr. Bjorklund was not revealing all that he knew, counsel for Wasatch, Mr. Hayes, demanded that any new information be divulged. Mr. Hayes stated:

Now, if I am getting the suspicion that he expects these women to testify differently than they did in their deposition, if that's the case, he should have come here armed today with affidavits to say so, to ask the Court to do it on the come, so to speak, and wait and see what happens. I don't think it is fair to the Court, and it's not fair to me to say that these women are going to testify differently and put it all in a period of '84/'85. Because they clearly did not do that in their depositions.

* * * * *

If counsel intends to put on or thinks that there is going to be evidence that's sufficient to lay a proper foundation, I think he is obligated at this point to make a record of it and tell us what that is going to be, and make some kind of proffer. Otherwise, I don't think he can argue that it's going to come and counsel should be ready when he hears it to try to cross-examine the witnesses with.

(R. 444 at 17-19.)

Counsel for Erickson did not at that time, or at any time prior to the trial, make the proffer demanded by Wasatch.

On the third day of trial, however, Erickson moved the court to reconsider the Order in Limine, claiming that the witnesses had changed their testimony, because they had, in fact, consulted their diaries, journals, calendars, and friends. Judge Wilkinson specifically relied on this changed testimony in reaching his decision to reverse his prior Order in Limine and admit the testimony of the three county employees. The judge expressly stated that he would have to admit the testimony, because the witnesses had brought their falls within the same relative time period as the fall of Erickson. (R. 446 at 55-56.) Had Erickson made his Motion three weeks prior to the trial when he obtained the new information, or at any time during the three weeks prior to trial, Judge Wilkinson could have changed his Order, but at least Wasatch would have had time to prepare for the new evidence.

POINT V: THE TESTIMONY OF THE COUNTY EMPLOYEES WAS NOT REBUTTAL TESTIMONY.

Rebuttal evidence is properly deemed to be evidence which is relevant only by virtue of evidence deduced by the adverse party. Its function is to explain or rebut the evidence introduced by the adverse party -- not mainly to support the parties' case-in-chief. Wells v. C.M. Mays Lumber Co., Inc., 754 P.2d 888, 889 (Okla. App. 1987). Rebuttal witnesses are those persons the necessity of whose testimony reasonably cannot be anticipated before the time of trial. Wirth v. Commercial Lease Resources, Inc., 96 N.M. 340, 630 P.2d 292, 298 (1981). The party who has the affirmative burden of proof is required to produce the first evidence on an issue,

and at that time should produce all his evidence in chief. Then, after his adversary has produced all his evidence, the former should be confined to rebuttal evidence, or evidence which tends to answer or explain his adversary's evidence. Soliz v. Ammerman, 16 Utah 2d 11, 395 P.2d 25, 26 (1964).

In Wells, the Oklahoma Court of Appeals held that the admission of a tape-recorded conversation between the appellants was not admissible as rebuttal evidence. In that case, Wells contracted with Richardson to act as a foreman and supervise the construction of Well's home. Wells later brought an action against Richardson and the company from whom Richardson obtained the building materials, alleging that the defendants were improperly overcharging Wells for the materials. 754 P.2d at 889. On the final day of trial, after the defense had rested, the trial court allowed Wells to reopen the case and present as rebuttal evidence a tape-recorded conversation between Wells and an employee of the defendant in which the employee admitted his guilt. Id. The tape-recording was not listed on the pre-trial order as an exhibit. Wells claimed that this was due to the fact that he was either unaware of it or had forgotten about it.

The Oklahoma Court of Appeals held that the tape-recording should have properly been offered as evidence as part of Well's case-in-chief, rather than as rebuttal evidence, because it obviously went to the major premise of Well's argument. Id. The court held that regardless of whether Wells knew of the tape-recording prior to the last day of trial, he should have known about it. The court further held:

Presentation of the tape on the last day of trial without Defendant's prior knowledge that such tape existed was not only violative of pre-trial discovery requirements, but it also constituted harmful surprise and was clearly unfairly prejudicial to Defendant's case.

754 P.2d at 890.

Similarly in Wirth, the New Mexico Court of Appeals held that the testimony of a witness not previously included in the pre-trial order did not constitute "rebuttal" testimony. Because the witness' testimony was intended to discredit the plaintiff's credibility, the New Mexico court held that the testimony was part of the planned case of the defense, and it was not rebuttal testimony which was reasonably unanticipated prior to the time of trial. 630 P.2d at 298.

In the present case, the testimony of the county employees was not true rebuttal testimony. First, the testimony of these ladies was offered by Erickson during his case-in-chief. At that time, Wasatch had not even begun to present its defense. Although Erickson called as adverse witnesses two employees of Wasatch, Wasatch's counsel did not question these witnesses until after the testimony of Ms. Helms, Ms. Christensen, and Ms. Mark was presented to the jury. Thus, the testimony of these ladies was not introduced to rebut the evidence presented by Wasatch. Furthermore, the testimony was reasonably anticipated prior to the time of trial. In fact, the ladies' testimony, like that of the witness in Wirth, was intended to discredit the credibility of Wasatch's witnesses. Thus, this testimony was a part of

Erickson's planned prosecution or case-in-chief, and was not rebuttal testimony.

It would be against policy considerations to allow this testimony to come in as rebuttal testimony when Wasatch has previously relied upon the court's Order that the testimony would not be admissible unless the guidelines established in the Order were met. To allow this to occur in this case would be in total contradiction to the purposes of the rules of civil procedure and an abuse of discretion.

The trial court did not indicate at any time during its Ruling on Erickson's Motion to Reconsider the Order in Limine state that he would admit the testimony on the grounds that it constituted rebuttal testimony. Rather, the court indicated that its decision to admit the testimony was based on the change in testimony. (R. 446 at 56.)

POINT VI: THE TESTIMONY OF THE COUNTY EMPLOYEES AFFECTED THE OUTCOME OF THE TRIAL.

Erickson has argued in his Brief that the testimony of the county employees did not change the outcome of the trial. At this point it is pure speculation how this testimony affected the jury at arriving at its verdict. However, had the court's original Order in Limine been enforced, there would have been no witnesses to testify regarding the alleged prior slip and fall accidents on the Wasatch Manor parking lot, and there would have been no one to testify that Wasatch Manor had prior notice that people had fallen on the parking lot and/or that the lot was dangerous. However, at trial, they not only testified that they reported their falls, but further

identified Art Kersey as the Wasatch Manor employee to whom they reported their falls. (R. 446 at 63-63, 89.)

POINT VII: WASATCH SUFFICIENTLY OBJECTED TO THE ADMISSION OF THE SURPRISE TESTIMONY AND PROPERLY PRESERVED THE RIGHT TO APPEAL ITS ADMISSION INTO EVIDENCE.

In April 1989, Judge Wilkinson heard oral argument on Wasatch's Motion in Limine, requesting that the testimony of three county employees be declared inadmissible. By Order dated May 10, 1989, the court granted this Motion. The case proceeded to trial, and the admissibility of the testimony was again raised, this time by Erickson's Motion for Reconsideration. Wasatch accordingly objected to the admission of this testimony in oral argument on the Motion to Reconsider. Thus, Wasatch objected at trial in accordance with Utah law, and preserved its right to challenge the Court's admission of the surprise testimony.

That Wasatch properly preserved its right to challenge the admission evidence is supported by Utah Rules of Evidence 103(a)(1). Utah Rules of Evidence 103(a)(1) states:

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

(1) 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 (Emphasis added.)

Wasatch's objection was timely in that it was raised as soon as Erickson moved for reconsideration of the Court's Order.

The rationale for the rule that objections regarding admission of evidence must be raised at trial was outlined in

State v. Lesley. 672 P.2d 79 (Utah 1983). The Utah Supreme Court stated:

Prior to trial, a judge is often in a disadvantaged position to decide on the admissibility of evidence. The trial judge is likely to have a more complete view of the grounds for excluding or admitting certain evidence. When defense counsel fails to call the trial judge's attention to any problems regarding the admissibility of evidence at the time it is offered, he or she deprives the trial court of an opportunity to avoid error in the trial which may have been created by an improper ruling on a pre-trial motion based on inadequate information. (Emphasis added.)

672 P.2d at 82. The court further stated:

The only requirement is that any objections to evidence be made known to the trial judge so that he or she can make an informed decision to admit or exclude it. (Emphasis added.)

Id. at 82 n. 1.

In the trial of this matter, Mr. Hayes, counsel for Wasatch, complied with the holdings of State v. Lesley and State v. Holyoak, 743 P.2d 791 (Utah App. 1987). Mr. Hayes made his objection to the testimony of the three county employees "known to the trial judge." Unlike the facts presented in State v. Lesley and State v. Holyoak, Wasatch does not simply rely on its pre-trial Motion in Limine in arguing that it properly objected to the admission of testimony. Rather, Wasatch points out that on the third day of trial, in oral argument on Erickson's Motion to reconsider, Mr. Hayes objected to the admission of such testimony based on surprise. Thus Mr. Hayes' objection was made at trial, and before the trial judge. Mr. Hayes' objection brought to

Judge Wilkinson's attention the problems associated with admitting such testimony into evidence. The trial court had the opportunity to avoid error. According to State v. Lesley, the purposes of Utah Rules of Evidence 103(a)(1) have been met.

POINT VIII: THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WASATCH'S MOTION FOR A NEW TRIAL.

Wasatch appealed on the grounds that the court erred in admitting surprise testimony, and in giving Jury Instruction No. 20. These are alternative and independent grounds for the appeal. However, their effect is cumulative in that they both resulted in prejudice to Wasatch. As more fully briefed in Point III of the Corrected Appellant's Brief, it is Wasatch's opinion that the trial court "transgressed any reasonable bounds of discretion" in denying Wasatch's Motion for a New Trial. See 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). The trial court abused its discretion in failing to order a new trial to Wasatch who was genuinely and severely surprised when the trial court, on the very last day of trial, reversed its own prior Order in Limine, thereby allowing into evidence crucial testimony against Wasatch for which Wasatch had no opportunity to prepare.

The trial court further abused its discretion by giving Jury Instruction No. 20 which misstated the standard of care that a landlord must exercise toward a tenant. As more fully briefed in Point II of the Corrected Appellant's Brief, Utah law does not impose upon the landlord any duty beyond that

of the exercise of ordinary care to maintain its premises in a reasonably safe condition for its 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). The law does not impose on the landlord a "further duty" to observe dangerous conditions known to him, or which reasonable diligence would reveal, and to take reasonable steps to remedy or remove those dangerous conditions. However, this "further duty" was improperly included in Jury Instruction No. 20.

Contrary to Erickson's accusations, Wasatch did not intend to mislead the Court of Appeals that Jury Instruction No. 20 merely contained objectional language. In fact, Wasatch's Brief cited what it considered to be the objectionable part of Jury Instruction No. 20, and attached the entire Jury Instruction as Appendix C to its Brief. (See also Corrected Appellant's Brief at p. 31.)

The Cornwell v. Barton, 18 Utah 2d 325, 422 P.2d 663 (1967) case relied upon by Erickson did in fact approve of an instruction such as the portions of Instruction No. 20 to which Wasatch objects. Although that case has not been overturned, the more recent cases on landlord tenant liability do not impose any "additional duties." It is Wasatch's position that these recent cases, such as Gregory v. Fourthwest Investments, and Schofield, established the proper standard of care to be applied to a landlord.

In the most recent case on the standard to be applied to a landlord, Gregory v. Fourthwest, the Utah Court of

Appeals cited Martin v Safeway Stores Inc., 565 P.2d 1139 (Utah 1977) with approval. As previously briefed, Martin v. Safeway Stores rejected an instruction like that of Instruction No. 20 in this case, and held that it is not the duty of persons in control of buildings to mop the sidewalks dry or to take other steps necessary to prevent the accumulation of moisture on the sidewalk, and they do not have a duty to seek out and mop dry all such depressions in the walkways. 565 P.2d at 1140-41.

Jury Instruction No. 20 was improperly given. The fact that the trial court instructed the jury as to the proper standard of care required of a landlord after it had given the incorrect standard of care does not cure the improper instruction, nor does it render the instruction proper and non-objectionable. It is likely that in its absence, a reasonable jury would find that Wasatch had met its standard of care under the circumstances.

CONCLUSION

This appeal was properly brought by Wasatch. The law does not support a grant of attorney's fees in this case. The standard in determining whether a party has brought a frivolous appeal is set out in Rule 33(b) of the Utah Rules of Appellate Procedure. That rule states that a frivolous appeal is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify or reverse the existing law. See also O'Brien v. Rush, 744 P.2d 306, 310 (Utah App. 1987). However, sanctions for frivolous appeals should only be applied in "egregious cases,

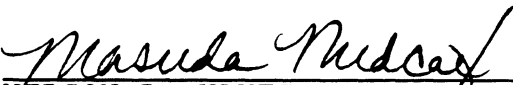
lest there be an improper chilling of the right to appeal erroneous lower court decisions." Porco v. Porco, 752 P.2d 365, 369 (Utah App. 1988).

Erickson's suggestion that the appeal is frivolous is nothing but ludicrous hype. As obviously shown in two briefs, the appeal is not frivolous. Wasatch not only has a legitimate right but obligation under the law to appeal the admission of surprise testimony, particularly where the surprise was due to the trial court's sudden reversal of its own Order upon which Wasatch relied. Furthermore, Wasatch's appeal regarding Jury Instruction No. 20 is supported by case law indicating that the instruction was not a proper statement of the law.

For the foregoing reasons Wasatch respectfully requests the Court to reverse the trial court's Judgment, or in the alternative, remand this case for a new trial.

Respectfully submitted this 5th day of July, 1990.

RICHARDS, BRANDT, MILLER
& NELSON


NELSON L. HAYES
MASUDA A. MEDCALF
Attorneys for Defendant-
Appellant Wasatch Manor, Inc.

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 5th day of July, 1990, to the following counsel of record:

Eric Bjorklund
3808 South West Temple, Suite 1D
Salt Lake City, Utah 84111

Kathy C. Park

ERICKS01/MAMW
k6724-591