2010

Patricia Niemela v. Imperial Manufacturing, Inc., an Alabama Corporation, d/b/a Imperial Mailbox Systems, and John Does I-V : Brief of Appellee

Utah Court of Appeals

Cory D. Memmott; Ray, Lego and Associates; Attorneys for Defendants.
Daniel F. Bertch; Kevin R. Robson; Bertch Robson; Attorneys for plaintiff.

IN THE UTAH COURT OF APPEALS

PATRICIA NIEMELA

Plaintiffs/Appellants,

vs.

IMPERIAL MANUFACTURING, INC., an Alabama Corporation, d/b/a IMPERIAL MAILBOX SYSTEMS, and JOHN DOES I-V,

Defendant/Appellee.

APPELLEE'S BRIEF

Appellate Case #20100682-CA

BRIEF OF APPELLEE IMPERIAL MANUFACTURING, INC.

Appeal from the Third Judicial District Court,
Tooele County, State of Utah
Judge Stephen Henriod

Daniel F. Bertch, #4728
Kevin R. Robson #6976
BERTCH ROBSON
1996 East 6400 South, Suite 100
Salt Lake City, Utah 84121
Attorneys for Appellants

Cory D. Memmott, #8346
RAY LEGO & ASSOCIATES
1100 East 6600 South, Suite 350
Salt Lake City, UT 84121
Attorneys for Appellee

IN THE UTAH COURT OF APPEALS

PATRICIA NIEMELA

Plaintiffs/Appellants,

vs.

IMPERIAL MANUFACTURING, INC., an Alabama Corporation, d/b/a IMPERIAL MAILBOX SYSTEMS, and JOHN DOES I-V,

Defendant/Appellee.

APPELLEE'S BRIEF

Appellate Case #20100682-CA

BRIEF OF APPELLEE IMPERIAL MANUFACTURING, INC.

Appeal from the Third Judicial District Court,
Tooele County, State of Utah
Judge Stephen Henriod

Daniel F. Bertch, #4728
Kevin R. Robson #6976
BERTCH ROBSON
1996 East 6400 South, Suite 100
Salt Lake City, Utah 84121
Attorneys for Appellants

Cory D. Memmott, #8346
RAY LEGO & ASSOCIATES
1100 East 6600 South, Suite 350
Salt Lake City, UT 84121
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Imperial is dissatisfied with the three issues presented by Niemela for review. Imperial states that the following issues more accurately reflect the issues before this Court:

Issue #1. Was the Trial Court correct in concluding that Niemela failed to set forth facts sufficient to create a genuine issue of material fact rebutting the presumption that the mailboxes at issue were free from defect or defective condition and that Imperial was entitled to a judgment as a matter of law?

An appellate court will not reverse the findings of fact of a trial court sitting without a jury unless they are clearly erroneous. Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998). An appellate court reviews a trial court's "legal conclusions and ultimate grant or denial of summary judgment" for correctness, and views "the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993).

Issue #2. Did the Trial Court abuse its discretion in rejecting Niemela's February 19, 2010 affidavit?

A trial court decision to admit evidence is reviewed under a broad grant of discretion. In re General Determination of Rights to Use of All Water, Both Surface and Underground, Within Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake,

Davis, Summit, Wasatch, Sanpete and Juab Counties in Utah, 982 P.2d 65, ¶26, 368 Utah Adv. Rep. 9, (Utah 1999).

RELEVANT STATUTES AND RULES

Utah Code Ann. §78-15-6 (1977) Defect or defective condition making product unreasonably dangerous — Rebuttable presumption.

> In any action for damages for personal injury, death, or property damage allegedly caused by a defect in a product:
>
> (1) No product shall be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.
>
> (2) As used in this act, "unreasonably dangerous" means that the product was dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer or user of that product in that community considering the product's characteristics, propensities, risks, dangers and uses together with any actual knowledge, training, or experience possessed by that particular buyer, user or consumer.
>
> (3) There is a rebuttable presumption that a product is free from any defect or defective condition where the alleged defect in the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were in conformity with government standards established for that industry which were in existence at the time the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were adopted.

Utah Rules of Civil Procedure Rule 56(e) Form of affidavits; further testimony; defense required.

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters

stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

Utah Rules of Appellate Procedure Rule 24(a)(9)

A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

STATEMENT OF THE CASE

Imperial is satisfied with Niemela's "Nature of the Case" and "Course of Proceedings and Disposition in the Court Below."

STATEMENT OF FACTS

1. The Trial Court made the finding of fact that the 1992 Model Mailboxes[1] and related components e.g. knobs, that Niemela complains of were in place in or about 1995. R.221-22.

2. In her deposition, Niemela stated:

Q. I'm interested in the handwritten.
A. Knob in 1995 on Rural Route 4 Tooele, Imperial mailbox.

[1] For ease of reference, the mailboxes that were manufactured under the 1992 Standards will be referred to as the 1992 Model Mailboxes.

Q. So it's your information that these knobs were on these mailboxes in Tooele at least as of 1995?
A. Exactly.
Q. Route number four, is that the route we've been talking about, the Overlake?
A. Yes.

(R. 193). While Niemela asserts in her brief at page 4 "The bulk of the Imperial mailboxes, if not every single mailbox, in the Overlake HOA was installed after the February 8, 2001 revisions by the USPS" and cites to affidavit of Niemela (R.107-110) for support, the Trial Court rejected this statement from her affidavit as inconsistent with her deposition testimony and found that the mailboxes and related components *e.g.* knobs, that Niemela complains of were in place in or about 1995. R.221-22.

3. The Trial Court found that the 1992 Model Mailboxes at issue were approved and in compliance with the 1992 Untied States Postal Services requirements and Imperial was entitled to a rebuttable presumption that the 1992 Model Mailboxes were free from any defect or defective condition. R.220 and R. 92-94.

4. The Trial Court found that Niemela failed to show that the 2001 USPS Standards were in effect in or about 1995 when the 1992 Model Mailboxes at issue were manufactured to create a genuine issue of fact to rebut the presumption that the mailboxes were free from any defect or defective condition. R. 220-221.

5. The Trial Court found that Niemela failed to provide expert or other testimony regarding the design of the handles/knobs of the 1992 Model Mailboxes to create a genuine issue of fact to rebut the presumption that the mailboxes were free from any defect or defective condition. R. 220.

6. The Trial Court found that Niemela failed to show that Imperial had prior knowledge or any knowledge that the manufactured handles/knobs caused injuries or were in any way defective to create a genuine issue of fact to rebut the presumption that the mailboxes were free from any defect or defective condition. R. 220.

7. The Trial Court found that Niemela failed to show that the 1992 Model Mailboxes in question were "unreasonably dangerous" or otherwise create a genuine issue of fact to rebut the presumption that the mailboxes were free from any defect or defective condition. R. 220.

8. The Trial Court found that Niemela did not submit any admissible evidence showing a defect or defective condition of the 1992 Model Mailboxes. R. 217-218.

9. The "facts" contained in Niemela's brief under the section titled "The Imperial Mailboxes at Overlake HOA Did Not Comply with the 2001 Standards and were Defective" were contained in the February 19, 2010 Affidavit (R. 107-110) and were rejected by the Trial Court as inconsistent with her deposition testimony, not based on

personal knowledge, lacks foundation, conclusory and/or containing inadmissible opinion testimony. R. 217-222 and 203-211.

SUMMARY OF ARGUMENT

Niemela cannot challenge the Trial Court's findings of fact because Niemela has failed to properly marshal the evidence. The Trial Court correctly concluded that Imperial was entitled to judgment as a matter of law because it owed no duty to Niemela in regards to the 1992 Model Mailboxes. Imperial had no duty to refrain from marketing a non-defective product when a revised or safer model was available. Imperial had no duty to inform the consumers of the availability of a revised or safer model. The Trial Court correctly concluded Niemela's negligence claim failed as a matter of law because Niemela did not produce any admissible evidence that her injuries were proximately and actually caused by the mailboxes. The Trial Court was correct in concluding that the 1992 Model Mailboxes were free from defect or defective condition and that Niemela failed to create a genuine issue of material fact to rebut that presumption. The Trial Court was within its broad discretion to reject the February 19, 2010 Affidavit of Niemela as inadmissible evidence.

ARGUMENT

I. NIEMELA HAS FAILED TO PROPERLY MARSHAL THE EVIDENCE AND THEREFORE CANNOT CHALLENGE THE TRIAL COURT'S FACTUAL FINDINGS.

The Trial Court's factual findings cannot be challenged because Niemela has failed to properly marshal all the evidence. "In order to challenge a court's factual findings, an appellant must first marshal all the evidence *in support of* the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Chen v. Stewart, 2004 UT 82, ¶ 76, 100 P.3d 1177 (emphasis added) (internal quotation marks omitted); *see also* Utah Rules of Appellate Procedure Rule 24(a)(9). ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."). To fulfill its duty to marshal, Niemela was required to "present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings [it] resists." Chen, 2004 UT 82, ¶ 77, 100 P.3d 1177. Instead of marshaling, Niemela simply reasserts the evidence it presented to the trial court and asks the Appellate court to reconsider *de novo*. Niemela's failure to marshal leaves Imperial and the Appellate court "to bear the expense and time of performing the critical task of marshaling the evidence. This is unfair, inefficient, and unacceptable." United Park City

Mines Co. v. Stichting Mayflower Mountain Fonds, 2006 UT 35, ¶ 26, 140 P.3d 1200. Accordingly, Niemela cannot challenge the Trial Court's finding of facts because Niemela has failed to properly marshal the evidence.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT IMPERIAL WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON NIEMELA'S NEGLIGENCE CLAIM BECAUSE IT OWED NO DUTY TO NIEMELA IN REGARDS TO THE NON-DEFECTIVE 1992 MODEL MAILBOXES.

The Trial Court correctly concluded that Imperial owed no duty to Niemela in regards to the 1992 Model Mailboxes and was entitled to judgment as a matter of law on Niemela's Negligence claim. The undisputed facts before the Trial Court were that the mailboxes at issue were 1992 Model Mailboxes that had been in place since about 1995. Imperial properly established that the 1992 Model Mailboxes were in conformity with government standards established for that industry which were in existence at the time the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were adopted. Once Imperial established that fact, it was entitled to a rebuttable presumption that its 1992 Model Mailboxes were free from any defect or defective condition. Niemela was then required to submit sufficient admissible evidence to create a genuine issue of material fact to rebut that presumption. Waddoups v. Amalgamated Sugar Co., 2002 UT 69, ¶31, 54 P.3d 1054. A preponderance of the evidence is required to rebut the presumption of non-defectiveness.

See Ebgert v. Nissan N. Am., Inc., 2007 UT 64, ¶14, 157 P.3d 347. Niemela failed to do so. Niemela failed to submit any admissible evidence that the 2001 Standards were in effect when the 1992 Model Mailboxes were manufactured or designed. Niemela failed to show that Imperial had prior knowledge or any knowledge that the manufactured handles/knobs caused injuries or were in any way defective. Niemela failed to provide any expert or other testimony regarding the design of the handles/knobs of the mailboxes at issue. Instead, Niemela submitted an affidavit that contradicted her deposition testimony, contained conclusory opinions and allegations. Niemela claimed in the affidavit that the 1992 Model Mailboxes were defective because they did not comply with the 2001 Standards. As addressed below, those opinions and allegations were rejected by the Court within its broad discretion. Nevertheless, whether or not the 1992 Model Mailbox complied with the 2001 Standards is irrelevant to this matter. The undisputed facts before the Trial Court were that the mailboxes at issue were 1992 Model Mailboxes that were in compliance with the 1992 Standards. Niemela provided no admissible evidence to create a genuine issue of fact to rebut the presumption that the 1992 Model Mailboxes were free from defect or defective condition. Accordingly, the Trial Court correctly concluded that the 1992 Model Mailboxes at issue were free from defect or defective condition.

Once the Trial Court made that determination that the 1992 Model Mailboxes at issue were free from defect or defective condition, the Trial Court then correctly concluded that Imperial had no duty to refrain from marketing a non-defective product when an improved model became available. Niemela is essentially claiming that Imperial was negligent by designing a product in conformity with governmental standards and by not informing consumers about an allegedly safer model when the government changed its design standards. These are the same allegations rejected by the Utah Supreme Court in Slisze v. Stanley-Bostitch, 1999 UT 20, 979 P.2d 317. In Slisze, a construction worker injured while using a pneumatic nailer sued the manufactured of the nailer under a negligence and breach of implied warranty claim. Slisze claimed that the manufacturer was negligent because they failed to stop marketing their product once an updated design became available. The Court rejected the claim and stated:

> It is important to emphasize here that Slisze is essentially asserting that Stanley had a duty to stop marketing a product that is less safe than another, although not defective, or to actively warn and inform consumers that the product is less safe. In weighing the factors set out in *AMS Salt,* we are not persuaded that it is necessary or wise to recognize a duty requiring manufacturers to discontinue manufacturing less safe but non-defective products; there has been no showing that the likelihood of injury would be reduced enough to outweigh the costs and burdens of discontinuation.

Slisze, 1999 UT 20, ¶12, 979 P.2d 317. In addition in Slisze, the Court refused to recognize a duty on the manufacturer to make a safe product safer. The Court states:

> Alternatively, Slisze wants this court to impose a duty on the manufacturer to inform consumers about the safer model. Considering the *AMS Salt* factors, we are again unconvinced. To require information to be provided to consumers on the availability of the safer model would, in this case (where the distinctions in the trip features are obvious), reduce the likelihood of injury so minimally that to impose the duty would be unduly burdensome. Such a burden might well act as a disincentive for manufacturers in the development of safer products when such development could force the discontinuation of the less safe model. Consequently, Slisze's negligence claim fails for lack of duty, and it was proper for the lower court to dismiss it. There is no duty to make a safe product safer.

Id. at ¶13 (internal quotations omitted). Niemela argues on appeal that the 1992 Model Mailbox became "defective" and "unreasonably dangerous" once the 2001 Standard became effective and Imperial then had a duty not to sell a "defective" or "unreasonably dangerous mailbox." That argument is based upon the erroneous assumption that the 1992 Model Mailbox was defective because it did not comply with the 2001 Standards. However, as the Utah Supreme Court explained in Slisze, "[w]e have never, nor has any other jurisdiction, recognized a duty on the part of a manufacturer to refrain from marketing a non-defective product when a safer model is available, or a duty to inform the consumer of the availability of the safer model." Slisze, 1999 UT 20, ¶10, 979 P.2d 317. Without a duty, there can be no claim of negligence. *See* Young v. Salt Lake City Sch. Dist., 2002 UT 64, ¶ 12, 52 P.3d 1230. Therefore, the Trial Court properly concluded that Imperial had no duty to Niemela in regards to its non-defective 1992

Model Mailbox and that Imperial was entitled to judgment as a matter of law as to Niemela's negligence claim.

III. THE TRIAL COURT CORRECTLY CONCLUDED NIEMELA'S NEGLIGENCE CLAIM FAILED AS A MATTER OF LAW BECAUSE NIEMELA DID NOT PRODUCE ANY ADMISSIBLE EVIDENCE THAT HER INJURIES WERE PROXIMATELY AND ACTUALLY CAUSED BY THE MAILBOXES.

The Trial court correctly concluded Niemela's negligence claim failed as a matter of law because Niemela did not produce any admissible evidence that her injuries were proximately and actually caused by the 1992 Model Mailboxes. In Utah, "[t]he need for positive expert testimony to establish a causal link between the defendants' negligent act and the Plaintiff's injury depends on the nature of the injury." Beard v. K-Mart Corp., 2000 UT App 285, ¶16, 12 P.3d 1015. However, it is only in "the most obvious cases" that a plaintiff may be excepted from the requirement of using expert testimony to prove causation. Id. In this case, Niemela claims that she suffered "serious and permanent physical injuries from opening and closing the pre-2004 Imperial mailbox, including injury to her right fingers, hand and wrist, resulting in a permanent impairment of her right extremity of 25-27%" from using the 1992 Model Mailboxes. R. 9. However, such claims are beyond the ordinary senses and common experience of a layperson. The Trial Court was correct in concluding that Niemela needed expert testimony to establish her *prima facie* case of causation and to prevent the fact-finder from resorting to speculation.

See Fox v. Brigham Young Univ., Inc., 2007 UT App 406, ¶23, 176 P.3d 446. Therefore, the Trial Court was correct in concluding that Imperial was entitled to summary judgment on Niemela's negligence claim as a matter of law because she could not make a *prima facie* case of causation.

IV. THE TRIAL COURT WAS CORRECT IN CONCLUDING THAT THE 1992 MODEL MAILBOXES WERE FREE FROM DEFECT OR DEFECTIVE CONDITION AND NIEMELA FAILED TO CREATE A GENUINE ISSUE OF MATERIAL FACT TO REBUT THAT PRESUMPTION.

The Trial Court properly concluded that Imperial was entitled to an order granting summary judgment in its favor because Niemela failed to create a genuine issue of material fact to rebut the presumption that the 1992 Model Mailboxes were free from any defect or defective condition because they were designed in conformity with the 1992 requirements of USPS-STD-7. The Trial Court found that the 1992 Model Mailboxes were in place on or about 1995. The Trial Court found that the design of the 1992 Model Mailboxes at issue were in compliance with the 1992 requirements of the United States Postal Service and Imperial was entitled to a rebuttable presumption of non-defectiveness[2]. The only evidence that Niemela put forth to attempt to rebut the

[2] The Utah Supreme Court recently ruled that its decision in Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), determining that the statute of repose in the Act was unconstitutional, necessarily required that other sections of the Act were also unconstitutional because the Act was nonseverable. *See* Egbert v. Nissan Motor Co.,

presumption that the 1992 Model Mailbox was non-defective was her inadmissible subjective belief that the mailboxes re-designed under the 2001 standards were better than those designed under the 1992 standards and that she was injured while opening a mailbox. However, the applicable common law rule is that the product is be to viewed in the light of "standards established for that industry which were in existence at the time the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were adopted." Accordingly, whether or not the 2001 design is better or whether a product designed under the 1992 standards conforms to the 2001 standards is irrelevant. Accordingly, the Trial Court was correct in determining that the 1992 Model Mailbox was free from a defect or defective condition.

Furthermore, a mailbox is not "unreasonably dangerous" or defective simply because it is capable of causing injury. Niemela has provided no admissible evidence of manufacturing flaws, no objective admissible evidence of defects with the 1992 design when viewed under standards at the time and no admissible evidence of inadequate warnings regarding use. Niemela has offered no admissible evidence that the mailboxes at issue were not designed in accordance with the 1992 design standards. Niemela did alleged that she was injured while opening a mailbox. A product is not defective simply

---

Ltd., 2010 UT 8, ¶10, 228 P.3d 737. However, the Court held that due to two decades of judicial articulation, the Utah Courts have adopted implicitly into the common law the same rule that was enunciated by section 78-15-6. Id. at ¶17.

because it is possible to be injured while using it. *See e.g.* Moomey v Massey Ferguson, Inc., 429 F2d 1184 (CA10 NM 1970) (applying New Mexico law) (piece of metal not unreasonably dangerous even though caused injury after being struck by hammer). Any product is capable of causing injury. Accordingly, the Trial Court was correct in determining that the mailbox at issue is not unreasonably dangerous or defective as a matter of law.

V. THE TRIAL COURT WAS WITHIN ITS BROAD DISCRETION TO REJECT THE FEBRUARY 19, 2010 AFFIDAVIT OF NIEMELA AS INADMISSIBLE EVIDENCE.

The Trial Court was within its broad discretion to reject the February 19, 2010 Affidavit of Niemela as admissible evidence. Rule 56(e) of the Utah Rules of Civil Procedure sets out the substantive requirements for affidavits and states:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Utah R. Civ. P. 56(e). An affidavit that is based upon unsubstantiated belief, contains conclusory statements, is not based upon personal knowledge or containing improper opinion testimony must be excluded. *See, e.g.*, Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985) (affidavit based on unsubstantiated belief insufficient); Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983) (conclusory affidavits are invalid); GNS Partnership v. Fullmer, 873 P.2d 1157, 1164-65 (Utah Ct.App.1994) (affidavits not

based on personal knowledge were properly stricken). In the February 19, 2010 affidavit, Niemela opines about the "adequate accessibility" of mailbox knobs, the proper depth of a knob to allow quick grasping, adequate "finger clearance and surface area for carriers to grasp," and what knob depth caused "possible injury" versus depth that was "adequate to prevent hand and arm strain and injury." However, the affidavit does not set forth any admissible evidence that Niemela has the foundation or expertise necessary to opine on the design elements of 1992 Model Mailbox and knobs, the standards within the industry, or the medical expertise to opine regarding causation.

Furthermore, Niemela attempts in the affidavit to opine about the 1992 Model Mailbox knobs alleged failure to "operate freely" within the industry standard and snow and ice accumulation inside the mailbox. There is no evidence that Niemela has the foundation or expertise to opine of the design elements of "operate freely" or whether the natural accumulation of ice and snow violates the design standards established by the United States Postal Service.

Niemela attempts to aver that the 1992 Model Mailbox knobs did not "allow easy opening and closing requiring no more than 5 pounds of force" and did not "fit and operate properly with no unintended catch or binding points". There is no evidence that Niemela has the foundation or expertise to opine of the design elements of "easy opening", "more than 5 pounds of force" or "fit and operate properly with no unintended

catch or binding points" with the industry. Niemela has produced no testing regarding the amount of force required to open the mailboxes at issue.

Niemela states in the affidavit that 1992 Model Mailbox did not "utilize the best commercial practice workmanship standards in the fabrication of all components and assemblies" and claims the hinges were too light-weight for the cast-metal doors and allowed the doors to misalign and jam, or to become frozen shut during adverse weather. There is no evidence that Niemela has the foundation or expertise to opine of the design elements of "best commercial practice workmanship standards in the fabrication of all components and assemblies" or whether or not the hinges were too light-weight or caused the doors to misalign and jam or freeze shut. There is no foundational evidence of engineering expertise that would allow Niemela to opine about the cause of the doors allegedly misaligning and jamming.

Niemela even attempts to provide expert medical testimony regarding the cause of her injuries by stating she had episodes of cramping and pain in her right hand from repetitively pulling open the Imperial mailbox doors. Niemela does not have the expertise to opine whether or not the cramping and pain in her hand was caused by the mailboxes.

Moreover, these statement (even if admissible) are not material because they are Niemela's subjective conclusory beliefs regarding her application of the 2001 Standards

to the 1992 Model Mailbox designed under the 1992 Standards. Accordingly, the Trial Court was well within its broad discretion to reject February 19, 2010 affidavit of Niemela.

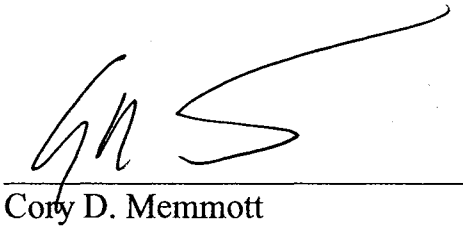
CONCLUSION

Niemela's failure to properly marshal the evidence prevents her from challenging the Trial Court's findings of fact. The Trial Court found that the 1992 Model Mailboxes were free from defect or defective condition and were in place in or about 1995. The Trial Court was correct in concluding that Niemela failed to demonstrate that Imperial had a duty towards her in regards to the 1992 Model Mailboxes or that her injuries were actually and proximately caused by the 1992 Model Mailboxes. The Trial Court was correct in concluding that Niemela failed to set forth facts sufficient to create a genuine issue of material fact rebutting the presumption that 1992 Model Mailboxes were free from defect or defective condition. The Trial Court was correct in concluding that Imperial was entitled to a judgment as a matter of law. The Trial Court was within its broad discretion in rejecting Niemela's February 19, 2010 affidavit. Accordingly, the

decision of the Trial Court must be affirmed.

DATED February 25, 2011.

RAY LEGO & ASSOCIATES



Cory D. Memmott
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellee were served by U.S. Mail on February 25, 2010 as follows:

Daniel F. Bertch, #4728
Kevin R. Robson #6976
Bertch Robson
1996 East 6400 South, Suite 100
Salt Lake City, Utah 84121

RAY LEGO & ASSOCIATES

_____
Cory D. Memmott
Attorneys for Appellee