

1989

Klatt v. Thomas : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

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

Richard K. Glauser; Hanson, Epperson & Smith; Terry L. Wade; Snow, Nuffer, Engstrom & Drake; attorneys for defendants.

Floyd W. Holm; Chamberlain & Higbee; attorneys for appellant.

Recommended Citation

Brief of Appellant, *Cory Klatt v. Ike Thomas*, No. 890120.00 (Utah Supreme Court, 1989).
https://digitalcommons.law.byu.edu/byu_sc1/2482

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 Supreme Court 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.

DOCUMENT
KFU
45.9
.S9
DOCKET NO.

BRIEF

890120

*Arch. Statu
Repose D*

IN THE SUPREME COURT OF THE STATE OF UTAH

CORY KLATT,)	
	)	BRIEF OF APPELLANT
Plaintiff/Appellant,)	
)	
vs.)	
)	
IKE THOMAS; JOHN DOE I dba)	
SOUTHGATE GOLF COURSE;)	
LAVA HILLS RESORT CORPORATION,)	
a Utah corporation; REX)	
JACKSON; JOHN LaGANT; and	)	Case No. 890120
JOHN WILLIE,)	
	)	<i>Priority No. 146</i>
Defendants/Appellees.)	

APPEAL FROM SUMMARY JUDGMENTS OF THE FIFTH
JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY,
STATE OF UTAH

THE HONORABLE J. PHILIP EVES, DISTRICT JUDGE

FLOYD W HOLM [1522]
CHAMBERLAIN & HIGBEE
Attorneys for Plaintiff/Appellant
250 South Main Street
P.O. Box 726
Cedar City, Utah 84721-0726
Telephone: (801) 586-4404

RICHARD K. GLAUSER
HANSON, EPPERSON & SMITH
Attorneys for Defendant/
Appellee Southgate Golf
Course
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970

TERRY L. WADE
SNOW, NUFFER, ENGSTROM & DRAKE
Attorney for Defendant/Appellee
Rex Jackson
90 East 200 North
P.O. Box 400
St. George, Utah 84770

JUL 25 1989

Clerk, Supreme Court, Uta

(continued)

TIMOTHY B. ANDERSON
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys Defendant/Appellee
John LaGant
249 East Tabernacle, Suite 200
St. George, Utah 84770

PAUL GRAF
Attorney for Defendant/Appellee
John Willie
P.O. Box 1637
St. George, Utah 84770

IN THE SUPREME COURT OF THE STATE OF UTAH

CORY KLATT,)	
	)	BRIEF OF APPELLANT
Plaintiff/Appellant,)	
)	
vs.)	
)	
IKE THOMAS; JOHN DOE I dba)	
SOUTHGATE GOLF COURSE;)	
LAVA HILLS RESORT CORPORATION,)	
a Utah corporation; REX)	
JACKSON; JOHN LaGANT; and	)	Case No. 890120
JOHN WILLIE,)	
)	
Defendants/Appellees.)	

APPEAL FROM SUMMARY JUDGMENTS OF THE FIFTH
JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY,
STATE OF UTAH

THE HONORABLE J. PHILIP EVES, DISTRICT JUDGE

FLOYD W HOLM [1522]
CHAMBERLAIN & HIGBEE
Attorneys for Plaintiff/Appellant
250 South Main Street
P.O. Box 726
Cedar City, Utah 84721-0726
Telephone: (801) 586-4404

RICHARD K. GLAUSER
HANSON, EPPERSON & SMITH
Attorneys for Defendant/
Appellee Southgate Golf
Course
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970

TERRY L. WADE
SNOW, NUFFER, ENGSTROM & DRAKE
Attorney for Defendant/Appellee
Rex Jackson
90 East 200 North
P.O. Box 400
St. George, Utah 84770

(continued)

TIMOTHY B. ANDERSON
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys Defendant/Appellee
John LaGant
249 East Tabernacle, Suite 200
St. George, Utah 84770

PAUL GRAF
Attorney for Defendant/Appellee
John Willie
P.O. Box 1637
St. George, Utah 84770

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	iii
<u>JURISDICTION AND NATURE OF PROCEEDINGS BELOW</u>	1
<u>STATEMENT OF ISSUES PRESENTED FOR REVIEW</u>	2
<u>TEXT OF AUTHORITIES</u>	3
<u>STATEMENT OF THE CASE</u>	4
<u>STATEMENT OF FACTS</u>	7
<u>SUMMARY OF ARGUMENTS</u>	9
<u>ARGUMENT</u>	11
<u>POINT I:</u> <u>PRESTON V. GOLDMAN</u> , IF APPLICABLE, IS DISTINGUISHABLE FROM THIS CASE	11
<u>POINT II:</u> BECAUSE JACKSON, WILLIE AND LAGANT HAVE FAILED TO PROPERLY RAISE THE STATUTE OF LIMITATIONS IN THEIR ANSWERS, SUCH DEFENSE IS WAIVED	17
<u>POINT III:</u> SECTION 78-12-25.5 IS UNCONSTITUTIONAL UNDER THE UTAH OPEN COURTS PROVISION	19
<u>POINT IV:</u> SECTION 78-12-25.5 IS AN UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION UNDER THE UTAH AND UNITED STATES CONSTITUTIONS	25
<u>POINT V:</u> THERE IS A GENUINE ISSUE OF MATERIAL FACT, PRECLUDING SUMMARY JUDGMENT, AS TO WHETHER SOUTHGATE KNEW OR SHOULD HAVE KNOWN OF ANY DEFECT IN THE GOLF COURSE	27
<u>POINT VI:</u> THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER SOUTHGATE CREATED A DEFECT OR DANGEROUS CONDITION ON THE GOLF COURSE, WHICH CAUSED PLAINTIFF'S INJURY	31
<u>CONCLUSION</u>	31

<u>ADDENDUM</u>	35
Second Amended Complaint	A 1
Affidavit of Vern Thomas aka Ike Thomas	A 8
Affidavit of John LaGant	A11
Affidavit of John Willie	A14
Co-Defendant John Willie's Response to Co-Defendant Southgate Golf Course's Request for Admissions . . .	A17
Affidavit of Rex Jackson	A20
Affidavit of Richard Schmutz in Support of Motion for Summary Judgment	A23
Affidavit of William Atkin in Support of Motion for Summary Judgment	A27
Affidavit of David A. Rainville	A31
Order Granting Defendant Rex Jackson's Motion for Summary Judgment; Findings of Fact and Conclusions of Law	A48
Summary Judgment (dated January 30, 1989)	A55
Conclusions of Law Underlying Summary Judgment	A58
Summary Judgment (dated March 22, 1989)	A63

TABLE OF AUTHORITIES

CASES:

<u>Berry ex rel. Berry v. Beech Aircraft Corp.,</u> 717 P.2d 670 (Utah 1985)	21, 22, 23, 24, 27
<u>Broom v. Truluck,</u> 270 S.C. 277, 241 S.E. 2d 739 (1980).	27
<u>Cogliati v. Ecco High Frequency Corp.,</u> 92 N.J. 402, 456 A.2d 542, (1983)	16
<u>Condemarin v. University Hospital,</u> 107 Utah Adv. Rep. 5 (Utah May 1, 1989).	26, 27
<u>Creekview Apts. v. State Farm Ins.,</u> 771 P.2d 693 (Utah Ct. App. 1989)	19
<u>Daugaard v. Baltic Cooperative Building Supply Ass'n,</u> 349 N.W. 2d 419 (S.D. 1984).	24
<u>Kallas Millwork Corp. v. Square D Co.,</u> 66 Wis. 2d 382, 225 N.W. 2d 454 (1975)	27
<u>Koer v. Mayfair Markets,</u> 19 Utah 2d 339, 431 P.2d 566, (1967).	28
<u>Loveland v. Orem City Corp.,</u> 746 P.2d 763 (Utah 1987)	14, 15, 16
<u>Loyal Order of Moose Lodge v. Cavaness,</u> 563 P.2d 143 (Okla. 1977).	27
<u>Malan v. Lewis,</u> 693 P.2d 661 (Utah 1984)	25, 26, 27
<u>Merrick v. Murphy,</u> 83 Misc.2d 39, 371 N.Y.S.2d 97 (N.Y. Sup. Ct. 1975)	16, 17
<u>Mountain Fuel Supply v. Salt Lake City Corp.,</u> 752 P.2d 884, (Utah 1988).	26
<u>Overland Construction Co. v. Sirmons,</u> 379 So. 2d 572, (Fla. 1979).	24
<u>Phillips v. ABC Builders, Inc.,</u> 611 P.2d 821 (Wyo. 1980).	24

<u>Preston v. Goldman,</u>	
42 Cal. 3d 108, 720 P.2d 476 (1986).	11, 12, 13, 15, 17
<u>Rogalski v. Phillips Petroleum Co.,</u>	
3 Utah 2d 203, 282 P.2d 304 (1955).	28
<u>Saylor v. Hall,</u>	
497 S.W. 2d 218 (Ky. 1973).	24
<u>Shebulia v. Architects Hawaii Ltd.,</u>	
65 Hawaii 26, 647 P.2d 276 (1982).	27
<u>Staker v. Huntington Cleveland Irrigation Co.,</u>	
664 P.2d 1188 (Utah 1983)	18, 19
<u>Stevens v. Colorado Fuel & Iron,</u>	
24 Utah 2d 214, 469 P.2d 3 (1970).	28
<u>Themy v. Seagull Enterprises Inc.,</u>	
595 P.2d 526 (Utah 1979)	28
<u>Wasatch Mines Co. v. Hopkinson,</u>	
24 Utah 2d 70, 465 P.2d 1007 (1970)	18

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend XIV, § 1.	25
Utah Const. art. I, § 11.	20, 25
Utah Const. art. I, § 24.	24, 25

STATUTES:

Utah Code Ann.	
§ 78-12-25.5 (Supp. 1989).	18, 20, 22, 23, 24, 26, 27, 32

RULES:

Utah R. Civ. P. 8(c).	17, 18
Utah R. Civ. P. 9(h).	17, 18
Utah R. Civ. P. 12(h).	18, 19
Utah R. Civ. P. 56(c).	28

FLOYD W HOLM [1522]
CHAMBERLAIN & HIGBEE
Attorneys for Plaintiff/Appellant
250 South Main Street
P.O. Box 726
Cedar City, Utah 84721-0726
Telephone: (801) 586-4404

IN THE SUPREME COURT OF THE
STATE OF UTAH

CORY KLATT,)	
	)	BRIEF OF APPELLANT
Plaintiff/Appellant,)	
)	
vs.)	
)	
IKE THOMAS; JOHN DOE I dba)	
SOUTHGATE GOLF COURSE;)	
LAVA HILLS RESORT CORPORATION,)	
a Utah corporation; REX)	
JACKSON; JOHN LaGANT; and	)	Case No. 890120
JOHN WILLIE,)	
)	
Defendants/Appellees.)	

JURISDICTION AND NATURE OF PROCEEDINGS BELOW

This is an appeal from a Summary Judgment entered in favor of Defendant/Appellee Rex Jackson, dated January 30, 1989 and from a Summary Judgment entered in favor of Defendants/Appellees Southgate Golf Course, John LaGant and John Willie, dated March 22, 1989. To the extent necessary, both Summary Judgments have been certified final under Rule 54(b) of the Utah Rules of Civil Procedure. Statutory jurisdiction is conferred upon this Court because this is an appeal from the judgment of a district court over which the Court of Appeals does not have original appellate jurisdiction. Utah Code Ann. §§ 78-2-2(3)(j); 78-2a-3 (Supp. 1989).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the lower court err in determining that Jackson, LaGant and Willie were vendors of the golf course and, therefore, were not liable as a matter of law for defects in their design or construction of the golf course which existed as of the date of its sale to Southgate?

2. Did the lower court err in dismissing the action against Jackson, LaGant and Willie as being time barred under the statute of limitations, when said individuals had failed to properly raise the defense of the statute of limitations as required under Rules 9(h) and 12(h) of the Utah Rules of Civil Procedure?

3. Is Section 78-12-25.5 as applied in this case unconstitutional under Article I, Section 11 of the Constitution of Utah?

4. Is Section 78-12-25.5 as applied in this case unconstitutional under Article I, Section 24 of the Constitution of Utah or unconstitutional as a denial of equal protection under Amendment 14 of the Constitution of the United States of America?

5. Did the lower court err in determining that there is no genuine issue of material fact as to whether Southgate knew or should have known of any defect in the subject golf course?

6. Did the lower court err in determining that there was no genuine issue of material fact as to Southgate's negligence as to any of the other particulars alleged in the Second Amended Complaint?

TEXT OF AUTHORITIES

1. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge and bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

Utah R. Civ. P. 8(c).

2. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statutes specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it.

Utah R. Civ. P. 9(h).

3. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action.

Utah R. Civ. P. 12(h).

4. (1) (a) An action to recover damages for any injury to property, real or personal, or for any injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, or any action for damages sustained on account of the injury, may not be brought against any person performing or furnishing the design, planning, surveying, supervising the construction of, or constructing the improvement to real property more than seven years after the completion of construction.

(2) The time limitation imposed by this section does not apply to any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of the improvement constitutes the proximate cause of the injury for which an action is brought.

(3) This section does not extend or limit the periods otherwise prescribed by state law for the bringing of any action.

(4) As used in this section:

(a) "Person" means an individual, corporation, partnership, or other legal entity.

(b) "Completion of construction" means the date of issuance of a certificate of substantial completion by the owner, architect, engineer, or other agent, or the date of the owner's use or possession of the improvement on real property.

Utah Code Ann. § 78-12-25.5 (Supp. 1989).

5. All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const. art I, § 11.

6. "All laws of a general nature shall have uniform operation." Utah Const. art I, § 24.

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

U.S. Const. amend XIV, § 1.

STATEMENT OF THE CASE

On April 5, 1986, while golfing at Southgate Golf Course in St. George, Utah, Plaintiff was struck in the face and personally

injured by an errant golf ball hit by Defendant Ike Thomas (hereinafter "Thomas"). Second Amended Complaint ¶ 10. (R. vol. I, pp. 302-03; Addendum [hereinafter "A."] 2-3).

Plaintiff brought this action against Thomas claiming he was negligent in causing the ball to strike Plaintiff. Further, Plaintiff alleged that Defendant Southgate Golf Course (hereinafter "Southgate"), the owner and operator of the golf course where the incident occurred, was negligent in failing to erect an appropriate barrier that would have prevented the ball from striking Plaintiff, in failing to warn Plaintiff and other golf course patrons of the danger posed by the configuration of the golf course and for failing to take other appropriate precautions for the safety of Plaintiff and others. Finally, Plaintiff named the previous owner and operator of the golf course, Lava Hills Resort Corporation (hereinafter "Lava Hills") and Rex Jackson, John LaGant and John Willie (hereinafter, respectively, "Jackson," "LaGant," and "Willie"), three former shareholders and principals of Lava Hills, who performed or participated in the design and construction of the golf course. Id., ¶¶ 12-15 (R. vol. I, pp. 303-04; A. 3-4).

Plaintiff claimed that Lava Hills and Jackson, LaGant and Willie were negligent in failing to safely design the golf course to prevent injury to Plaintiff and others, that they were negligent in failing to safely construct the golf course so as to prevent injury to Plaintiff and others and, finally that they were negligent in failing to inform Southgate and any other

successors in interest of any latent defects they knew or should have known existed at the golf course that could cause injury to Plaintiff and others. Id., ¶¶ 16-17 (R. vol. I, p. 304; A. 4).

Plaintiff settled her claims against Thomas and, therefore, he is not a party to this appeal. Furthermore, Lava Hills has been dissolved and, therefore, is not an active party to this action or this appeal. Summary Judgment dated March 22, 1989, ¶¶ 5-6 (R. vol. II, pp. 276-66; A. 64-65).

On January 30, 1989, after hearing oral argument, the district court entered Summary Judgment in favor of Jackson on the grounds that Jackson was a vendor of the golf course and was not subject to liability as of the date the vendee, Southgate, took possession of it. Summary Judgment dated January 30, 1989 (R. vol. II, pp. 215-16; A. 55-56); Order Granting Defendant Rex Jackson's Motion for Summary Judgment; Findings of Fact and Conclusions of Law (hereinafter "Findings"), Conclusions of Law, ¶¶ 1-3 (R. vol. II, pp. 212-13; A. 52-53).

On March 22, 1989, after hearing oral argument, the district court denied a Motion to Vacate the Summary Judgment in favor of Jackson on the additional ground that said action was not timely under the statute of limitations and further granted Summary Judgment in favor of LaGant and Willie on the same grounds. Also, the Court granted Summary Judgment in favor of Southgate on the grounds that Plaintiff had failed to demonstrate that Southgate knew or should have known of any defect in the golf course and was negligent. Conclusions of Law Underlying Summary Judgment (R. vol. II, pp. 270-73; A. 58-61).

STATEMENT OF FACTS

On April 5, 1986, Plaintiff was golfing at Southgate Golf Course in St. George, Utah. At approximately 12:15 p.m. that day she was standing on the tee-box of the 15th hole of the golf course waiting her turn to make her first shot from the tee. While standing in that area, Thomas, who was making his first shot from the tee area of the 14th hole, caused the ball to deviate from its straight path and fly to the right (slice) and strike Plaintiff in the face where she was standing. The tee boxes of the 14th and 15th holes were designed and constructed such that Plaintiff would have been standing approximately 50 to 75 yards in front of and to the right of where Thomas struck the ball. Second Amended Complaint ¶¶ 8-10 (R. vol. I, pp. 302; A. 2); Findings ¶ 1 (R. vol. II, pp. 209-10; A. 49-50).

At the time of the accident, the golf course was owned and operated by Southgate. Southgate had purchased the golf course some 11 months earlier from Lava Hills. Second Amended Complaint, ¶ 8 (R. vol. I, p. 302; A. 2); Findings, ¶¶ 2-3 (R. vol. II, pp. 209-210; A. 49-50).

After taking possession of the golf course, but prior to the accident that is the subject of this action, Southgate redesigned and modified the 14th hole of the golf course by moving the green, some 130 feet closer to the tee and to the left of the previous green location. Southgate made no change to the design of the 15th hole. Second Amended Complaint ¶ 9 (R. vol. I, p. 302; A. 2); Findings, ¶ 5 (R. vol. II, 210; A. 50).

Jackson, LaGant and Willie were involved in the initial design and construction of the golf course in the spring and summer of 1975. Willie was the primary designer of the course, with the assistance of LaGant. In its original design, it was intended that there would be a natural barrier (trees) between the 14th and 15th tees. Jackson, who supervised the actual construction of the golf course, failed to install the trees. Affidavit of John Willie (hereinafter "Willie Affidavit") ¶¶ 5-6, 8-9, 12-14 (R. vol. I, pp. 260-61; A. 14-15).

After designing and constructing the golf course, Jackson, LaGant and Willie all eventually ceased active association with its operation. After construction was completed, Jackson and Willie maintained only a shareholder's interest in Lava Hills until the golf course was sold to Southgate. LaGant sold his entire interest in December 1984, prior to the sale. Willie Affidavit ¶ 4 (R. vol. I, p. 260; A. 14); Affidavit of Rex Jackson, ¶ 3 (R. vol. I, p. 216; A. 20); Affidavit of John LaGant ¶ 4 (R. vol. II, p. 75; A. 11).

Plaintiff's expert, David Rainville, a golf course architect from Orange County, California, has expressed his opinion, by affidavit, that the golf course was defective in design and construction in that there was no natural or artificial barrier between the 14th and 15th holes. He stated that such defective condition still existed on April 5, 1986, after the modifications by Southgate. Affidavit of David A. Rainville ¶ 11 & Exhibit L (R. vol. I, pp. 116-117, 131; A. 33, 38-39).

Two principals of Southgate, Richard Schmutz and William Atkin, by affidavit in support of their Motion for Summary Judgment, first state that there is no defect in the design or construction of the golf course. Then, both state that both the layout and the proximity and location of the two tee boxes was patent and easily observable by any patron of the golf course, including Plaintiff. Finally, in its Findings of Fact in Support of the Summary Judgment in Favor of Jackson, the Court finds that if there is a defect in the course, "such defect could have been discovered by Defendant Southgate through such an inspection as would be made in the exercise of ordinary care and prudence, and Defendant Southgate had a reasonable time to discover and remedy any such defect or dangerous condition prior to the occurrence of Plaintiff's accident." Affidavit of Richard Schmutz in Support of Motion for Summary Judgment (hereinafter "Schmutz Affidavit"), ¶¶ 8-9 (R. vol. I, p. 81; A. 25); Affidavit of William Atkin in Support of Motion for Summary Judgment (hereinafter "Atkin Affidavit" ¶¶ 7-8) (Supplemental Record; A. 29).

SUMMARY OF ARGUMENTS

POINT I: Jackson, LaGant and Willie are, or should be excepted from the rule stated in Preston v. Golden. They are not vendors, they are commercial developers, and they performed the actual construction of the course. Further, they should remain liable at least a reasonable time after the sale. Such reasonable time is a genuine issue of material fact.

POINT II: Jackson, LaGant and Willie have not properly raised the defense of the statute of limitations under Rules 8(c) and 9(h) of the Utah Rules of Civil Procedure. Consequently, such a defense is waived under Rule 12(h) of the Utah Rules of Civil Procedure.

POINT III: Assuming Jackson, LaGant or Willie have properly raised the statute of limitations defense, Section 78-12-25.5 is unconstitutional under the Open Courts Provision of the Utah Constitution. Based upon the reasoning in Berry ex rel Berry v. Beech Aircraft Corp., there is not a reasonable justification for denying Plaintiff and others similarly situated from a remedy against the persons who may have created the defects in the golf course that ultimately caused her injury.

POINT IV: Section 75-12-25.5 is an unconstitutional denial of equal protection as applied to Plaintiff and others similarly situated in her class under Article I Section 24 of the Utah Constitution and Amendment 14 of the United States Constitution. Under the doctrine set forth in Malan v. Lewis and Condemarin v. University of Utah, there is no justifiable or reasonable basis for denying Plaintiff and the other persons similarly situated from bringing a cause of action because the wrongful conduct giving rise to the cause of action occurred more than seven years prior to the injury.

POINT V: The Affidavits of Richard Schmutz and William Atkin, along with the Finding of Fact in connection with the Summary Judgment in favor of Jackson and the Affidavit of

Plaintiff's expert, all raise a genuine issue of material fact as to whether there was a latent defect in the golf course, which caused injury to Plaintiff, and whether Southgate knew or should have known such defect existed.

POINT VI: Even assuming the lower court was correct in determining, as a matter of law, that any defect in the golf course was latent, there is still a question of fact regarding whether Southgate was negligent in creating the defect. Plaintiff's expert has testified that the golf course as actually modified by Southgate, was still defective in its design and construction. Therefore, there is still an issue of fact as to whether Southgate was affirmatively negligent in its design and/or construction of the modification of the 14th hole.

ARGUMENT

POINT I

PRESTON V. GOLDMAN, IF APPLICABLE, IS DISTINGUISHABLE FROM THIS CASE

The Court below determined that under the case of Preston v. Goldman, 42 Cal. 3d 108, 720 P.2d 476 (1986), Jackson, LaGant and Willie, as vendors of the golf course in May of 1985, were not liable for any defects in the design and/or construction of the course from the date Southgate took over possession and control of it after its purchase of the golf course.

In Preston, a child was severely injured from a near drowning in a pond constructed on certain residential property. The

child's father brought a lawsuit against both the present owners of the property and the previous owners who had designed and constructed the pond. After trial, the lower court entered judgment on a special verdict in favor of all defendants. On appeal to the California Court of Appeals, plaintiff argued that the court had failed to properly instruct the jury on the basis for liability of the previous owner. The California Court of Appeals reversed upon that basis, but the California Supreme Court reversed the Court of Appeals, holding that liability in a landowner liability case was predicated on ownership and control of the property regardless of whether the previous owner had created a dangerous condition.

The California court made a number of exceptions to its holding. First, the California court stated: "Our holding here relates only to the liability of 'do-it-yourself' home improvers and is not intended to effect, establish, or diminish any liability of commercial builders, contractors or renovators." Id. 720 P.2d at 487 n.10.

Second, the court recognized that when the prior landowner was the contractor or builder of the entire property, there are different rules that apply that may hold such professional developer/owner liable even after he has sold the property. Id., 720 P.2d at 481 n.3.

Finally, the California court discussed, but rejected, an exception that would permit a previous landowner's liability to continue even after the date of purchase until a subsequent

landowner could reasonably discover a hazardous defect in the property and take appropriate precautions to remedy it, especially if the previous landowner had created the condition. Id. 720 P.2d at 478 n.2, 480.

The facts of the instant case fall under all of the exceptions outlined in Preston. Furthermore, because of Utah law regarding latent defects, this Court should not follow Preston or, at least should adopt the third exception rejected by Preston.

A. Commercial Builders Contractors or Renovators

In the first exception, the Preston court specifically excludes from its holding any effect upon the liability of "commercial builders, contractors or renovators." Id., 720 P.2d at 487 n.10. It appears that the reason for this exception would be to discourage a contractor or builder from substandard performance when he knows that after his work is completed the property will be conveyed to a new owner and the contractor or builder would be insulated from liability. The California court instead limits its holding to improvements made by "do-it-yourselfers." In other words, one must actually have owned the property when the improvements were made, made the improvements himself and then sold it to a third party prior to the injury in order to be insulated from liability under Preston.

In this case, Lava Hills was the owner of the golf course at the time it was initially designed and constructed and at the time it was sold to Southgate. Although Jackson, LaGant and

Willie were officers and shareholders of Lava Hills at various times, they were never, as individuals, owners. Indeed, LaGant apparently did not even have an equity interest in Lava Hills at the time the golf course was sold to Southgate. Also, both Jackson and Willie, although they apparently still held stock in Lava Hills, no longer had any supervisory control over that corporation. Thus, it appears that only Lava Hills might possibly be excepted from liability under the Preston rule.

B. Owner/Developer

Even assuming that Jackson, LaGant and Willie were the vendors of the golf course at the time it was sold to Southgate, the second exception under Preston applies because they were owners/developers who, previous to conveying the golf course to Southgate, had fully designed, constructed and developed the property. Under this exception, more emphasis is placed upon the landowner's role as the creator of the dangerous condition and he is found to be liable despite his subsequent sale of the property.

This Court apparently applied this exception in Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987). There, the purchasers of a home brought an action against the city, the irrigation company and the developer of the subdivision for failing to design and construct a fence or other barrier over a canal in which the plaintiffs' child drowned shortly after the plaintiffs purchased the property from the developer's successor in interest, Jacor. The lower court granted summary judgment in

favor of all defendants and this Court affirmed, holding, inter alia, that the developer had no duty to disclose any dangers in the canal to Jacor or plaintiffs. This Court based its decision upon Section 352 of the Restatement (Second) of Torts, which was the primary basis for the Preston decision. This Court then stated:

The Lovelands contend that they did not sue Brown Brothers in its capacity as a vendor of lot sixteen, but rather as the developer of the property. Brown Brothers, without authority, claims that this distinction is of no legal consequence. We disagree. Although there has been no wholesale importation of the principal underlying products liability into the real estate context, some exceptions have arisen where the prior landowner was a professional developer.

Id. at 768 (citing Preston v. Goldman, 42 Cal. 3d 108, 117 n.3, 720 P.2d 476, 481 n.3 (1986)).

Although this case did not involve the development of a subdivision as in Loveland, since Jackson, LaGant and Willie developed the property, the same exception outlined in Preston and Loveland should apply to them despite Plaintiff's lack of privity with them.

Before leaving Loveland, this Court should note two other exceptions to the vendor non-liability rule touched upon in Preston and discussed at some length in Loveland. Those exceptions, set forth in Section 353 of the Restatement (Second) of Torts are set forth in Loveland as follows:

The first exception involves a vendor's duty to disclose to the vendee any concealed conditions known to the vendor which involve an unreasonable danger. The second exception is that a vendor owes a duty for a reasonable time to those outside the land who are

injured after the sale by a dangerous condition on the land.

Loveland, 746 P.2d at 768 (emphasis in original) (footnotes omitted) (citing Restatement (Second) of Torts §§ 353, 373 (1965)).

Regarding the first Loveland exception, there is at least an issue of fact (although admittedly none of the parties have presented affidavits or other sworn testimony addressing this issue, Plaintiff has raised it as an allegation in her Complaint) as to whether Jackson, LaGant and/or Willie failed to properly disclose a concealed defect in the golf course to Southgate at the time of sale.

C. Reasonably Extended Liability

The second exception in Loveland is similar to the third exception that was rejected in Preston; that is, that the vendor should continue to be liable to third parties who come onto the land until the vendee has had a reasonable time to discover and correct the dangerous condition. This exception has been supported in Cogliati v. Ecco High Frequency Corp., 92 N.J. 402, 456 A.2d 524, 531 (1983). The New York Supreme Court has carried this exception a step further by determining that there is always liability to a prior owner who commits affirmative acts of negligence by creating the dangerous condition. Merrick v. Murphy, 83 Misc. 2d 39, 371 N.Y.S.2d 97, 100 (N.Y. Sup. Ct. 1975).

In the instant case, there is clearly an issue of fact as to whether a reasonable time has passed to enable Southgate to

correct any defect created by Jackson, LaGant and/or Willie. Further, there is a genuine issue of material fact as to whether Jackson, LaGant and/or Willie created the dangerous condition, if this Court were to adopt the New York rule under Merrick.

As will be explained in Point V, and based upon the lower Court's ruling to that effect, Southgate is not liable for any defect or dangerous condition that it neither knew nor should have known existed at the golf course at the time Southgate took possession and control of it. Consequently, unless Plaintiff were allowed to maintain a cause of action against the persons who actually created the dangerous condition, in spite of their vendor status, she would be effectively denied a remedy.

Because the facts of this case fall under one or more of the exceptions outlined in Preston, which have been or should be followed by this Court, Plaintiff should be entitled to maintain her claim against Jackson, LaGant and Willie, despite their possible status as vendors.

POINT II

BECAUSE JACKSON, WILLIE AND LAGANT HAVE FAILED TO
PROPERLY RAISE THE STATUTE OF LIMITATIONS IN THEIR
ANSWERS, SUCH DEFENSE IS WAIVED

Rule 8(c) of the Utah Rules of Civil Procedure provides that the affirmative defense of statute of limitations must be raised in the responsive pleading, in this case, the answer. Utah R. Civ. P. 8(c). Further, Rule 9(h) states that the defense of statute of limitation must be raised with some particularity by

specifying the particular section, subsection and/or particular provision relied upon. Id., 9(h).

It is undisputed that none of the Answers filed by Jackson, LaGant or Willie raise the affirmative defense of the statute of limitations, much less specifically identify Section 78-12-25.5--upon which the court relied in its Summary Judgment--with any particularity.

Rule 12(h) of the Utah Rules of Civil Procedure provides that unless a defense, such as the statute of limitations, is raised by an initial motion or in the responsive pleading (answer) such a defense is waived. Id., 12(h). This Court has applied that rule most recently in Staker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188 (Utah 1983). There, a plaintiff brought an action to recover reimbursement of excessive water fees he had paid to the defendant water company. On the morning of trial, the defendant sought to amend its answer to claim that plaintiff's claim was barred by the applicable statute of limitations. The lower court denied the motion and ultimately granted judgment for plaintiff. This Court affirmed the denial of the motion to amend the answer, stating that "[t]he statute of limitations defense must be pleaded as an affirmative defense in the responsive pleading, or it is waived, Utah R. Civ. P. 8(c) and 12(h), unless an amended pleading asserting the defense is allowed pursuant to the requirements of Rule 15(a)." See also Wasatch Mines Co. v. Hopkinson, 24 Utah 2nd 70, 465 P.2d 1007, 1010-11 (1970). Cf., Creekview Apartments v. State Farm

Insurance Co., 771 P.2d 693, 694-95 (Utah Ct. App. 1989) (insurance policy "statute of limitations" is waived because it was not contained in a responsive pleading).

Based upon Rule 12(h) as construed in Staker and others, Jackson, LaGant and Willie waived the statute of limitations defense and the lower Court improperly granted Summary Judgment on the basis of the statute of limitations.

POINT III

SECTION 78-12-25.5 IS UNCONSTITUTIONAL UNDER THE UTAH OPEN COURTS PROVISION

If this Court agrees with the Court below that Jackson, LaGant and Willie have properly raised the statute of limitations defense, then this Court should determine whether such statute is unconstitutional in light of Article I, Section 11 of the Utah Constitution, the Open Courts Provision. Indeed, even if this Court reverses the lower court's decision on the grounds that the statute of limitations defense was waived, it should still provide some guidance to the lower court as to the constitutionality of the statute if the statute of limitations defense is ultimately allowed to be raised by amendment.

The statute of limitations (actually a statute of repose) upon which Jackson, LaGant and Willie rely, provides that no person can bring an action for personal injury or property damage "against any person performing or furnishing the design, planning, supervision of construction or construction" of any

improvement to real property that may be defective or in a dangerous condition, if such action is brought more than seven years after the construction is completed. Utah Code Ann. § 78-12-25.5 (Supp. 1989).

In this case, there may be a genuine issue of material fact as to whether construction of the golf course was ever completed, thereby precluding the statute from beginning to run. Willie states in his affidavit that he designed the golf course to include trees that would be planted between the 14th and 15th tees and that construction was never completed. Willie Affidavit ¶¶ 8-9, 12.

Assuming that there is no issue of fact that the golf course was completed by the time it was open for business, then it is undisputed that more than seven years have passed since that occurred and Plaintiff would be barred from a cause of action against Jackson, LaGant and Willie under Section 78-12-25.5. Because under Section 78-12-25.5, Plaintiff is denied a remedy against Jackson, LaGant and Willie before it even arises, that provision is unconstitutional under the Open Courts Provision of the Utah Constitution.

Article I Section 11 of the Utah Constitution declares that "[a]ll courts shall be open, and every person, for an injury done to him and his person, property, or reputation, shall have remedy by due course of law" Utah Const. art. I, § 11. Although this Court has never addressed the constitutionality of Section 78-12-25.5 under Article I Section 11, it has determined

that a similar statute of repose under the Utah Products Liability Act is unconstitutional under the Open Courts Provision.

In Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985) plaintiffs brought a wrongful death action against the manufacturer of an airplane under products liability theories, for defects in the airplane that caused the death of their husband and father. The lower court granted summary judgment to the defendant manufacturer of the airplane on the grounds that the action was barred under Section 78-15-3 of the Utah Code, which provided that a products liability action cannot be brought more than six years after the product is initially purchased or ten years after its date of manufacture. This Court reversed the summary judgment and remanded the matter to the lower court for trial, holding that the products liability statute of repose was unconstitutional under the Open Courts Provision. The court then established a two-part analysis for determining whether a provision is unconstitutional under the Open Courts Provision:

First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different. . . .

Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of

action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

Id. at 680 (citations and footnote omitted).

Under the first part of the analysis, it appears that the substitute remedy contemplated would be something similar to the worker's compensation and no fault insurance provisions. Id. at 677. In this case, the legislature has not developed any alternative statutory remedy like worker's compensation or no fault insurance that would appropriately compensate a party injured by an improvement completed more than seven years prior to the injury.

Jackson, LaGant and/or Willie may argue that Plaintiff does have another common law remedy against Southgate, who was the owner and occupier of the golf course at the time of Plaintiff's injury. That remedy, based upon the authorities cited below, is contingent upon Plaintiff proving that the defect or dangerous condition in the property was known or should have been known by Southgate prior to the injury. Although Plaintiff contends that whether Southgate knew or should have known of a defect in the golf course is a question of fact and that the lower Court's grant of Summary Judgment was improper, there is still some likelihood that the trier of fact will ultimately determine that any defect or dangerous condition in the golf course was latent to Southgate and, therefore, Southgate would not be liable. If Section 78-12-25.5 is upheld, then Plaintiff would be

effectively denied any remedy whatsoever for her injuries, even against the very parties who created the defect and dangerous condition.

The second prong of the Berry analysis is whether there is any justifiable legislative purpose behind the statute of repose. In Berry, this Court performs an extensive analysis of whether the products liability statute of repose is justifiable. That analysis is likewise applicable to the builders statute of repose at issue here. Based upon that analysis, in this case, as in Berry, this Court should determine that Section 78-12-25.5 "does not reasonably and substantially advance the stated purpose of the statute . . . and whatever beneficial effects may accrue from the statute of repose do not justify the denial of the rights protected by Article I section 11." Id. at 683.

One justification for the statute of repose that may be offered by Jackson, LaGant and/or Willie, which was not discussed in Berry, is that the statute prevents a builder or architect from having to defend "stale" claims for improvements that were constructed decades previous to the injury. Although that may be true, the burden is even greater upon a plaintiff, who must prosecute an action based upon a claimed defect that occurred so very long ago. Indeed, since Plaintiff has the burden of proof, it would appear that a difficulty in obtaining witnesses and evidence from decades ago would be more detrimental to Plaintiff than to any of the Defendants. The Florida Supreme Court rejected such a justification in striking down a builder and

architect statute of repose under its open courts provision in Overland Construction Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979).

There, the Florida Supreme Court stated as follows:

We recognize the problems which inhere in exposing builders and related professionals to potential liability for an indefinite period of time after an improvement to real property has been completed. Undoubtedly, the passage of time does aggravate the difficulty of producing reliable evidence, and it is likely that advances in technology tend to push industry standards inexorably higher. The impact of these problems, however, is felt by all litigants. Moreover, the difficulties of proof would seem to fall at least as heavily on injured plaintiffs, who must generally carry the initial burden of establishing that the defendant was negligent. In any event, these problems are not unique to the construction industry, and they are not sufficiently compelling to justify the enactment of legislation which, without providing an alternative means of redress, totally abolishes an injured person's cause of action.

Id., at 574.

Finally, by holding Section 78-12-25.5 unconstitutional, as it did the products liability statute of repose in Berry, this Court would not be treading new ground, but would be joining a growing number of jurisdictions that have done likewise. See, e.g., Id.; Saylor v. Hall, 497 S.W. 2d 218 (Ky. 1973); Daugaard v. Baltic Cooperative Building Supply Ass'n, 349 N.W. 2d 419 (S.D. 1984); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980).

Based upon the above discussion, this Court should determine that Section 78-12-25.5 is an unjustified abrogation of Plaintiff's constitutional rights under Article I Section 11.

POINT IV

SECTION 78-12-25.5 IS A CONSTITUTIONAL DENIAL OF EQUAL PROTECTION UNDER THE UTAH AND UNITED STATES CONSTITUTIONS

The appellants in Berry also argued that the products liability statute of repose was an unconstitutional denial of equal protection under Article I Section 24 of the Utah Constitution and the 14th Amendment of the United States Constitution. Either because it determined that the Open Court's Provision was more applicable to the facts at hand or because that provision effectively disposed of the case, this Court did not address the equal protection argument in Berry. Despite the apparent inclination of this Court to at least downplay an equal protection challenge in a case like this, Plaintiff will briefly address that issue here.

Article I section 24 of the Utah Constitution provides that "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. Similarly, the 14th amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the law. U.S. Const. amend. 14, § 1. This Court has recently construed the application of both of the above provisions in Malan v. Lewis, 693 P.2d 661 (Utah 1984). There, this Court struck down as unconstitutional the Utah Automobile Guest Statute, deciding the case under Article I section 24 of the Utah Constitution. Therefore this Court did not consider constitutional arguments under the Utah due process clause and

the Open Court's Provision. Id. at 693. In holding the Guest Statute unconstitutional under Article I Section 24, this Court established the following criteria:

Article I, § 24 protects against two types of discrimination. First a law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute. If the relationship of the classification to the statutory objectives is unreasonable or fanciful, the discrimination is unreasonable.

. . . .

When persons are similarly situated, it is unconstitutional to single out one person or group of persons from among a larger class on the basis of a tenuous justification that has little or no merit.

Id. at 670-71 (citations omitted). Accord, Condemarin v. University Hospital, 107 Utah Adv. Rep. 5, 8-11 (Utah May 1, 1989); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 889-90 (Utah 1988).

In this case, it would appear that Section 78-12-25.5 is not unconstitutional under the first type of discrimination described in Malan. All plaintiffs who have brought a cause of action prior to seven years before completion are treated the same and all plaintiffs who have brought a cause of action more than seven years after completion are treated the same. In other words, it is the seven year period from date of completion that determines the class into which a particular person falls. Therefore, in order for Section 78-12-25.5 to pass constitutional muster, there must be some reasonable justification and legislative objective

that is fulfilled by the classification. The analysis thus becomes essentially the same as in Berry.¹

Based upon the analysis in Berry and Malan, the rationale for upholding Section 78-12-25.5 is not justified. Additionally, other jurisdictions have determined that statutes of repose similar to Section 78-12-25.5 are unconstitutional denials of equal protection. See e.g., Shebulia v. Architects Hawaii Ltd., 65 Hawaii 26, 647 P.2d 276 (1982); Loyal Order of Moose Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977); Broome v. Truluck, 270 S.C. 227, 241 S.E. 2d 739 (1978); Kallas Milwark Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W. 2d 454 (1975).

POINT V

THERE IS A GENUINE ISSUE OF MATERIAL FACT, PRECLUDING
SUMMARY JUDGMENT, AS TO WHETHER SOUTHGATE KNEW OR
SHOULD HAVE KNOWN OF ANY DEFECT IN THE GOLF COURSE

Plaintiff's primary claim of negligence against Southgate is that, as the owner of the golf course, it failed to properly inspect the premises for defects and dangerous conditions, to warn Plaintiff of such conditions and to properly repair and maintain the course in a reasonably safe condition. It is clear

¹In Condemarin, two justices in the majority expressed some dissatisfaction with the equal protection analysis, rather than a due process analysis, in determining the constitutionality of a governmental immunity provision. Condemarin, 107 Utah Adv. Rep. 5, at 11 (Durham, J., lead opinion), 20-21 (Zimmerman, J. concurring in part). On the other hand, the third justice concurring in the majority believed the equal protection approach to be more appropriate. Id. at 22 (Stewart, J., separate opinion). Because of this apparent divergence in the Court, Plaintiff has presented for review analyses under both approaches.

that Southgate has such a duty under Utah case law. Stevens v. Colorado Fuel & Iron, 24 Utah 2d 214, 469 P.2d 3, 5 (1970); Rogalski v. Phillips Petroleum Co., 3 Utah 2d 203, 282 P.2d 304, 307 (1955).

Southgate has further contended that for Plaintiff to be able to enforce this duty she must be able to show that Southgate either created the dangerous condition or that it had actual or constructive notice of it. Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566, 569 (1967).

In order to affirm the Summary Judgment in favor of Southgate, this Court must consider the evidence in a light most favorable to Plaintiff and still conclude that there are no genuine issues of material fact and that Southgate is entitled to judgment as a matter of law. Themy v. Seagull Enterprises, Inc., 595 P.2d 526, 528-29 (Utah 1979). In other words, as long as any part of the pleadings, depositions, answers to interrogatories, admissions or affidavits show that there is any genuine issue of material fact, summary judgment is not warranted and this Court should reverse. Utah R. Civ. P. 56(c).

Assuming that the above stated law regarding the duty of Southgate is correct, the sworn statements on file with the Court establish that there are genuine issues of material fact precluding summary judgment as follows:

1. Did Southgate create a defective or dangerous conditions that existed on April 5, 1986?

2. Did Southgate know or should it have known of a defective or dangerous condition that existed on the golf course?

The first issue of fact will be discussed in Point VI, below. The lower Court determined that there was no genuine issue of fact as to whether Southgate knew or should have known of any defect or dangerous condition in the golf course. However, the affidavits establish that there is an issue of fact as to whether Southgate had actual or constructive notice.

A. Actual Notice.

Plaintiff's expert stated in his affidavit that he believed there was a defect in the design and/or construction of the golf course, because of the proximity of the 14th and 15th tees without a natural or artificial barricade between them.² Further, Mr. Rainville stated that such defect existed on the date of the accident, April 5, 1986. Therefore, a reasonable inference would be that the defect could have been caused by the modifications made to the 14th hole by Southgate itself, after its purchase from Lava Hills but before the accident. Therefore, if Southgate created all or a portion of the defect, it must have had actual notice of it.

²Obviously, according to Mr. Rainville, it would have been unnecessary for an artificial or natural barrier if hole 15 had been shortened to obviate the danger caused by the proximity of the tee boxes.

B. Constructive Notice.

Considering the Affidavit of Mr. Rainville in a light most favorable to Plaintiff, this Court must assume that there was a defect in the golf course as of April 5, 1986. In their affidavits, both Richard Schmutz and William Atkin state that "[t]he layout of the course as it existed at the time of Plaintiff's accident was patent and easily observable by any person playing the course. Additionally, a person preparing to tee off on the 15th hole would have previously played the 14th hole and would be familiar with the proximity and location of the two tees." Schmutz Affidavit ¶¶ 8-9; Atkin Affidavit ¶¶ 7-8. If the layout and condition of the course was so observable to Plaintiff, then it should have been even more observable to Southgate, who owned and operated the course on a daily basis. Therefore, Plaintiff has raised a genuine issue as to whether Southgate should have known of a defect in the course that they had been operating and even modifying during the past 11 months.

Finally, the lower Court had already determined that any defect, assuming one existed, "could have been discovered by Defendant Southgate through such an inspection as would be made in the exercise of ordinary care and prudence." Findings ¶ 10. Hence, it would appear that the lower court's own rulings as to constructive notice are inconsistent. If the lower court is not even sure in which direction to go, it would appear that there is at least a genuine issue of material fact.

POINT VI

THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER
SOUTHGATE CREATED A DEFECT OR DANGEROUS CONDITION
ON THE GOLF COURSE, WHICH CAUSED PLAINTIFF'S INJURY

Even assuming the lower court was correct in determining that there was no genuine issue of material fact as to whether Southgate knew or should have known of any defect in the golf course, that court should have not granted judgment as a matter of law because there was still an issue as to whether Southgate created a defective or dangerous condition.

As stated above, Mr. Rainville has stated that, in his opinion, there was a defect in the golf course as of April 5, 1986. April 5, 1986 was after Southgate had performed various modifications to the 14th hole. Yet, even after those modifications, the golf course was still defective. By its modifications of the 14th hole, Southgate thus at least contributed to creating the unsafe condition of the golf course on April 5, 1986. Whether Southgate's contribution to the condition of the golf course gives rise to its liability is, therefore, a genuine issue of material fact.

CONCLUSION

This Court should reverse the lower Court as to the Summary Judgments of all Defendants and remand the case for trial before the trier of facts. If this Court is inclined to reverse the Summary Judgment in favor of Jackson, LaGant and Willie on the grounds that they have waived the statute of limitations defense,

such reversal should be with directions to the lower Court that Section 78-12-25.5 is unconstitutional under the Open Courts and/or Equal Protection Provisions of the Utah and United States Constitutions.

RESPECTFULLY SUBMITTED this 20th day of July, 1989.

CHAMBERLAIN & HIGBEE

A handwritten signature in cursive script, reading "Floyd W. Holm", is written over a horizontal line.

FLOYD W HOLM

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July, 1989, four (4) copies of the within and foregoing BRIEF OF APPELLANT were served on the following, by first class mail, postage fully prepaid.

Richard K. Glauser, Esq.
HANSON, EPPERSON & SMITH
Attorneys for Defendant/Appellee
Southgate Golf Course
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970

Paul Graf, Esq.
Attorney for Defendant/Appellee
John Willie
P.O. Box 1637
St. George, Utah 84770

Terry L. Wade, Esq.
SNOW, NUFFER, ENGSTROM & DRAKE
Attorneys for Defendant/Appellee
Rex Jackson
90 East 200 North
P.O. Box 400
St. George, Utah 84770

Timothy B. Anderson, Esq.
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendant/Appellee
John LaGant
249 East Tabernacle, Suite 200
St. George, Utah 84770


FLOYD W HOLM

ADDENDUM

'88 OCT 26 AM 10 17

CLERK
DEPUTY *M. J. G. G. G.*

FLOYD W HOLM [1522]
CHAMBERLAIN & HIGBEE
Attorneys for Plaintiff
250 South Main Street
P.O. Box 726
Cedar City, Utah 84720
Telephone: (801) 586-4404

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

CORY KLATT,)	
)	
Plaintiff,	)	SECOND AMENDED
	)	COMPLAINT
)	
vs.)	
)	
IKE THOMAS; JOHN DOE I, d/b/a)	
SOUTHGATE GOLF COURSE; LAVA)	
HILLS RESORT CORPORATION, a)	
Utah corporation; REX JACKSON;)	
JOHN LaGANT; and JOHN WILLIE,	)	Civil No. 86-1116
)	
Defendants.)	

Plaintiff, for cause of action against Defendants, alleges
as follows:

1. Defendant Ike Thomas (hereinafter "Thomas") is an
individual residing in Blaine County, Idaho.

2. Defendant John Doe I is an unknown individual,
partnership or corporation, doing business as Southgate Golf
Course (hereinafter "Southgate"). Southgate has its principal
place of business in Washington County, Utah. Pursuant to Rule
9(a)(2), Utah Rules of Civil Procedure, Plaintiff reserves the
right to substitute the true name of John Doe I at such time as
such true name becomes known to her.

1 3. At all times pertinent herein, Defendant Lava Hills
2 Resort Corporation (hereinafter "Lava Hills") was a corporation
3 organized and existing under the laws of the State of Utah, with
4 its principal place of business in Washington County, Utah.

5 4. Upon information and belief, Defendants Rex Jackson,
6 John LaGant and John Willie (hereinafter "Lava Hills
7 individuals") are individuals residing in Washington County,
8 Utah.

9 5. The accident that is the subject of this accident took
10 place in Washington County, Utah.

11 6. Plaintiff, at all times pertinent herein, was a business
12 invitee of Southgate.

13 7. At all times pertinent herein, the Lava Hills
14 individuals were officers, employees or agents of Lava Hills,
15 acting within the course and scope of such employment or agency.

16 8. On or about April 5, 1986 at approximately 12:15 p.m.,
17 Plaintiff was standing on the tee-box of the 15th hole of the
18 golf course owned and operated by Southgate in St. George, Utah.

19 9. At the same time and place, Thomas was on the tee-box
20 of, upon information and belief, the 14th hole of the same golf
21 course, which was approximately 50 to 75 yards southwest of
22 Plaintiff. The 14th hole was a temporary hole being used during
23 modification of the golf course.

24 10. Immediately thereafter, and while Plaintiff was still
25 standing on the 15th tee, Plaintiff hit a golf ball from the 14th
tee in a northerly direction, the ball sliced to the right and,

1 without warning from Thomas, struck Plaintiff on the face,
2 causing her substantial injury.

3 11. As a result of the accident, Plaintiff sustained
4 injuries to her face, including, but not limited to, her
5 forehead, nose and left eye.

6 12. The accident and injuries to Plaintiff resulted from
7 the following acts of negligence on the part of Thomas:

8 (a) Failure to keep his golf ball under proper
9 control;

10 (b) Hitting his golf ball from the tee without first
11 ascertaining that it could be done safely and without injury
12 to others, including Plaintiff; and

13 (c) Failure to warn Plaintiff of the golf ball
14 travelling in Plaintiff's direction so that Plaintiff could
15 take appropriate precautions for her safety.

16 13. The negligent acts of Thomas were a proximate cause of
17 Plaintiff's injuries.

18 14. The accident and injuries to Plaintiff resulted from
19 the following acts of negligence on the part of Southgate:

20 (a) Allowing its patrons to play on the temporary
21 hole, No. 14 while modifications were in progress;

22 (b) Failure to erect a fence, screen or other
23 appropriate barrier for the safety of its business invitees,
24 including Plaintiff, between the 14th tee and fairway and
25 the 15th tee;

RLAIN
3EE

1 MAIN
C 726
CITY,
1720
5-4404

1 (c) Failure to warn its business invitees, including
2 Plaintiff and Thomas, of the danger posed by the close
3 proximity of the tees for the 14th and 15th holes; and

4 (d) Failure to take other appropriate precautions for
5 the safety of its business invitees, including Plaintiff.

6 15. The negligent acts of Southgate were a proximate cause
7 of Plaintiff's injuries.

8 16. The accident and injuries to Plaintiff resulted from
9 the following acts of negligence on the part of the Lava Hills
10 individuals and Lava Hills by and through the Lava Hills
11 individuals:

12 (a) Failure to safely design the golf course to
13 prevent injury to the general public, including Plaintiff.

14 (b) Failure to safely construct the golf course so as
15 to prevent injury to the general public, including
16 Plaintiff.

17 (c) Failure to inform Southgate and/or its other
18 successors in interest of latent defects it knew or should
19 have known existed on the golf course, which could cause
20 injury to the general public, including Plaintiff.

21 17. The negligent acts of the Lava Hills individuals and
22 Lava Hills were a proximate cause of Plaintiff's injuries.

23 18. As a proximate result of the negligence of all
24 Defendants, Plaintiff has incurred hospital and medical expenses
25 in an amount in excess of Eight Hundred Eighty Five Dollars
(\$885.00) and sustained physical pain and mental anguish.

1 19. It is anticipated that Plaintiff will sustain physical
2 pain and mental anguish for a long period of time in the future,
3 if not for the remainder of her life. By reason of the
4 negligence of Defendants, Plaintiff has been damaged generally in
5 the sum of Fifty Thousand Dollars (\$50,000.00).

6 20. Plaintiff has incurred medical and hospital expenses
7 and will continue to do so during and after this litigation, all
8 in an amount to be proven at the time of trial or other
9 appropriate hearing.

10 21. As a proximate result of the negligence of both
11 Defendants, Plaintiff has been unable to fully continue her
12 customary employment and will be unable to do so for a long
13 period of time in the future, if not for the remainder of her
14 life.

15 22. Plaintiff has lost income and will continue to do so
16 during and after this litigation, all in an amount to be proven
17 at the time of trial or other appropriate hearing.

18 23. Pursuant to Section 78-27-44, Utah Code Annotated,
19 1953, as amended, Plaintiff is entitled to interest on all
20 special damages incurred by her at the rate of eight percent (8%)
21 per annum from and after the date of the accident until the date
22 of judgment herein.

23 WHEREFORE, Plaintiff prays for judgment against Defendants,
24 jointly and severally, as follows:
25

1 1. For special damages, including medical expenses and lost
2 income, together with interest thereon as may be determined by
3 the Court at the time of trial;

4 2. For future special damages, including medical expenses
5 and lost income, the exact amount of which is unknown at this
6 time, but for which may be determined by the Court at the time of
7 trial;

8 3. For general damages in the sum of \$50,000.00;

9 4. For costs of this action; and

10 5. For such other and further relief as the Court deems
11 just and proper.

12 DATED this 21st day of October, 1988.

13 CHAMBERLAIN & HIGBEE

14
15 

16 FLOYD W. HOLM
17 Attorneys for Plaintiff

18 Plaintiff's Address:

19 1885 Pelican Lane
20 West Yellowstone, Montana 59758
21
22
23
24
25

CERTIFICATE OF MAILING

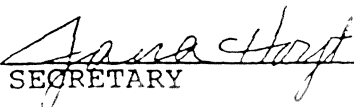
I HEREBY CERTIFY that I hand delivered a full, true and correct copy of the foregoing SECOND AMENDED COMPLAINT to each of the following, by first class mail, postage fully prepaid on this 25th day of October, 1988:

Richard K. Glauser
HANSON, DUNN, EPPERSON & SMITH
Attorneys for Defendant Southgate
Golf Course
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970

Paul Graf, Esq.
Attorney for Defendant John Willie
94 West Tabernacle
St. George, Utah 84770

Terry L. Wade, Esq.
SNOW, NUFFER, ENGSTROM & DRAKE
Attorney for Defendant Rex Jackson
90 East 200 North
P.O. Box 400
St. George, Utah 84770

Timothy B. Anderson
JONES, WALDO, HOLBROOK & McDONOUGH
249 East Tabernacle
Suite 200
St. George, Utah 84770


SECRETARY

FILED
FIFTH DISTRICT COURT
WASHINGTON COUNTY

'87 OCT 28 AM 9 54

CLERK
DEPUTY L. Williamson

WENDELL E. BENNETT
Bar License #0287
Attorney at Law
Attorney for Defendant Thomas
448 East 400 South, Suite 304
Salt Lake City, Utah 84111
801-532-7846

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

---ooo0ooo---

CORY KLATT,	:	AFFIDAVIT OF VERN THOMAS,
	:	aka IKE THOMAS
Plaintiff,	:	
	:	
vs.	:	
	:	
IKE THOMAS and JOHN DOE I,	:	Civil No. 86-1116
dba SOUTHGATE GOLF COURSE,	:	
	:	
Defendants.	:	

---ooo0ooo---

VERN THOMAS, ALSO KNOWN AS IKE THOMAS, being first duly sworn upon oath, deposes and says:

1. That he is one of the defendants above named.
2. That he makes this affidavit of his own knowledge.
3. That on the 5th day of April, 1986, he was playing golf at the Southgate Golf Course in St. George, Utah. In conjunction with that game of golf, he hit a tee shot from the 14th tee box, intending the ball to go toward the 14th green.
4. That the tee shot from the 14th tee box did not go directly toward the green, but sliced, which is something that occasionally occurs to right handed golfers, and immediately after I

hit the shot, one of the members of my golfing party, namely, Bob Johnson, immediately hollered "fore" at the earliest moment it could be determined that the ball was slicing to the right.

5. I also saw the ball at about the same time I heard Mr. Johnson holler "fore", it taking me a short period of time to see the flight of the ball after I completed my swing, and realizing the ball was slicing to the right toward the 15th tee box, I also hollered "fore" to warn the people standing in that area that a ball was approaching them, and could possibly pose a hazard to them.

6. That both Bob Johnson and myself warned the people standing in the 15th tee box of the travel of my tee shot in that direction as quickly as was humanly possible by hollering "fore" which is the prescribed warning to give when a shot poses a danger to anyone on the golf course.

7. I did not intend my drive, which was hit with a six iron, to slice, and I was aiming directly for the 14th green, however, as will sometimes occur, the ball sliced to the right and traveled in the direction of the 15th tee box which is immediately adjacent to the 14th hole fareway and green.

FURTHER AFFIANT SAITH NOT.

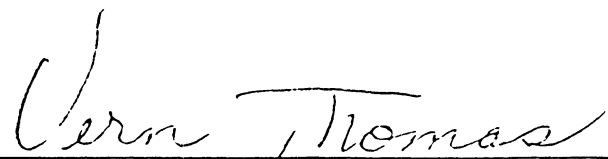
DATED this 13 day of October, 1987.

Vern Thomas

VERN THOMAS

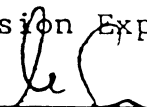
STATE OF IDAHO)
) ss
COUNTY OF BLAINE)


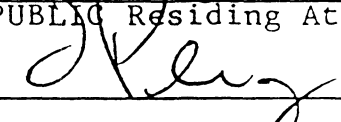
VERN THOMAS, being first duly sworn on oath, deposes and says that he is the defendant above named, that he has made and read the foregoing affidavit and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and as to such matters, believes them to be true.


VERN THOMAS

SUBSCRIBED AND SWORN to before me this 13 day of October, 1987.

My Commission Expires




NOTARY PUBLIC Residing At


88 DEC 13 PM 3 5

CLERK
DEPUTY Alza Allen

Timothy B. Anderson of
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendant Lagant
249 East Tabernacle, Suite 200
St. George, Utah 84770
Telephone: (801) 628-1627

IN THE FIFTH JUDICIAL DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

---ooo0ooo---

CORY KLATT,

Plaintiff,

vs.

IKE THOMAS AND JOHN DOE I,
DBA SOUTHGATE GOLF COURSE,

Defendant.

:

: AFFIDAVIT OF
JOHN LAGANT

:

: Civil No. 86-¹¹¹⁶116

:

---ooo0ooo---

STATE OF California)
County of San Diego) :ss:

John V. Lagant, being first duly sworn, deposes and says:

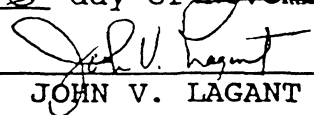
1. I am a Defendant in the above-captioned action.
2. I am a resident of SHERIDAN, WYOMING.
3. I was a principal in the original Lava Hills Resort Corporation, which originally developed the Lava Hills Golf Course (now "Southgate").
4. On DEC, 1984, I sold my interest in said Lava Hills Resort Corporation and terminated my affiliation in all respects with the golf course at that location.
5. I have reviewed the pleadings in this case; specifically Southgate Golf Course's Answers to Interrogatories and Requests for Production of Documents dated September 9, 1987. The Answer to

Interrogatory No. 4 sets for the modifications to the golf course with respect to the 14th and 15th holes where the alleged injury to plaintiff occurred.

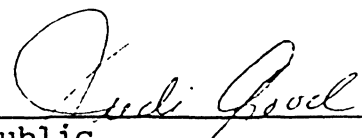
6. The modification involved the movement of the 14th green in October, 1985, and the abandonment of the original 15th green in February, 1986, with attendant construction activity in the area until October, 1986.

7. I neither authorized nor had any knowledge of or involvement whatsoever in the modification, design or construction work referred to in Plaintiff's complaint, and more specifically, described in the Answer to Interrogatory No. 4 referred to above.

DATED this 6 day of ^{DECEMBER 24}~~November~~, 1988.


JOHN V. LAGANT

Subscribed and sworn to before me this 6th day of November, 1988.


Notary Public
Residing in: INDIO, CA

My Commission Expires:

5-10-89

C:\LAGANT\Affidavit

STATE OF CALIFORNIA

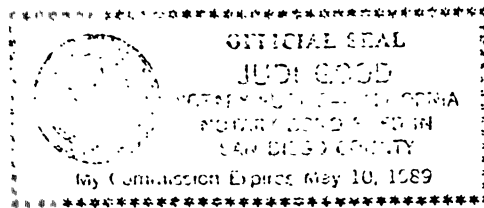
County of Riverside ss.

On this 6th day of December, in the year 1988, before me, the undersigned, a Notary Public in and for said County and State, personally appeared John V. Lagan

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name John V. Lagan subscribed to this instrument and acknowledged that he executed it.

WITNESS my hand and official seal.

Judi Good
Notary Public in and for said County and State.

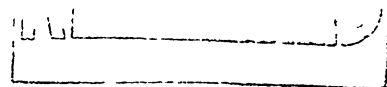


CD-15 ✓

76

A13

PAUL F. GRAF #1229
ATTORNEY FOR DEFENDANT JOHN WILLIE
P.O. BOX 1637
ST. GEORGE, UTAH 84765
(801) 628-2757



IN THE FIFTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

CORY KLATT,
Plaintiff,

vs.

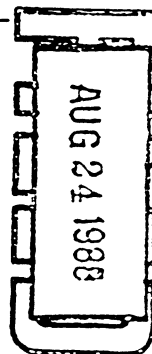
IKE THOMAS; John Doe I dba
Southgate Golf Course; Lava
Hills Resort Corporation,
a Utah Corporation; Rex Jackson;
John LaGant; and John Willie,

Defendants.

AFFIDAVIT OF
JOHN WILLIE

Civil No. 86-1116

C. Smith
CLERK
DEPUTY



STATE OF UTAH)
COUNTY OF WASHINGTON) ss.

John Willie, being duly sworn upon his oath deposes and
says:

1. That I am a defendant in the above-entitled action.
2. That I have personal knowledge of the facts set
forth herein and am competent to testify.

3. That I was an officer and shareholder in Lava Hills
Resort Corporation at the time of its incorporation in
December of 1975.

4. That on July 1, 1976, I resigned as an officer of
the Lava Hills Resort Corporation, but remained as a small
stockholder in Lava Hills Resort Corporation.

5. That as my contribution to the corporation, in order

250

A14

to qualify to become a shareholder, I designed the Lava Hills Golf Course with the aid of John LaGant, golf pro.

6. That in preparing the golf course design, I never at any time acted in the capacity of an independent contractor.

7. That I was never paid any money nor sent bills for any work in relation to the design of said golf course.

8. That I recommended landscaping along all fairways on the north end of the golf course, including the 14th and 15th holes.

9. That as of July 1, 1976, the Lava Hills Golf Course was not complete, specifically the 14th and 15th holes were not complete.

10. That I was not involved in the construction or management of the course at the time of opening.

11. That I was not associated with the Lava Hills Resort Corporation during any construction that took place after July 1, 1976, including construction on the 14th and 15th holes of the Lava Hills golf Course.


12. That no landscaping was ever placed along the fairways on the north end of the golf course including the 14th and 15th holes as I recommended and designed.

13. That Rex Jackson had the responsibility of building the golf course as his contribution to the corporation.

14. That John LaGant had the responsibility for operations of the golf course and assistance in design of the golf course as his contribution to the corporation.

FURTHER AFFIANT SAITH NAUGHT.

DATED this 24th day of August, 1988.


John Willie

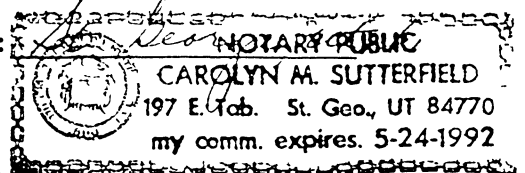
SUBSCRIBED AND SWORN to before me this 24th day of
August, 1988.

My Commission Expires:

May 24, 1992

Carolyn M. Sutterfield
Notary Public

Residing at:



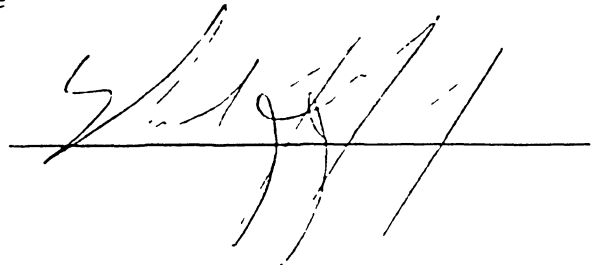
Certificate of Mailing

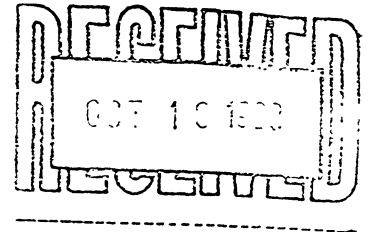
I hereby certify that on the 24th day of August, 1988,
I mailed a copy of the foregoing Affidavit of John Willie to
to each of the following by ~~depositing a copy in the U.S.~~
~~Mail, postage pre-paid, addressed to:~~ *hand delivery to:*

Floyd W. Holm, Esq.
Chamberlain & Higbee
250 South Main Street
P.O. Box 726
Cedar City, Utah 84720

Richard K. Glauser, Esq.
Hanson, Dunn, Epperson & Smith
650 Clark Learning Office Center
175 South West Temple
Salt Lake City, Utah 84101

Terry L. Wade
Kory D. Staheli
Snow, Nuffer, Engstrom & Drake
90 East 200 North
St. George, Utah 84770





PAUL F. GRAF #1229
ATTORNEY FOR DEFENDANT JOHN WILLIE
P.O. BOX 1637
ST. GEORGE, UTAH 84765
(801) 628-2757

IN THE FIFTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

CORY KLATT,)	
Plaintiff,	)	CO-DEFENDANT JOHN WILLIE'S
	)	RESPONSE TO CO-DEFENDANT
vs.	)	SOUTHGATE GOLF COURSE'S
	)	REQUEST FOR ADMISSIONS
IKE THOMAS; John Doe I dba)	
Southgate Golf Course; Lava)	
Hills Resort Corporation,)	
a Utah Corporation; Rex Jackson;)	
John LaGant; and John Willie,)	
)	
Defendants.	)	Civil No. 86-1116
)	

COMES NOW Co-defendant John Willie by and through Paul F. Graf, his attorney of record in the above captioned matter and responds to Co-defendant Southgate Golf Course's requests for admissions as follows:

ADMISSION REQUEST NO. 1: Admit that you designed the Lava Hills Golf Course.

RESPONSE TO ADMISSION REQUEST NO. 1: John Willie admits that he designed the Lava Hills Golf Course with the assistance of John LaGant.

ADMISSION REQUEST NO. 2: Admit that at the time you designed the Lava Hills Golf Course, you were acting as an independent contractor.

RESPONSE TO ADMISSION REQUEST NO. 2: John Willie denies that he ever worked as an independent contractor in relation

to his activities with Lava Hills Golf Course.

ADMISSION REQUEST NO. 3: Admit that the Lava Hills Golf Course was built by Rex Jackson.

RESPONSE TO ADMISSION REQUEST NO. 3: John Willie believes that Rex Jackson built the Lava Hills Golf Course. John Willie does admit that Rex Jackson had the responsibility to see that the golf course was built.

ADMISSION REQUEST NO. 4: Admit that Rex Jackson built the Lava Hills Golf Course according to your designs.

RESPONSE TO ADMISSION REQUEST NO. 4: John Willie denies that the Lava Hills Golf Course was built according to all his designs and recommendations. His plan may have been used as a guide, but his specific recommendations for holes 14 and 15 were not followed in every aspect.

ADMISSION REQUEST NO. 5: Admit that the Lava Hills Golf Course remained unchanged and unmodified until it was sold and the name changed to the Southgate Golf Course.

RESPONSE TO ADMISSION REQUEST NO. 5: John Willie has no basis to admit or deny this request. He disassociated himself with the golf course on July 1, 1976, prior to the completion of the course, more particularly, prior to the completion of holes 14 and 15. He does not know the condition of the golf course when it was initially completed or the condition at the time of sale.

ADMISSION REQUEST NO. 6: Admit that the Lava Hills Golf Course as originally designed was not defective.

RESPONSE TO ADMISSION REQUEST NO. 6: John Willie admits

that the Lava Hills Golf Course as originally designed was not defective.

ADMISSION REQUEST NO. 7: Admit that the Lava Hills Golf Course as originally built was not defective.

RESPONSE TO ADMISSION REQUEST NO. 7: John Willie has no knowledge of the conditions of the originally completed golf course, but admits that if his plans and recommendations were followed, then the Lava Hills Golf Course as originally built was not defective.

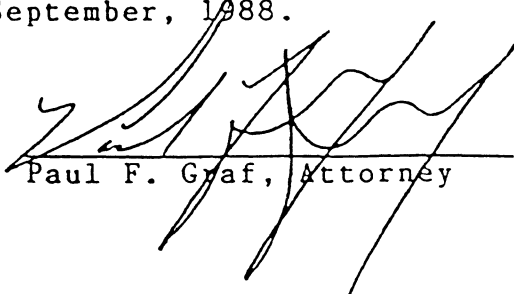
ADMISSION REQUEST NO. 8: Admit that the modifications to the 14th green made by the Southgate Golf Course increased the angle of play on the 14th hole away from the 15th tee area.

RESPONSE TO ADMISSION REQUEST NO. 8: John Willie has no knowledge of the initially completed 14th hole and 15th tee or modifications later made.

ADMISSION REQUEST NO. 9: Admit that the modification referred to above, made the course safer than when originally constructed.

RESPONSE TO ADMISSION REQUEST NO. 9: John Willie has no knowledge of the modifications made to the 14th hole and 15th tee.

DATED this 22nd day of September, 1988.



Paul F. Graf, Attorney

88 AUG 12 PM 4 13

CLERK
DEPUTY

[Signature]

TERRY L. WADE -A 3882
SNOW, NUFFER, ENGSTROM & DRAKE
A Professional Corporation
90 East 200 North
P.O. Box 400
St. George, Utah 84770
801/628-1611
File #532501/KDSmisc

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

CORY KLATT,)	
Plaintiff,	)	AFFIDAVIT OF REX
vs.	)	JACKSON
IKE THOMAS; JOHN DOE I dba)	
SOUTHGATE GOLF COURSE; LAVA)	
HILLS RESORT CORPORATION,)	
a Utah Corporation; REX JACKSON;)	
JOHN LaGANT; and JOHN WILLIE,)	
Defendants.	)	Civil No. 86-1116

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

Rex Jackson, being duly sworn upon his oath deposes and says:

1. That I am a defendant in the above action.
2. That I have personal knowledge of the facts set forth herein and am competent to testify.
3. That I was an officer and shareholder in Lava Hills Resort Corporation from the time it was incorporated in December of 1975, until May of 1985 when I sold my shares to Southgate Golf Course.
4. That I had nothing to do with creating a design for the Lava Hills Golf Course.

5. That the golf course was designed by John Willie.

6. That John Willie designed the Golf Course in the capacity of an independent contractor.

7. That John Willie had complete control over designing the Lava Hills Golf Course.

8. That I have exercised no control whatsoever over the golf course from the date I sold my shares in the corporation to Southgate, and specifically, that I had no control over the course in April of 1986.

9. That after Southgate purchased the golf course, it changed the location of the 14th green/hole, as well as the direction of the 14th tee box.

10. That in April of 1986, the 14th green/hole was in a different location than it was in when the golf course was owned by Lava Hills, and furthermore, the direction or angle of the 14th tee box was materially different as of the said date than it had been during the ownership of Lava Hills.

11. That during the approximately 10 years the golf course was owned and operated by Lava Hills, there were no major accidents on the golf course, and specifically none involving the 14th and 15th holes.

FURTHER AFFIANT SAITH NAUGHT.

DATED this 12 day of aug, 1988.

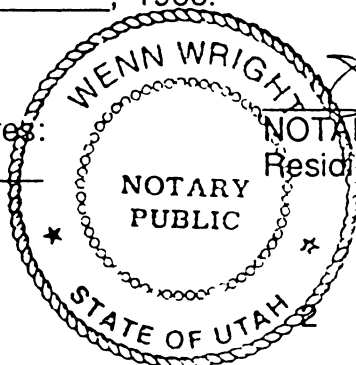
Rex L. Jackson

REX JACKSON

SUBSCRIBED AND SWORN to before me this 12th day of

August, 1988.

My Commission Expires:
11-2-88



Wenn Wright

NOTARY PUBLIC
Residing at: St George, Utah

MAILING CERTIFICATE

I hereby certify that on the 12th day of August, 1988, I served a copy of the foregoing AFFIDAVIT OF REX JACKSON on each of the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Floyd W. Holm, Esq.
CHAMBERLAIN & HIGBEE
250 South Main Street
P.O. Box 726
Cedar City, Utah 84720

Richard K. Glauser, Esq.
HANSON, DUNN, EPPERSON & SMITH
650 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101


Secretary

'87 OCT 6 PM 1 26

CLERK _____
DEPUTY L. Williamson

LOWELL V. SMITH, #3006
RICHARD K. GLAUSER, #4324
HANSON, DUNN, EPPERSON & SMITH
A Professional Corporation
Attorney for: Defendant
650 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101
Telephone: (801) 363-7611

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY,
STATE OF UTAH

CORY KLATT,)	
	)	AFFIDAVIT OF RICHARD SCHMUTZ
Plaintiff,	)	IN SUPPORT OF MOTION FOR
	)	SUMMARY JUDGMENT
vs.)	
)	
IKE THOMAS and JOHN DOE I,)	
dba SOUTHGATE GOLF COURSE,)	
	)	Civil No. 86-1116
Defendants.)	

Richard Schmutz, being first duly sworn upon oath,
deposes and says:

1. At the time of the incident underlying plaintiff's
Complaint, affiant was a part-owner of the defendant, Southgate
Golf Course.

2. The affiant has not only owned a golf course but
also golfs regularly and is familiar with typical golf course
rules, etiquette and procedure.

DESIGN OF GOLF COURSE

3. The defendant, Southgate Golf Course, purchased the
grounds in May of 1985. The defendant did not design, construct

or in any way create the golf course. Affiant is informed and believes that the golf course was created in or near the mid-1970s and was designed and constructed by the prior owners, Rex Jackson, John LaGant and John Willie, as agents of the prior owner, Lava Hills Resort Corporation. The course was designed and constructed long before any affiliation with the course existed with defendant, Southgate Golf Course.

MODIFICATIONS TO THE COURSE

4. From the time the defendant purchased the golf course until the accident described in plaintiff's Complaint, only one modification was made to the golf course. This modification was to move the 14th green approximately 130 feet to the northwest. This modification was made approximately during the first two weeks of October, 1985. The effect of this change was to make the 15th tee, where plaintiff was allegedly standing at the time of the accident, further away from the line of fire of patrons on the 14th hole. The reason for the damage was not concern that previous alignment was too close to the 15th tee (it had played that way 7 years without incident). The reason was sale of land that took the original 14th green. The new green was closer to the tee and made a shorter #14 3-par hole, and it was further out of the line of fire from the 15th tee.

NO DEFECT

5. Since affiant became affiliated with the Southgate Golf Course, thousands of patrons played the course as it

appeared at the time of plaintiff's accident. Thousands of patrons also played the course as it existed prior to the modification described above which lessens any danger to patrons on the 15th tee area. Of all the players that played the course, affiant is not aware of any other complaints regarding players on the 15th tee being struck or threatened by balls hit by patrons from the 14th tee area.

6. Affiant believes that the course as it existed at the time of plaintiff's accident did not create an unreasonable risk to patrons besides the risk inherent in the game of golf.

7. The 15th tee is not in the line of fire of patrons playing the 14th hole. At the time of plaintiff's accident, the 15th tee center was approximately 253 feet to the northeast of the 14th tee. The 15th tee was approximately 160 feet to the right of the line of fire of the 14th tee. The 15th tee was approximately 40 degrees to the right of the line of fire from the 14th tee to the 14th green.

ASSUMPTION OF RISK

8. The layout of the course as it existed at the time of plaintiff's accident was patent and easily observable by any person playing the course.

9. Additionally, a person preparing to tee off on the 15th hole would have previously played the 14th hole and would be familiar with the proximity and location of the two tees.

10. The game of golf inherently contains the risk that golf balls will not travel precisely in the intended course. Players are aware of these risks and should be alert to the potential of straying golf balls. Additionally, golfers are required to give adequate warnings to other endangered players by reasonably shouting "fore" when a shot may endanger another player.

DATED this 18th day of September, 1987.

Richard Schmutz
RICHARD SCHMUTZ

STATE OF UTAH)
COUNTY OF Washington ;

RICHARD SCHMUTZ, being first duly sworn on oath, deposes and says that he is a representative of the defendant above named; that he has read the foregoing Affidavit and knows the contents thereof; that the same are true of his own knowledge, except as to matters therein stated upon information and belief, and as to such matters, believes them to be true.

Richard Schmutz
RICHARD SCHMUTZ

SUBSCRIBED AND SWORN to before me
this 18th day of September, 1987.

Jeri Adams
Notary Public
Residing at: 6-1-91

LOWELL V. SMITH, #3006
RICHARD K. GLAUSER, #4324
HANSON, DUNN, EPPERSON & SMITH
A Professional Corporation
Attorney for: Defendant
650 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101
Telephone: (801) 363-7611

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY,
STATE OF UTAH

CORY KLATT,)	
)	
Plaintiff,	)	AFFIDAVIT OF WILLIAM ATKIN
	)	IN SUPPORT OF MOTION FOR.
vs.	)	SUMMARY JUDGMENT
)	
IKE THOMAS and JOHN DOE I,)	
dba SOUTHGATE GOLF COURSE,)	
	)	Civil No. 86-1116
Defendants.)	

William Atkin, being first duly sworn upon oath,
deposes and says:

1. The affiant is currently the superintendant for the defendant, Southgate Golf Course. Prior to May of 1985, he worked as the course superintendant for the prior owner, The Lava Hills Resort Corporation. Prior to May of 1985, the grounds were referred to as The Lava Hills Golf Course. He has been employed and has worked on that course since October of 1981.

DESIGN OF GOLF COURSE

2. The defendant, Southgate Golf Course, purchased the grounds in May of 1985. The defendant did not design, construct or in any way create the golf course. Affiant is informed and believes that the golf course was created in or near the mid-1970s and was designed and constructed by the prior owners, Rex Jackson, John LaGant and John Willie, as agents of the prior owner, Lava Hills Resort Corporation. The course was designed and constructed long before any affiliation with the course existed with defendant, Southgate Golf Course.

MODIFICATIONS TO THE COURSE

3. From the time the defendant purchased the golf course until the accident described in plaintiff's Complaint, only one modification was made to the golf course. This modification was to move the 14th green approximately 130 feet to the southwest. This modification was made approximately during the first two weeks of October, 1985. The effect of this change was to make the 15th tee, where plaintiff was allegedly standing at the time of the accident, further away from the line of fire of patrons on the 14th hole. In essence, this change made it less likely that patrons on the 15th tee would be in or near the line of fire from players on the 14th hole.

NO DEFECT

4. Since affiant became affiliated with the Southgate Golf Course, thousands of patrons played the course as it

appeared at the time of plaintiff's accident. Thousands of patrons also played the course as it existed prior to the modification described above which lessens any danger to patrons on the 15th tee area. Of all the players that played the course, affiant is not aware of any other complaints regarding players on the 15th tee being struck or threatened by balls hit by patrons from the 14th tee area. As the course superintendant for almost six years, affiant would generally be apprised of any danger to patrons while playing the course.

5. Affiant believes that the course as it existed at the time of plaintiff's accident did not create an unreasonable risk to patrons besides the risk inherent in the game of golf.

6. The 15th tee is not in the line of fire of patrons playing the 14th hole. At the time of plaintiff's accident, the 15th tee center was approximately 253 feet to the northeast of the 14th tee. The 15th tee was approximately 160 feet to the right of the line of fire of the 14th tee. The 15th tee was approximately 40 degrees to the right of the line of fire from the 14th tee to the 14th green.

ASSUMPTION OF RISK

7. The layout of the course as it existed at the time of plaintiff's accident was patent and easily observable by any person playing the course.

8. Additionally, a person preparing to tee off on the 15th hole would have previously played the 14th hole and would be familiar with the proximity and location of the two tees.

9. The game of golf inherently contains the risk that golf balls will not travel precisely in the intended course. Players are aware of these risks and should be alert to the potential of straying golf balls. Additionally, golfers are required to give adequate warnings to other endangered players by reasonably shouting "fore" when a shot may endanger another player.

DATED this ____ day of September, 1987.

WILLIAM ATKIN

STATE OF UTAH)
 :
COUNTY OF _____)

WILLIAM ATKIN, being first duly sworn on oath, deposes and says that he is a representative of the defendant above named; that he has read the foregoing Affidavit and knows the contents thereof; that the same are true of his own knowledge, except as to matters therein stated upon information and belief, and as to such matters, believes them to be true.

WILLIAM ATKIN

SUBSCRIBED AND SWORN to before me
this ____ day of September, 1987.

Notary Public
Residing at: _____

WASHINGTON COUNTY

'08 FEB 8 PM 1 07

CLERK

DEPUTY L. Williams

FLOYD W HOLM [1522]
CHAMBERLAIN & HIGBEE
Attorneys for Plaintiff
250 South Main Street
P.O. Box 726
Cedar City, Utah 84720
Telephone: (801) 586-4404

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

CORY KLATT,)	
)	
Plaintiff,	)	AFFIDAVIT OF
	)	DAVID A. RAINVILLE
vs.)	
)	
IKE THOMAS and JOHN DOE I,)	
d/b/a SOUTHGATE GOLF COURSE,	)	Civil No. 86-1116
)	
Defendants.)	

STATE OF CALIFORNIA)
 : ss.
COUNTY OF ORANGE)

I, DAVID A. RAINVILLE, being first duly sworn upon oath,
depose and say as follows:

1. I am a resident of the State of California with offices
in Tustin, Orange County, California.

2. I am presently self-employed as a designer and
consultant for the design of golf courses.

3. I have 25 years experience as a golf course designer.

4. I have personally designed or participated in the design
of over 30 golf courses.

1 5. I am a member of the American Society of Golf Course
2 Architects and have been for five years.

3 6. The American Society of Golf Course Architects is an
4 exclusive society. Membership is only granted after the golf
5 course designer has designed at least five golf courses and has
6 been judged by his peers to be a competent and expert golf course
7 architect.

8 7. In my experience as a golf course designer and
9 architect, I have been called upon and required to determine and
10 insure that golf courses are designed for the maximum safety of
11 those who would play on the golf course.

12 8. I have been qualified as an expert witness in three
13 unrelated court matters and have testified therein concerning the
14 safety of the design of various golf courses.

15 9. I have been requested by Plaintiff in the above-entitled
16 action to render my expert opinion regarding the adequacy of the
17 design and warnings of Defendant's golf course on or about April
18 5, 1986.

19 10. I have relied upon the following information to render
20 my opinions:

21 (a) Copies of the deposition transcripts of Mrs. Cor
22 Klatt and Mr. David Klatt.

23 (b) An aerial photograph with topographical marking
24 of the entire golf course, which was taken prior to April 5
25 1986.

1 (c) An irrigation plan for the golf course dated
2 December 18, 1975.

3 (d) An engineer's drawing of the fourteenth hole and
4 fifteenth tee, which was prepared on or about March 27,
5 1987.

6 (e) Various photographs of the fourteenth tee and
7 green and fifteenth tee of the golf course taken by
8 Plaintiff's counsel in October, 1987.

9 Copies of all of the above-referenced materials with the
10 exception of the depositions of Mr. and Mrs. Klatt, have been
11 attached hereto as Exhibits "A" through "K" and are incorporated
12 herein by this reference.

13 11. Based upon the above information and upon my expertise
14 and experience as a golf course designer and architect, I have
15 formed an opinion as to the adequacy and safety of the design and
16 warnings concerning the use of the Southgate Golf Course, whether
17 such inadequacies, if any, were negligent on the part of
18 Southgate Golf Course and whether such negligence, if any, was a
19 cause of Mrs. Klatt's injuries. A copy of a report outlining my
20 findings and conclusions and expert opinion on the above stated
21 issues is attached hereto as Exhibit "L" and incorporated herein
22 by this reference.

23 DATED this 5th day of February, 1988.

24
25 
DAVID A. RAINVILLE

State of Calif
County of Orange.

SUBSCRIBED AND SWORN to before me this 5th day of
February, 1988.

Casper P Hare

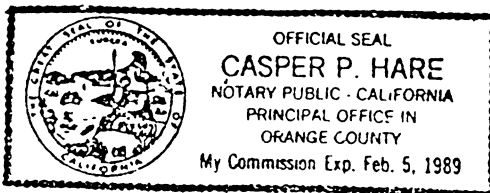
NOTARY PUBLIC

My Commission Expires:
2/5/89

Residing at:

420 El Camino Real #9

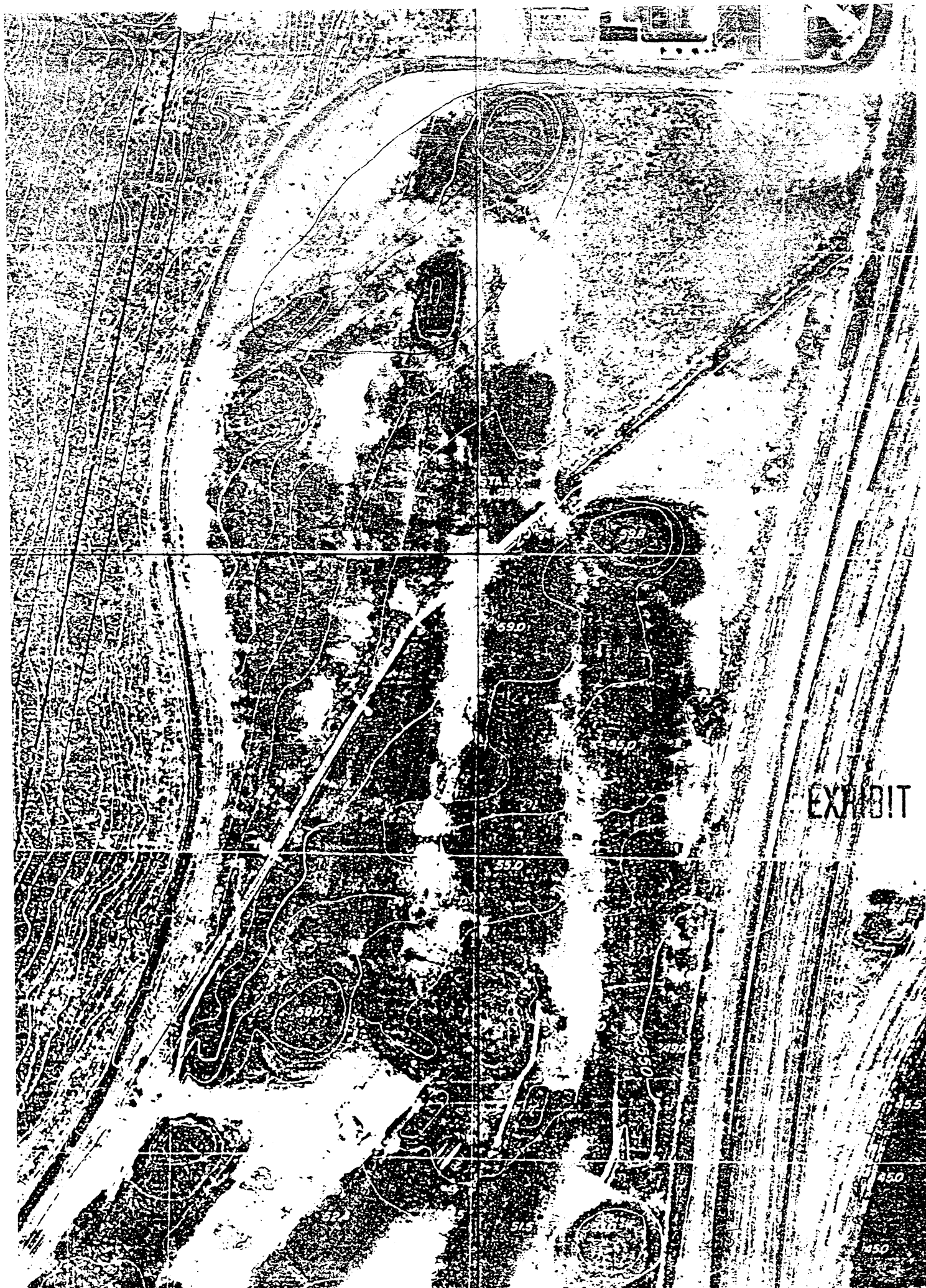
Tustin, Cal. 92680

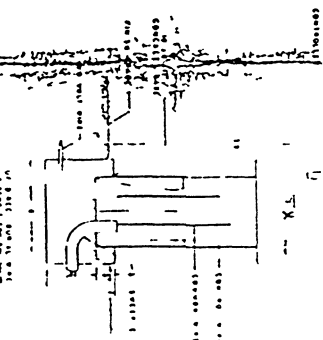


CERTIFICATE OF MAILING

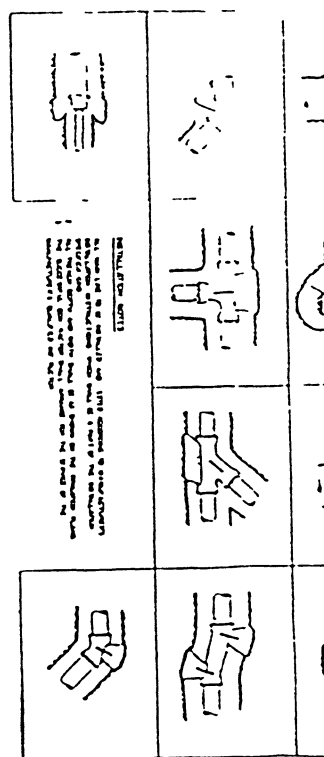
I HEREBY CERTIFY that I mailed a full, true and correct copy
of the foregoing AFFIDAVIT OF DAVID A. RAINVILLE to Mr. Lowell V.
Smith and Mr. Richard K. Glauser, HANSON, DUNN, EPPERSON & SMITH,
Attorneys for Defendant Southgate Golf Course, 650 Clark Leaming
Office Center, 175 South West Temple, Salt Lake City, Utah 84101;
and to Mr. Wendell E. Bennett, Attorney for Defendant Ike Thomas,
448 East 400 South, Suite 304, Salt Lake City, Utah 84111; by
first class mail, postage fully prepaid on this 6th day of
February, 1988.

Veresa Bremholt
SECRETARY

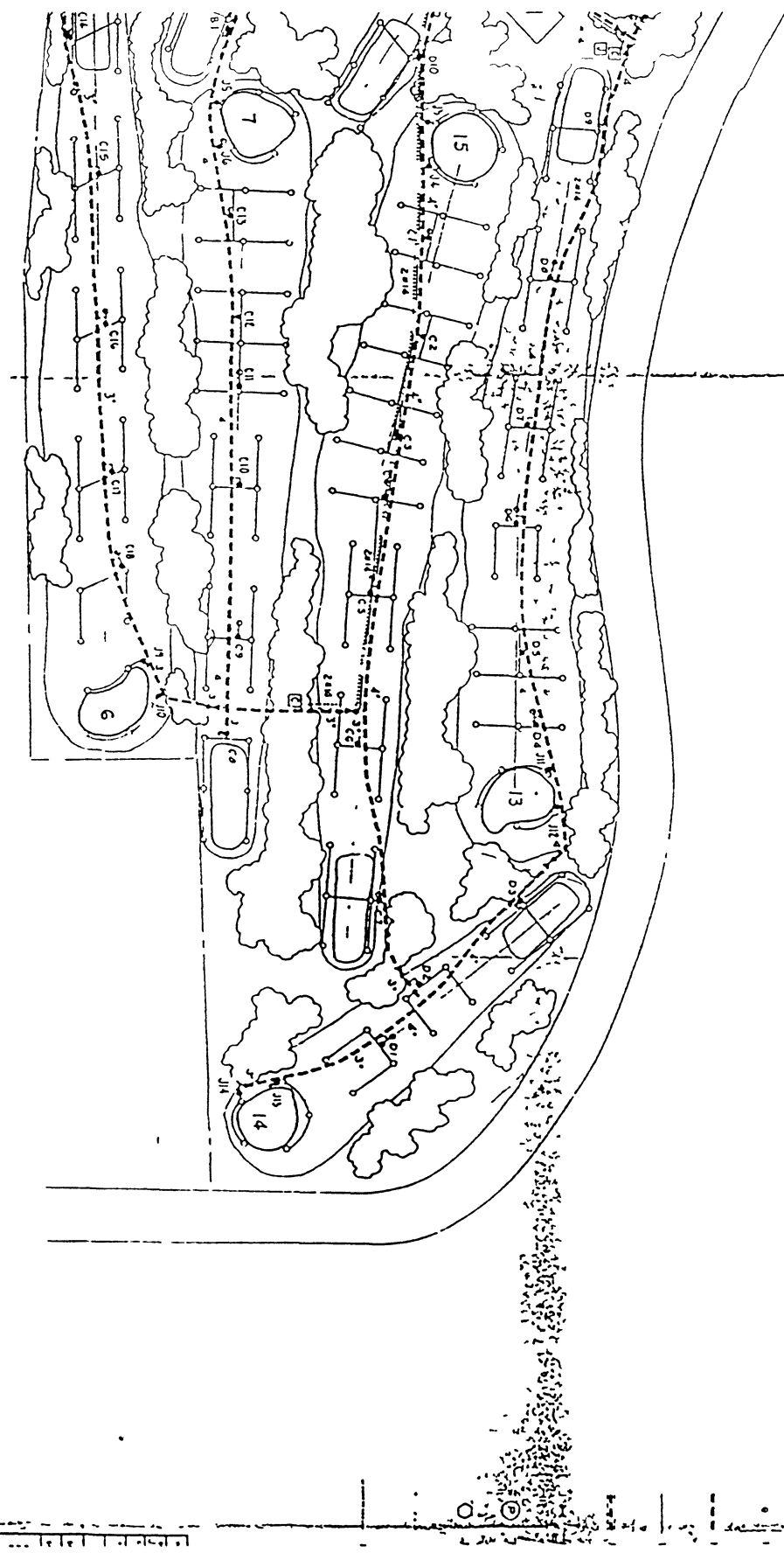




CONTROLLER DETAIL
0 1 10



TYPICAL THRUST BLOCK DETAILS FOR BELL & RING PIPE (AC OR PVC)



NOTE:
THE TEE'S AND GREENS ON THIS DRAWING
ARE NO LONGER IN USE AS OF 3-27-1937.
THE LOCATION OF THE TEE'S AND GREENS
ON THIS PLAT ARE FROM FIELD TIES TAKEN
ON 3-26-1937.

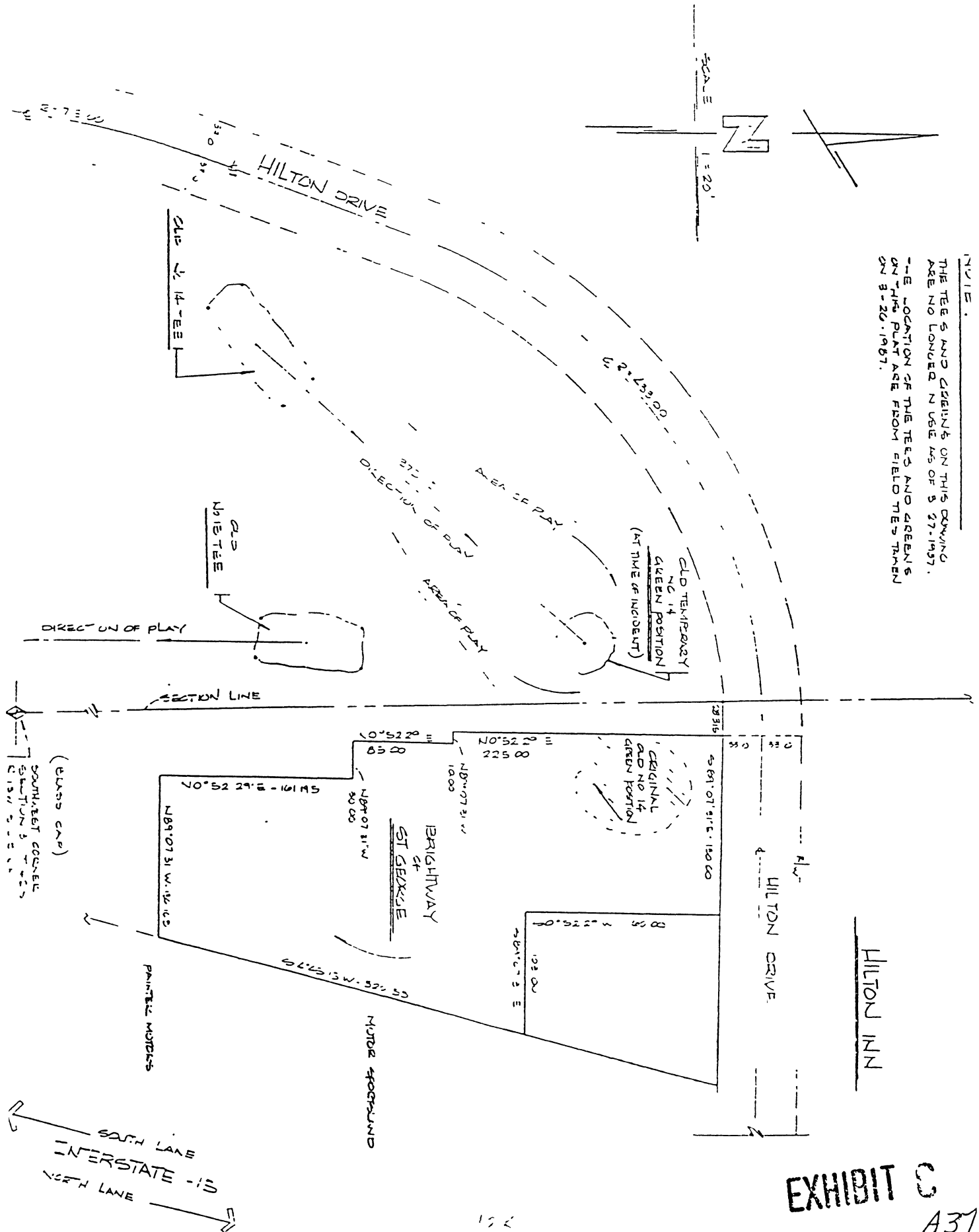


EXHIBIT C

A37



February 2, 1988

Floyd W. Holm
Chamberlain & Higbee
Attorneys at Law
P.O. Box 726
250 South Main
Cedar City, Utah 84720

RE: Klatt v. Southgate Golf Course

Dear Mr. Holm:

I have received the material you provided regarding the fourteenth and fifteenth holes of the Southgate Golf Course.

The engineer's mapping of the fourteenth hole and the fifteenth tee compares favorably with the aerial photograph provided. I checked the scale of the maps against indicated distances on the plot map shown on the engineer's drawing and known standards such as the tennis courts shown in the photo. I feel confident that my measurements of holes and tees are reasonably accurate, particularly for the determination of adequate separation.

The following are answers to your specific questions stated in your letter of November 9, 1987. The questions are restated for ease of comprehension.

1. Q. Was the golf course, as it existed on April 5, 1986, negligently designed such that it created an unreasonable hazard to the safety of persons using the golf course?

A. In my opinion, the proximity of the fifteenth tee to the centerline of the fourteenth hole is inadequate and not in keeping with safe design standards. My measurements indicate a mere 116 feet from the edge of the fifteenth tee to the centerline of the fourteenth hole. This creates an unreasonable hazard to the persons using the fifteenth tee.

2. Q. Could the golf course have economically erected a fence, screen, natural barrier or other appropriate barrier between the fourteenth and fifteenth tees to prevent injury to golfers?

A. The photographs show: a complete absence of trees separating holes fourteen and fifteen. Trees are a very economical method of providing a safety and psychological barrier. Two baffle fences on the right side of number fourteen tee, one at the front and one slightly beyond the first one, and fencing of the right side of fifteen tee could also have been provided. A third solution would be to simply relocate the fifteenth tee by shortening the hole slightly. Any two of these solutions are well within economic reason.

3. Q. Was it feasible for the golf course to provide warning signs, warning instructions or other appropriate warnings as to the danger posed by the proximity of the fourteenth and fifteenth tees?

A. In my opinion, warning signs or instructions are not acceptable solutions and should only be used as supplemental aides to more positive and physical solutions.

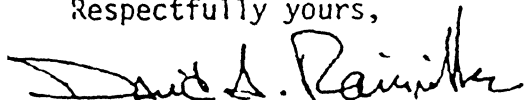
4. Q. Were Mrs. Klatt's injuries caused by the negligence of the golf course in any one or all of the foregoing respects?

A. My opinion stated in answer to question number one applies to this question in the respect that holes number fourteen and fifteen were not designed to safe standards nor were corrective measures taken in the way of protective fencing and the planting of trees to alleviate the unsafe conditions created by improper separation of the holes in question.

In my opinion, the relationship of holes fourteen and fifteen are unsafe by design and that a hazardous condition existed for players on the fifteenth tee.

I would further state that reasonable and economical measures could have been taken in the way of fencing and planting or relocation of fifteen tee to correct the design deficiencies. In my opinion, the design and lack of safety features contributed to the injuries experienced by Mrs. Klatt.

Respectfully yours,



David A. Rainville

DAR/sb

encs.

EXHIBIT D



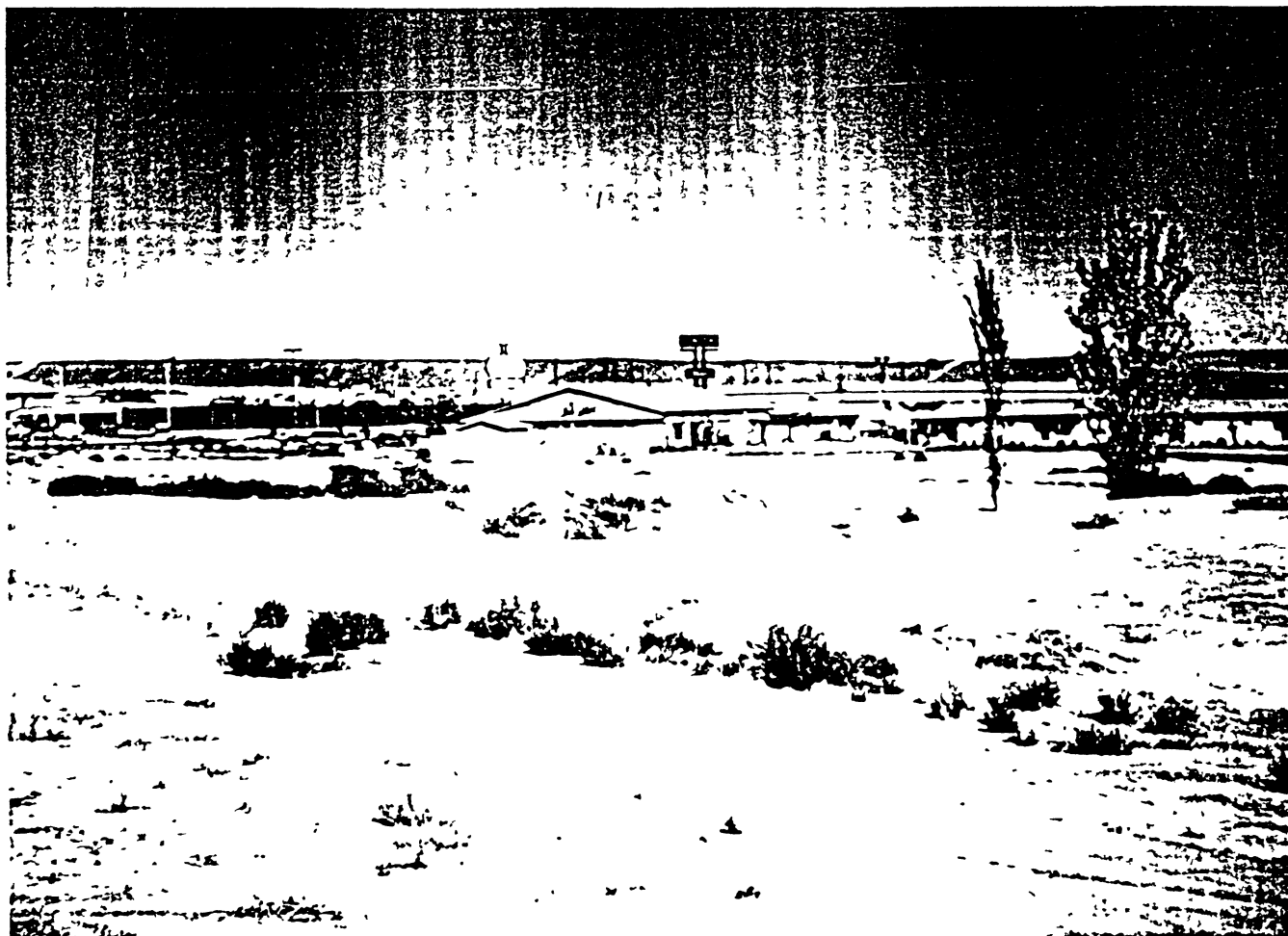
From the 14th tee northeasterly toward the 14th green.

EXHIBIT E



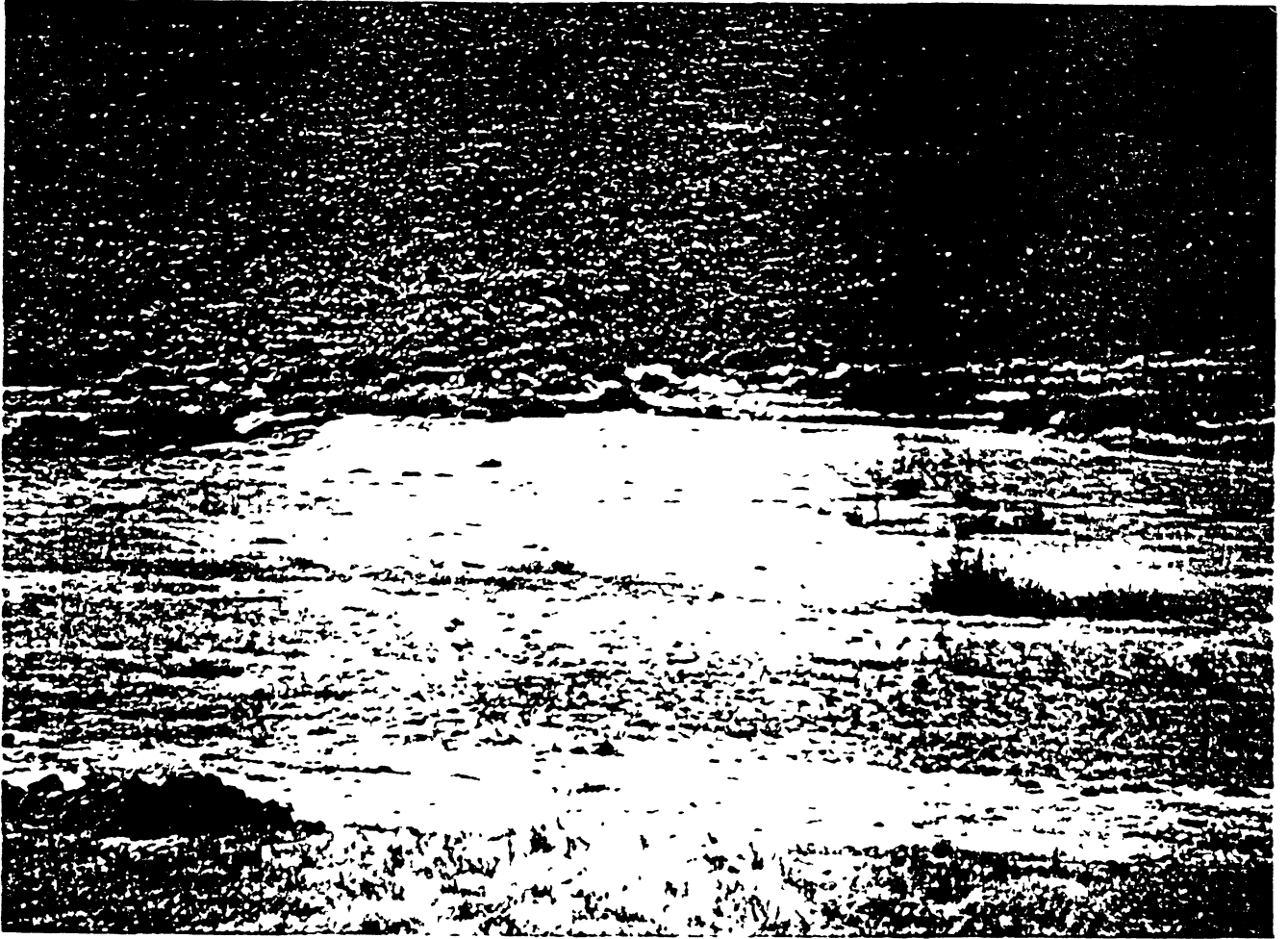
From the 14th tee northeasterly toward the 15th tee.

EXHIBIT F



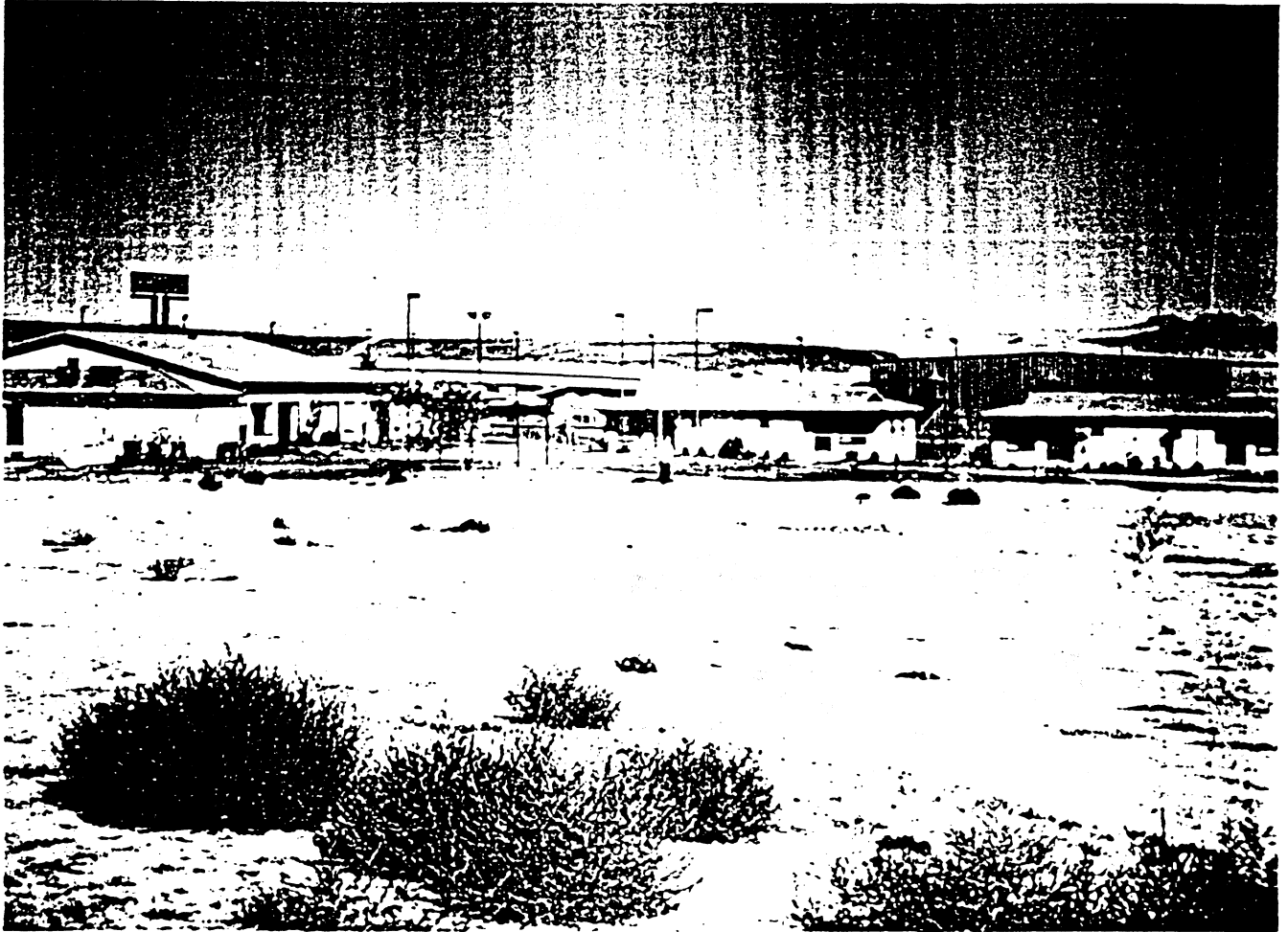
From approximately 50 yards behind the 14th tee (next to the road) showing both the 14th green and 15th tee.

EXHIBIT G



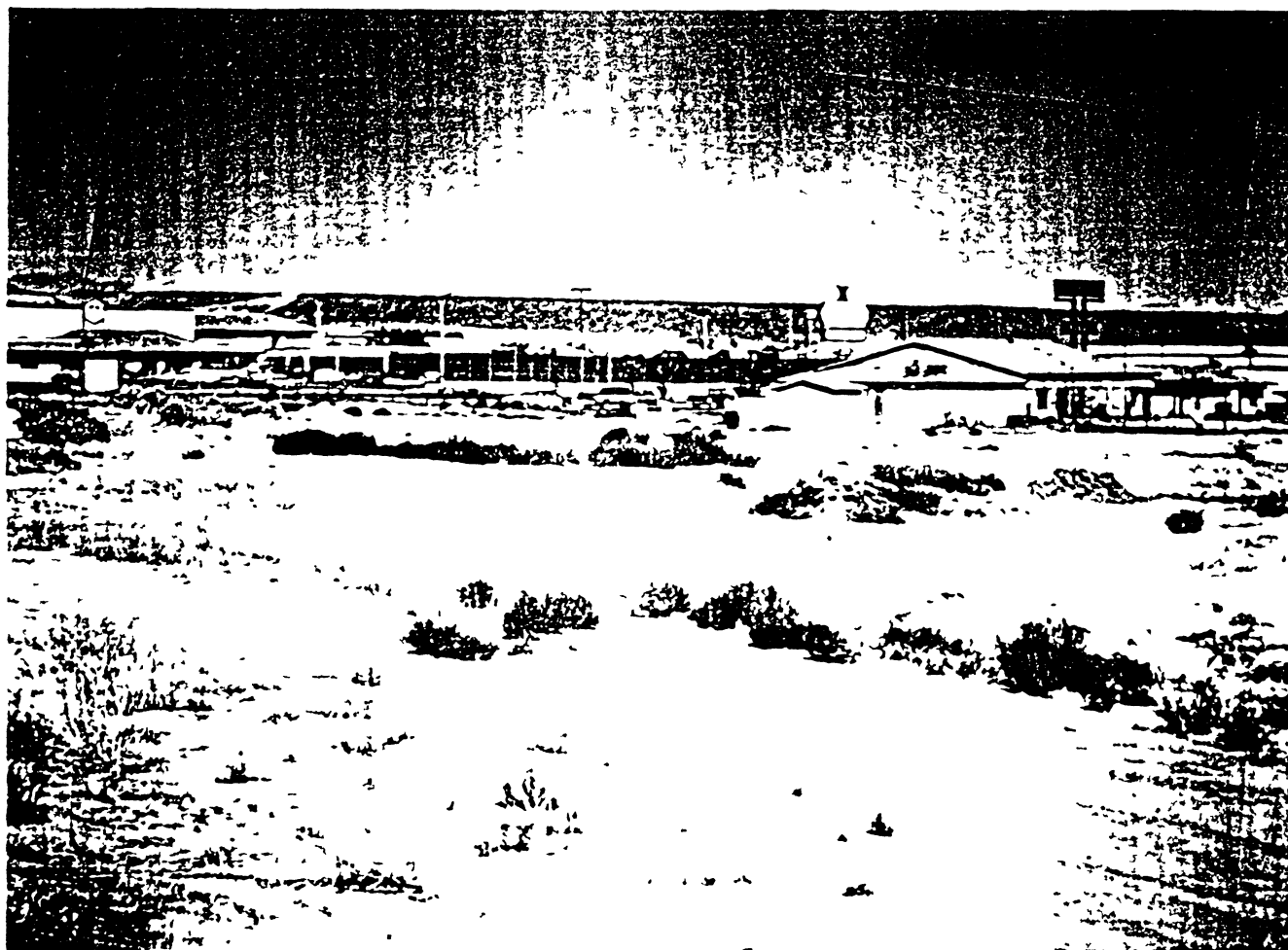
From the 15th tee southwesterly toward the 14th tee.

EXHIBIT H



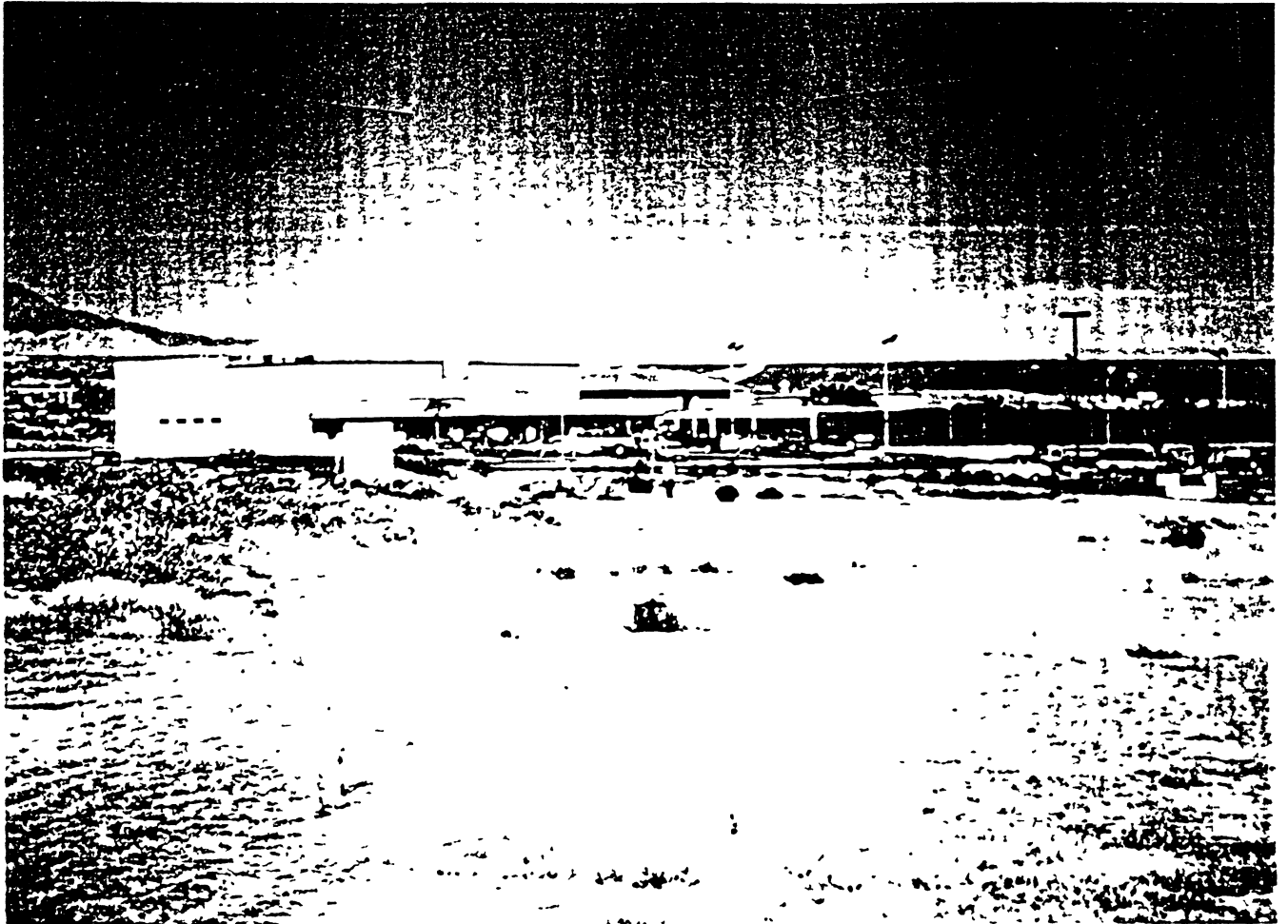
From the 14th tee northeasterly toward the 15th tee
with a person standing in approximate location of Mrs.
Klatt on the 15th tee.

EXHIBIT I



From approximately 50 yards behind the 14th tee (by the road) showing both the 14th green and 15th tee, with a person standing on the 15th tee.

EXHIBIT J



From the 14th tee northeasterly toward the 14th green
with a person standing on the 14th green.

EXHIBIT K



From approximately 50 yards behind the 14th tee (by the road) showing both the 14th green and 15th tee, with a person standing on the 14th green.

TERRY L. WADE -A 3882
SNOW, NUFFER, ENGSTROM & DRAKE
A Professional Corporation
90 East 200 North
P.O. Box 400
St. George, Utah 84770
801/628-1611
File #532501/BJ3

COURT
COUNTY
09 FEB 1 PM 4 15
CLERK
DEPUTY *[Signature]*

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

CORY KLATT,)	
Plaintiff,)	
vs.	)	ORDER GRANTING DEFENDANT
	)	REX JACKSON'S MOTION
	)	FOR SUMMARY JUDGMENT;
	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
IKE THOMAS; JOHN DOE I, dba)	
SOUTHGATE GOLF COURSE; LAVA)	
HILLS RESORT CORPORATION,)	
a Utah Corporation; REX JACKSON;)	
JOHN LaGANT; and JOHN WILLIE,)	
Defendants.	)	Civil No. 86-1116

Defendant Rex Jackson's Motion for Summary Judgment came on before the Court on Wednesday, the 21st day of December, 1988. Appearing at the hearing were Thomas M. Higbee, representing the Plaintiff, Cory Klatt; Terry L. Wade, representing the movant/Defendant, Rex Jackson; Timothy B. Anderson, representing Defendant, John LaGant; and Paul Graf, representing Defendant, John Willie. Defendants Southgate Golf Course and Ike Thomas neither appeared by counsel nor in person; however, Plaintiff's counsel adopted and argued the position of Defendant Southgate Golf Course as set forth in the latter's Memorandum in Opposition to Rex Jackson's Motion for Summary Judgment.

The Court first considered the "Objection to Notice of Hearing" filed by counsel for Defendant Southgate Golf Course respecting Defendant Rex Jackson's Motion for Summary Judgment. The Court determined that proper and

adequate notice of the hearing had been given, and that the hearing on the Motion for Summary Judgment could, therefore, go forward.

The Court then considered Plaintiff's counsel's oral objection to the timeliness of Defendants John LaGant's and John Willie's motions to join in the Motion for Summary Judgment of Defendant Rex Jackson. The Court determined that said joinder motions were untimely and that the Motion for Summary Judgment could go forward only as to Defendant Rex Jackson.

The Court then heard oral argument from counsel relative to Defendant Rex Jackson's Motion for Summary Judgment and, having reviewed the Memorandum of counsel and the pleadings, affidavits and other material on file with the Court, determined that there was no just reason for delaying the entry of final judgment as to Defendant Rex Jackson.

NOW, THEREFORE, being fully advised in the premises, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Rex Jackson's Motion for Summary Judgment be, and the same is, granted dismissing Plaintiff's Second Amended Complaint, as it relates to Defendant Rex Jackson, and further, dismissing Defendant Southgate Golf Course's Cross-Claim against Defendant Rex Jackson. The Court finds, as the basis for its Order, the following:

FINDINGS OF FACT

1. That Plaintiff, Cory Klatt, was injured as the result of an accident which occurred on April 5, 1986, while Plaintiff was playing golf at the Southgate Golf Course in St. George, Utah. That the said accident occurred when Defendant, Ike Thomas, aiming for the fourteenth green, sliced a shot from the fourteenth tee area and struck Plaintiff, who was standing in the fifteenth tee area.

2. That at the time of the accident involving Plaintiff, Defendant Southgate Golf Course (hereinafter "Defendant Southgate") was the owner of the golf course and had complete possession and control thereof.

3. That Defendant Southgate had purchased the subject golf course approximately eleven months prior to the accident involving Plaintiff, in May, 1985, from Defendant Lava Hills Resort Corporation (hereinafter "Defendant Lava Hills").

4. That Defendant Rex Jackson (hereinafter "Defendant Jackson") had been an officer and shareholder in Defendant Lava Hills from the time of its incorporation on or about December 9, 1975, until the sale to Defendant Southgate in May, 1985, at which time he sold his entire interest in the golf course to Defendant Southgate, and the latter purchased the remaining assets of Defendant Lava Hills. That since the time Defendant Jackson relinquished his interest in Defendant Lava Hills and in the golf course in May, 1985, he has not exercised any control whatsoever over the golf course.

5. That although the Southgate Golf Course (originally known as Lava Hills Golf Course) was originally designed and constructed during the ownership of Defendant Lava Hills, soon after purchasing the golf course, Defendant Southgate sold the particular segment of the golf course property whereon the original fourteenth hole, as designed and constructed during Lava Hills' ownership, had been located, and in October of 1985, constructed a new fourteenth hole approximately 130 feet to the Northwest.

6. That the acts of negligence alleged in Plaintiff's Complaint involved the new fourteenth hole designed and constructed by Defendant Southgate and the existing fifteenth hole of the golf course.

7. That on the date of the accident the fourteenth hole of the golf course was in a different location than the fourteenth hole as constructed during

Defendant Lava Hills' ownership and as shown on the original design maps for the Lava Hills Golf Course, it having been changed by Defendant Southgate in October of 1985. Furthermore, the direction or angle of the 14th tee box was materially different on the date of the accident than it had been during the ownership of Defendant Lava Hills.

8. That at the time of the accident, neither Plaintiff nor Defendant Thomas were following the original design and construction of the golf course as it had been when it was under the control of Defendant Lava Hills, at least with respect to the fourteenth hole.

9. That during the approximately ten years the golf course was owned and operated by Defendant Lava Hills, there were no major accidents on the golf course, and specifically none involving the fourteenth or fifteenth holes. During those approximate ten years the fourteenth and fifteenth holes were located according to the golf course's original design and construction. While under the control of Defendant Lava Hills, the fourteenth hole was never in the location it was in on April 5, 1986, the date of the accident.

10. That even if the fourteenth and fifteenth holes of the subject golf course, as designed and constructed during the ownership of Defendant Lava Hills, were defective or unsafe at the time Defendant Southgate purchased the golf course (and this Court makes no such finding at this juncture), such defect could have been discovered by Defendant Southgate through such an inspection as would be made in the exercise of ordinary care and prudence, and Defendant Southgate had a reasonable time to discover and remedy any such defect or dangerous condition prior to the occurrence of Plaintiff's accident.

11. That Plaintiff's claim against Defendant Rex Jackson (hereinafter "Defendant Jackson") of negligence in the design of the golf course is barred under the doctrine of Res Judicata in that:

- (a) said claim involves the same parties as it did when it was previously raised in Plaintiff's Amended Complaint;
- (b) the Court entered a final judgment on the merits as to this claim against Defendant Jackson when it granted Summary Judgment in an Order dated September 6, 1988; and
- (c) the said prior adjudication involved the same claim of negligent design against Defendant Rex Jackson as that presently raised in Plaintiff's Second Amended Complaint.

12. That the Court's "Order Granting Summary Judgment," dated September 6, 1988, aforescribed, was a final adjudication on the merits in that it did expressly determine that there was no just reason for delay in entry of final judgment as to Defendant Jackson, as required by Rule 54(b), Utah Rules of Civil Procedure.

From the foregoing Findings of Fact, the Court hereby makes the following:

CONCLUSIONS OF LAW

1. Defendant Jackson is entitled to Summary Judgment, dismissing, with prejudice, Plaintiff's Second Amended Complaint, as it relates to him, and further, dismissing, with prejudice, Defendant Southgate's Cross-Claim against him.


2. Defendant Jackson's entitlement to Judgment, as aforesaid, is based upon the general rule of law, which is stated thus in the Restatement Second of Torts, Section 352:

Except as stated in Section 353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession.

The exceptions to this general rule, as noted in Section 353, Restatement Second of Torts, do not apply under the facts of this case.

3. As a further legal basis for Defendant Jackson's entitlement to Judgment, as aforementioned, the Court adopts the reasoning set forth in the case of Preston v. Goldman, 42 Cal.3d 108, 227 Cal.Rptr. 817 (1986), and deems said case to be dispositive hereof.

MADE AND ENTERED this 30th day of January, 1989.
BY THE COURT:


J. PHILIP EVES
District Court Judge

MAILING CERTIFICATE

I hereby certify that on the 29th day of December, 1988, I served an unsigned copy of the foregoing ORDER GRANTING DEFENDANT REX JACKSON'S MOTION FOR SUMMARY JUDGMENT; FINDINGS OF FACT AND CONCLUSIONS OF LAW on each of the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Floyd W. Holm, Esq.
CHAMBERLAIN & HIGBEE
250 South Main Street
P.O. Box 726
Cedar City, Utah 84720

Richard K. Glauser, Esq.
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970

Paul F. Graf, Esq.
220 North 200 East
St. George, Utah 84770

Timothy B. Anderson, Esq.
JONES, WALDO, HOLBROOK & McDONOUGH
249 East Tabernacle, Suite 200
St. George, Utah 84770


Secretary

MAILING CERTIFICATE

I hereby certify that on the 15th day of February, 1989, I served a signed copy of the foregoing ORDER GRANTING DEFENDANT REX JACKSON'S MOTION FOR SUMMARY JUDGMENT; FINDINGS OF FACT AND CONCLUSIONS OF LAW on each of the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Floyd W. Holm, Esq.
CHAMBERLAIN & HIGBEE
250 South Main Street
P.O. Box 726
Cedar City, Utah 84720

Richard K. Glauser, Esq.
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970

Paul F. Graf, Esq.
220 North 200 East
St. George, Utah 84770

Timothy B. Anderson, Esq.
JONES, WALDO, HOLBROOK & MCDONOUGH
249 East Tabernacle, Suite 200
St. George, Utah 84770



Secretary

TERRY L. WADE -A 3882
SNOW, NUFFER, ENGSTROM & DRAKE
A Professional Corporation
90 East 200 North
P.O. Box 400
St. George, Utah 84770
801/628-1611
File #532501/BJ3

FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY

100 FEB 1 PM 4 15

DEPUTY *H. J. [Signature]*

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

CORY KLATT,)	
Plaintiff,)	
vs.	)	SUMMARY JUDGMENT
IKE THOMAS; JOHN DOE I, dba)	
SOUTHGATE GOLF COURSE; LAVA)	
HILLS RESORT CORPORATION,)	
a Utah Corporation; REX JACKSON;)	
JOHN LaGANT; and JOHN WILLIE,)	
Defendants.	)	Civil No. 86-1116


Defendant Rex Jackson's Motion for Summary Judgment came on before the Court on Wednesday, the 21st day of December, 1988. Appearing at the hearing were Thomas M. Higbee, representing the Plaintiff, Cory Klatt; Terry L. Wade, representing the movant/Defendant, Rex Jackson; Timothy B. Anderson, representing Defendant, John LaGant; and Paul Graf, representing Defendant, John Willie. Defendants Southgate Golf Course and Ike Thomas neither appeared by counsel nor in person; however, Plaintiff's counsel adopted and argued the position of Defendant Southgate Golf Course as set forth in the latter's Memorandum in Opposition to Rex Jackson's Motion for Summary Judgment. The Court, having heard oral argument from counsel and having considered and reviewed the memoranda of counsel, as well as the pleadings, affidavits, and other material on file with the Court, and having heretofore made and entered its

Findings of Fact and Conclusions of Law, and thus being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that no just reason exists for delaying the entry of final judgment as to Defendant Rex Jackson, and therefore, the latter's Motion for Summary Judgment is hereby granted dismissing, with prejudice, Plaintiff's Second Amended Complaint, as it relates to Defendant Rex Jackson, and further, dismissing, with prejudice, Defendant Southgate Golf Course's Cross-Claim against Defendant Rex Jackson.

DATED this 30th day of January, 1989.

BY THE COURT:


J. PHILIP EVES
District Court Judge

MAILING CERTIFICATE

I hereby certify that on the 29th day of December, 1988, I served an unsigned copy of the foregoing SUMMARY JUDGMENT on each of the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

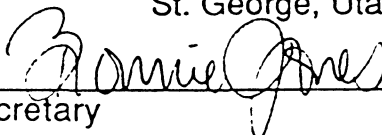
Floyd W. Holm, Esq.
CHAMBERLAIN & HIGBEE
250 South Main Street
P.O. Box 726
Cedar City, Utah 84720

Salt Lake City, Utah 84110-2970

Paul F. Graf, Esq.
220 North 200 East
St. George, Utah 84770

Richard K. Glauser, Esq.
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
P.O. Box 2970

Timothy B. Anderson, Esq.
JONES, WALDO, HOLBROOK &
249 East Tabernacle, Suite 200
St. George, Utah 84770


Secretary

MAILING CERTIFICATE

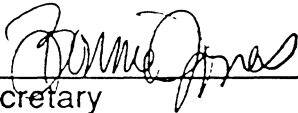
I hereby certify that on the 15th day of February, 1989, I served a signed copy of the foregoing SUMMARY JUDGMENT on each of the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Floyd W. Holm, Esq.
CHAMBERLAIN & HIGBEE
250 South Main Street
P.O. Box 726
Cedar City, Utah 84720

Richard K. Glauser, Esq.
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970

Paul F. Graf, Esq.
220 North 200 East
St. George, Utah 84770

Timothy B. Anderson, Esq.
JONES, WALDO, HOLBROOK & McDONOUGH
249 East Tabernacle, Suite 200
St. George, Utah 84770


Secretary

FILED IN COURT
COUNTY

09 MAR 22 PM 4 04

CLERK
DEPUTY *[Signature]*

LOWELL V. SMITH, #3006
RICHARD K. GLAUSER, #4324
HANSON, EPPERSON & SMITH
A Professional Corporation
Attorneys for Defendants
4 Triad Center, Suite 500
P. O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

CORY KLATT,

Plaintiff,

vs.

IKE THOMAS; JOHN DOE I, dba
SOUTHGATE GOLF COURSE; LAVA
HILLS RESORT CORPORATION, a
Utah corporation; REX JACKSON;
JOHN LAGANT; and JOHN WILLIE,

Defendants.

CONCLUSIONS OF LAW UNDER-
LYING SUMMARY JUDGMENT

Civil No.: 86-1116

Judge J. Philip Eves

Plaintiffs motion to vacate the summary judgment entered in favor of Rex Jackson, defendant John Willie's motion for summary judgment, defendant John LaGant's motion for summary judgment, and plaintiff's request for oral argument on defendant Southgate's motion for summary judgment all came on regularly for hearing on the 6th day of February, 1989. Plaintiff was represented by counsel, Floyd W. Holm. Rex Jackson was represented by counsel, Terry L. Wade. Defendant, John Willie, was represented by counsel Paul F. Graf and David L. Watson.

ASB

Defendant, John LaGant was represented by counsel Timothy B. Anderson. Defendant Southgate was represented by counsel, Richard K. Glauser. The court having reviewed all memoranda, affidavits and other relevant documents on file and having heard argument of counsel and being fully advised in the premises, now makes and enters the following:

CONCLUSIONS OF LAW

PLAINTIFF'S MOTION TO VACATE SUMMARY

JUDGMENT IN FAVOR OF REX JACKSON

1. The action against Rex Jackson is barred by the statute of repose for injury due to defective design or construction of improvements to real property contained in Section 78-12-25.5 of the Utah Rules of Civil Procedure.

2. The actions against Rex Jackson failed to state a cause of action based upon the principal set forth in Preston v. Goldman, 77 P.2d 476 (Cal. 1986).

3. There are no grounds to vacate the summary judgment previously entered in favor of Rex Jackson.

JOHN WILLIE'S MOTION FOR SUMMARY JUDGMENT

1. The action against John Willie is barred by the statute of repose for injury due to defective design or construction of improvements to real property contained in Section 78-12-25.5 of the Utah Rules of Civil Procedure.

2. The actions against John Willie failed to state a cause of action based upon the principal set forth in Preston v. Goldman, 77 P.2d 476 (Cal. 1986).

3. John Willie is entitled to summary judgment as a matter of law.

JOHN LAGANT'S MOTION FOR SUMMARY JUDGMENT

1. The action against John LaGant is barred by the statute of repose for injury due to defective design or construction of improvements to real property contained in Section 78-12-25.5 of the Utah Rules of Civil Procedure.

2. The actions against John LaGant failed to state a cause of action based upon the principal set forth in Preston v. Goldman, 77 P.2d 476 (Cal. 1986).

3. John LaGant is entitled to summary judgment as a matter of law.

SOUTHGATE'S MOTION FOR SUMMARY JUDGMENT


1. Plaintiff waived her right to oral argument pursuant to Rule 2.8(g) of the Rules of Practice in the District and Circuit Courts of the State of Utah. JAC

2. The facts as set forth in Southgate's memorandum in support of it's motion for summary judgment are deemed admitted pursuant to Rule 2.8(e) of the Rules of Practice in the District and Circuit Courts of the State of Utah. JAC

| 3. Plaintiff has failed to show any evidence that
defendant knew or should have known of any defect on the golf
course. JFE

2 4. Southgate is entitled to summary judgment as a
matter of law. JFE

DATED this 22nd day of March, 1989.


HONORABLE J. PHILIP EVES
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 17th day of March, 1989, a true and correct copy of the foregoing, to the following:

Floyd W. Holm
CHAMBERLAIN & HIGBEE
250 South Main Street
P. O. Box 726
Cedar City, Utah 84720

Terry L. Wade
Kory D. Staheli
SNOW, NUFFER, ENGSTROM & DRAKE
90 East 200 North
P. O. Box 400
St. George, Utah 84770

David L. Watson
650 East 500 South
St. George, Utah 84770

Paul F. Graf
P. O. Box 1637
St. George, Utah 84770-1637

Timothy B. Anderson
JONES, WALDO, HOLBROOK & McDONOUGH
249 East Tabernacle
St. George, Utah 84770

Original mailed to:

FIFTH DISTRICT COURT CLERK
220 North 200 East
St. George, Utah 84770

Cathy S. Alder

KLATT.FOF

03 FEB 22 PM 4 04

[Handwritten signature]

LOWELL V. SMITH, #3006
RICHARD K. GLAUSER, #4324
HANSON, EPPERSON & SMITH
A Professional Corporation
Attorneys for Defendants
4 Triad Center, Suite 500
P. O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

CORY KLATT,

Plaintiff,

vs.

IKE THOMAS; JOHN DOE I, dba
SOUTHGATE GOLF COURSE; LAVA
HILLS RESORT CORPORATION, a
Utah corporation; REX JACKSON;
JOHN LAGANT; and JOHN WILLIE,

Defendants.

SUMMARY JUDGMENT

Civil No.: 86-1116

Judge J. Philip Eves

Plaintiff's motion to vacate the summary judgment previously rendered in favor of Rex Jackson, defendant John Willie's motion for summary judgment, defendant John LaGant's motion for summary judgment, and a request for oral argument on defendant Southgate's motion for summary judgment, all came on regularly for hearing on the 6th day of February, 1989, before the Honorable J. Philip Eves. Plaintiff was represented by counsel, Floyd W. Holm. Defendant, Southgate Golf Course, was represented by counsel, Richard K. Glauser.

Defendant, John Willie, was represented by counsel, Paul Graf and David L. Watson. Defendant, Rex Jackson, was represented by counsel, Terry L. Wade. Defendant, John LaGant, was represented by counsel, Timothy B. Anderson.

The court having read and reviewed all of the pleadings relevant to the respective motions and having heard argument from all counsel of record and being fully advised in the premises and having previously entered its findings of fact and conclusions of law, now;

HEREBY ORDERS as follows:

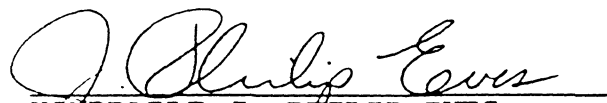
1. Plaintiff's motion to vacate the summary judgment rendered in favor of defendant, Rex Jackson, is hereby denied.
2. Defendant John Willie's motion for summary judgment is hereby granted;
3. Defendant John LaGant's motion for summary judgment is hereby granted;
4. Defendant Southgate's motion for summary judgment is hereby granted.
5. The court notes that defendant, Ike Thomas, has previously settled in entirety with the plaintiff and the plaintiff agreed to give to all other parties credit for the amount paid by defendant, Ike Thomas, or the percentage of negligence attributable to Ike Thomas, if any, whichever is

greater. Therefore, the complaint against Ike Thomas and any and all other cross-claims against Ike Thomas are hereby dismissed.

6. The court notes that defendant, Lava Hills Resort Corporation, has not ever appeared or otherwise been subject to the jurisdiction of this court.

7. Since this order disposes of all claims with regard to all parties over which this court has jurisdiction, the trial date of March 9 and 10, 1989, is moot and is hereby vacated. Likewise, Southgate's motion to compel and motion in limine regarding insurance are moot and the court makes no determination thereon. Although this court is not aware of any pending claims regarding parties within the jurisdiction of this court which are not disposed of by this order, the court expressly finds that there is no just reason for delay and that this order shall become final upon entry pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

DATED this 22nd day of March, 1989.


HONORABLE J. PHILIP EVES
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 21st day of February, 1989, a true and correct copy of the foregoing, to the following:

Floyd W. Holm
CHAMBERLAIN & HIGBEE
250 South Main Street
P. O. Box 726
Cedar City, Utah 84720

Terry L. Wade
Kory D. Staheli
SNOW, NUFFER, ENGSTROM & DRAKE
90 East 200 North
P. O. Box 400
St. George, Utah 84770

David L. Watson
650 East 500 South
St. George, Utah 84770

Paul F. Graf
P. O. Box 1637
St. George, Utah 84770-1637

Timothy B. Anderson
JONES, WALDO, HOLBROOK & McDONOUGH
249 East Tabernacle
St. George, Utah 84770

Original mailed to:

FIFTH DISTRICT COURT CLERK
220 North 200 East
St. George, Utah 84770

Cathy J. Alder

KLATT.SJ

file