

1989

## Klatt v. Thomas : Brief of Respondent

Utah Supreme Court

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### Recommended Citation

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DOCUMENT

KF

BRIEF

45.9

.S9

DOCKET NO.

**890120**

IN THE SUPREME COURT OF THE STATE OF UTAH

CORY KLATT,

Plaintiff/Appellant,

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/Appellees.

BRIEF OF RESPONDENT  
SOUTHGATE GOLF COURSE

Case No. 890120

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

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**FILED**  
AUG 25 1989

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

CORY KLATT,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	BRIEF OF RESPONDENT
	)	SOUTHGATE GOLF COURSE
	)	
IKE THOMAS; JOHN DOE I dba	)	
SOUTHGATE GOLF COURSE;	)	
LAVA HILLS RESORT CORPORATION,	)	
a Utah corporation; REX	)	Case No. 890120
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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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

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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, 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 State 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. (e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Utah R. Civ. P. 59(e).

2. (4) The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the movant relies.

(5) The points and authorities in opposition to a motion for

summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Utah Code of Judicial Administration, Rule 4-501 (4) and (5)

#### 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 paragraph 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 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, as parties to this law suit. Id., paragraphs 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, that they were negligent in failing to safely construct the golf course so as to prevent injury to Plaintiff 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. Id., paragraphs 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, paragraphs 2-3 (R. vol. II, pp. 276-66; A. 49-50).

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, paragraphs 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 alleged defect in the golf course and failed to demonstrate that Southgate was otherwise negligent. Conclusions of law underlying Summary Judgment (R. vol. II, pp. 272-73; A. 46).

#### STATEMENT OF FACTS

On April 5, 1986, Plaintiff was golfing at the Southgate Golf Course in St. George, Utah. She completed playing

the fourteenth hole and then proceeded to the fifteenth hole tee area. While the Plaintiff was standing in that area, Thomas, tee'd off from the fourteenth hole. His ball deviated to the right and struck the Plaintiff in the face. [Second Amended Complaint pp 8-10 (R. vol. I, pp.302; A.2)].

Southgate Golf Course, purchased the ground in May of 1985. Southgate did not design, construct or in any way create the golf course. The course was designed and constructed long before any affiliation with the course existed with Southgate. Affidavit of Richard Schmutz, paragraph 3 (R. vol. I, p. 80; A.14).

From the time Southgate 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 fourteenth 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 fifteenth tee, where Plaintiff was allegedly standing at the time of the accident, further away from the direction of play of patrons on the fourteenth hole. The reason for the change was not concern that the previous alignment was too close to the fifteenth tee (it had played that way over ten years without incident). The reason was sale of land that conveyed

the original fourteenth green. The new green was closer to the tee and made a shorter fourteenth 3-par hole, and it was further out of the direction of play from the fifteenth tee. The fourteenth and fifteenth tees involved in the accident had not been changed or modified at all by Southgate. Affidavit of Richard Schmutz, paragraph 4 (R. vol. I, p. 80; A.14).

Since Southgate purchased the 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 fifteenth tee area. Of all the players that played the course, the general manager of Southgate is not aware of any other complaints regarding players on the fifteenth tee being struck or threatened by balls hit by patrons from the fourteenth tee area. Affidavit of Richard Schmutz, paragraph 5 (R. vol. I, pp.80-81, A.14-15).

The general manager of Southgate 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. The fifteenth tee is not in the line of play of patrons playing the fourteenth hole. At the time of Plaintiff's accident, the fifteenth tee center was approximately 253 feet to the northeast of the fourteenth tee. The fifteenth

tee was approximately 160 feet to the right of the line of play of the fourteenth tee. The fifteenth tee was approximately 40 degrees to the right of the line of play of players on the fourteenth hole. Affidavit of Richard Schnutz, paragraphs 6 and 7 (R. vol I. p. 81; A.15).

During the ten years the golf course was owned by the prior owner, Lava Hills, there were no accidents involving the fourteenth and fifteenth holes. Affidavit of Rex Jackson paragraph 11 (R. vol. I, p. 217; A.9).

The fourteenth hole is a 3-par hole of less than 125 yards. See affidavit of David Rainville, Exhibit C (R. vol. I, 129-135; A.25).

Southgate moved for Summary Judgment and included a Memorandum of Points and Authorities setting forth a statement of uncontested facts. The motion was also based upon the affidavits of Richard Schmutz and William Atkin. Memorandum of points and authorities in support of Southgate's motion for summary judgment (R. vol II, pp 98-104).

The specific allegations set forth in the affidavits as cited above were never controverted by Plaintiff. In fact, Plaintiff never filed a responding memorandum to the motion for Summary Judgment filed by Southgate. However, the trial court

did hear oral argument but no evidence was presented by Plaintiff that Southgate knew or should have known of the alleged defect.

#### SUMMARY OF ARGUMENTS

I. Southgate filed a specific motion for summary judgment with supporting affidavits and memorandum containing a statement of facts. The Plaintiff failed to contest the statement of facts in the memorandum in support of motion for summary judgment and failed to file any affidavits to indicate that Southgate knew or should have known that the golf course was defective.

II. Southgate is not an insurer of the safety of patrons on its premises and can not be held liable absent evidence of negligence in that it knew or should have known of the alleged defect.

III. Southgate did not design the golf course and did not create or enhance the alleged defect.

IV. The uncontroverted facts show that Southgate did not have any actual knowledge of an alleged defect.

V. The uncontroverted facts show that Southgate had no reason to know or suspect an alleged defect.

ARGUMENT

POINT I

THE FACTS SUPPORTING SOUTHGATE'S MOTION  
FOR SUMMARY JUDGMENT ARE UNCONTESTED

On December 20, 1988, Respondent, Southgate Golf Course (hereinafter "Southgate") filed a Motion for Summary Judgment with Supporting Memorandum and Affidavits of William Atkin and Richard Schmutz. On January 4, 1989, after the Plaintiff failed to respond in any manner to Southgate's Motion for Summary Judgment with its Supporting Affidavits and Memorandum, Southgate submitted a request for ruling on its motion. To date, the Plaintiff has failed to file any response or Counter-Affidavits to the Plaintiff's motion. Rule 56(e) of the Utah Rules of Civil Procedure provides in pertinent part:

When a Motion for Summary Judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, his response, by Affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, Summary Judgment, if appropriate, shall be entered against him.

This Court has recognized and enforced the clear language of this rule many times. Busch Corporation vs. State Farm Fire & Casualty Company 743 P2d 1217 (Utah 1987); Treloggan vs. Treloggan, 699 P2d 747 (Utah 1985); Reagan Outdoor

Advertising, Inc. vs. Lundgren, 692 P2d 776 (Utah 1984); Cowen and Company vs. Atlas Stock Transfer Company, 695 P2d 109 (Utah 1984); Franklin Financial vs. New Empire Development Company, 659 P2d 1040. The application of Rule 56(e) was clearly explained in Franklin, supra, as follows:

Thus, when a party opposes a properly supported Motion for Summary Judgment and fails to file any responsive Affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movent's Affidavit affirmatively discloses the existence of such an issue. Without such a showing, the Court need only decide whether, on the basis of the applicable law, the moving party is entitled to a judgment. [Citations omitted] Id at 1044.

At the time Southgate filed it's Motion for Summary Judgment, the new Utah Code of Judicial Administration was in affect. Rule 4-501(5) adds further support to the authorities cited above. Points and authorities in support of a motion for summary judgment must contain a concise statement of material facts as to which the movants contend no genuine issue exists. The points and authorities in opposition to a Motion for Summary Judgment must refute those facts or the "movant's statement shall be deemed admitted for the purpose of summary judgement." Here, Southgate filed a memorandum of points and authorities in support of it's motion for summary judgment. The memorandum contained a

concise statment of facts. Those facts were never controverted, objected to or otherwise responded to and must be deemed admitted for purposes of summary judgment.

In her brief, Appellant now attempts to claim genuine issues of material fact exist as to whether Southgate created, knew or should have known about a defect or dangerous condition on the golf course. However, the uncontroverted facts clearly establish that Southgate did not design the course, did not know about a defect and had no reason to suspect a defect. This Court has repeatedly recognized the basic principle that matters not presented to the trial court may not be raised for the first time on appeal. Franklin Financial vs. New Empire Development Company, supra; Shayne vs. Stanley & Son's, Inc., 605 P2d 775 (Utah 1980); Edgar vs. Wagner, 572 P2d 405 (Utah 1977).

Although the court did allow oral argument, Plaintiff failed to submit any evidence to show that Southgate knew or should have known of the alleged defect. Based upon the record before it, the trial court properly held that there were no issues of fact indispute and that Southgate was entitled to Summay Judgment.

#### POINT II

SOUTHGATE IS NOT LIABLE TO PLAINTIFF ABSENT  
EVIDENCE OF NEGLIGENCE.

The mere fact that misfortune occurred does not necessarily mean that someone else must respond in damages. Eaton vs. Savage, 502 P2 564 (Utah 1972). Furthermore, the mere fact that the unfortunate accident occurred on the premises of the Defendant which resulted in injuries to the Plaintiff is insufficient to establish liability on the part of the property owner. Pollick vs. J. C. Penney Co., 473 P2d 394 (Utah 1970). It is elementary that a business invitor is not liable to its business invitees unless it is negligent and its negligence is the proximate cause of the accident. Howard vs. Auerbach Co., 20 Utah 2d 355, 437 P2d 395 (1968).

In Koer vs. Mayfair Markets, 19 Utah 2d 339, 431 P2d 566 (1967), a customer slipped and fell on a grape inside a store. The customer alleged that the store manager had passed by the spot where the accident occurred just prior to the accident, and therefore, either had actual notice or constructive notice of this potentially dangerous condition and should have removed it. The Supreme Court affirmed a judgment for the Defendants notwithstanding the verdict. Negligence could not lie against the store unless it created the dangerous condition or had actual or constructive knowledge of the dangerous condition.

Likewise, Southgate cannot be held liable to Plaintiff without evidence it created a dangerous condition or had actual or constructive knowledge of the dangerous condition.

### POINT III

#### SOUTHGATE DID NOT CREATE THE ALLEGED DEFECT.

The uncontroverted facts below clearly indicate that Southgate did not design or construct the golf course where the accident occurred. In her brief, the Appellant correctly recognizes that the golf course had been designed, developed and constructed by the Co-Defendants, Lava Hills Resort Corporation, Rex Jackson, John LaGant and John Willey. Second Amended Complaint paragraph 16. (R. vol. I pp. 304;)

If, arguendo, there was a defective and dangerous condition in the golf course, it was created by the original builder and/or designer. The undisputed facts indicate that the tee area from which the golf ball was hit and the tee area upon which the Plaintiff was standing had not been in any way altered by Southgate. The only slight modification moved the fourteenth green area so that the line of play of Mr. Thomas was further away from the tee area where the Plaintiff was standing. Plaintiff did not dispute that this slight modification made the course more safe. Memorandum of points and authorities in support of Southgate's motion for summary judgment facts 2 and 4

(R. vol II, p. 99; A37) Affidavit of Richard Schmutz, paragraph 4 (R. vol I, pp. 80).

If the course as originally designed by John Willey or as originally constructed by Rex Jackson, contained a design defect, no liability can attach to Southgate solely as a result of the negligence of others.

#### POINT IV

SOUTHGATE DID NOT HAVE ANY ACTUAL KNOWLEDGE  
OF AN ALLEGED DEFECT.

It is also undisputed that Southgate had no knowledge that there was a dangerous or defective condition in the golf course. The uncontroverted facts in Southgate's motion for summary judgment established a lack of knowledge on behalf of Southgate. Memorandum of points and authorities in support of Southgate's motion for summary judgment (R. vol II, p. 99; A37) and affidavits of Richard Schmutz and William Atkin (R. Vol. I p. 80; A12). No liability can be attached to Southgate on a theory that it knew of a defect in the golf course.

#### POINT V

SOUTHGATE HAD NO REASON TO KNOW OF THE ALLEGED DEFECT.

First, as indicated above, the uncontroverted statement of facts in Southgate's memorandum of points and authorities in support of its motion for summary judgment indicate that Southgate owned the golf course for eleven months prior to the incident described in Plaintiff's complaint. During that time, thousands of patrons played the course and Southgate had no complaints, accidents "or other reason to believe that the course was defective." Memorandum of points and authorities in support of Southgate's motion for summary judgment, Statement of fact number 6 (R. vol II, pp. 100) and affidavit of Richard Schmutz, paragraphs 5, 6 and 7 (R. vol. I pp. 80-81). No objection was raised to the affidavit of Richard Schmutz or to the statement of facts and the trial court was correct in relying thereon in ruling and granting summary judgment.

Secondly, negligence cannot be inferred or assumed. Plaintiff must present facts in response to a well supported motion for summary judgment showing a degree of negligence on the part of the Defendant. The Plaintiff has completely failed to show any degree of negligence on behalf of Southgate.

The uncontradicted evidence indicates that even prior to the sale of the golf course to Southgate, for over ten years thousands of rounds of golf had been played without any incident or problem involving the unaltered fourteenth or fifteenth tee

areas. Affidavit of Richard Schmutz paragraphs 5-7 (R. vol. I pg. 80-81). Affidavit of Rex Jackson paragraph 11 (R. vol. I pg. 217; A.9).

The uncontroverted evidence also shows that no agents of Southgate were experts in the design and layout of golf courses. If there was a defect in the golf course, it was a design defect only recognizable to a trained architect. Although the law places a duty upon a property owner to inspect the premises for dangerous conditions, the law has never placed upon a land owner a duty to have his property inspected by an architect absent a reason to believe that there may be a defect. The law should not impose such a heavy onus upon land owners. To do so would expand the area of premises liability to an enormous extent. If a land owner must have his property inspected by an architect to avoid future potential liability, the result will open Pandora's Box in the area of premises liability. It is difficult to draw a distinction between other experts such as structural engineers, soils engineers, hydro specialists, etc. and such a ruling will in effect create strict liability for property owners.

The fact that Southgate did not have any reason to suspect a defect indicates that the defect was latent. Although the layout of the golf course was open and obvious, the defect,

if any, required the recognition of a trained golf course architect. Even in her brief, Appellant acknowledges that the defect was latent. (Page 6 line 1, page 13 line 7, page 15 line 3rd from bottom, page 16 line 11)

This situation is analogous to a defective truss in the roof of a structure. The truss could be openly observable to all individuals that enter the structure including the owner of the property. However, only a trained engineer would be able to calculate the stress of the loads placed upon the truss and the strength of the material, etc., to determine that the truss should be constructed of 2" x 8" beams instead of 2" x 4" planks. Although the layout of the truss is open, the defect is latent to a reasonable home owner. Certainly, the law should not place a burden upon a home owner to retain experts to review truss loads, foundation adequacy, beam strengths, joist adequacy, etc. Absent a reason to expect a problem, the reasonable property owner assumes the property has been adequately designed.

Here, the uncontroverted evidence indicates that the fifteenth tee is not in the line of play of patrons playing the fourteenth hole. At the time of Plaintiff's accident, the fifteenth tee center was approximately 253 feet to the Northeast of the fourteenth tee. The fifteenth tee was approximately 160 feet to the right of the line of play of the fourteenth hole.

The fifteenth tee was approximately 40 degrees to the right of the line of play of the fourteenth hole. Affidavit of Richard Schmutz paragraph 7 (R. vol. I pg. 81).

Naturally, golf courses are laid out in such a way that when a golfer finishes playing a hole, the next tee area should be in the general proximity of the green just completed. Certainly, a property owner would have no reason to suspect a problem with a tee area 40 degrees to the right of the line of fire and 253 feet away. Although a golf course architect may second guess this design, an owner would not be on notice of any alleged defect. This is especially true on a 3-par hole of less than 125 yards and an adjacent tee area approximately 160 feet away from the direction of play at a 40 degree angle.

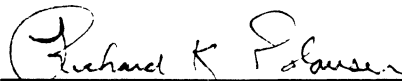
Southgate submitted evidence that a golf course owner and manager believed that the golf course did not create an unreasonable risk to patrons besides the risk inherent in the game of golf. Affidavit Richard Schmutz, paragraph 6 (R. vol I, p. 81). No evidence was presented to contradict or challenge that evidence. An affidavit from a golf course architect in California that in his opinion the golf course was not designed properly is irrelevant. It does not and could not suggest that a reasonable golf course owner would have any reason to suspect a defect.

### CONCLUSION

The trial court was correct in granting summary judgment to Southgate. A well documented motion for summary judgment was filed by Southgate and the Plaintiff failed to object to the statement of facts or present affidavits to the contrary. The Plaintiff asked the trial court and is asking this court to simply infer that Southgate knew or should have known of the alleged defect without providing any supporting evidence to the fact. The affidavit of a golf course architect from California that there was a defect in the course is not sufficient to establish that the owners were placed on constructive notice.

RESPECTFULLY SUBMITTED this 24th day of August, 1989.

HANSEN, EPPERSON & SMITH

  
\_\_\_\_\_  
RICHARD K. GLAUSER  
Attorneys for Respondant  
Southgate

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of August, 1989, four (4) copies of the within and foregoing BRIEF OF APPELLANT were served on the following, by first class mail, postage fully prepaid.

Floyd W. Holm  
CHAMBERLAIN & HIGBEE  
Attorneys for Plaintiff/Appellant  
250 South Main Street  
P.O. Box 726  
Cedar City, Utah 84721-0726

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

  
\_\_\_\_\_  
RICHARD K. GLAUSER

'88 OCT 26 AM 10 17

CLERK  
DEPUTY *[Signature]*

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;

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 21<sup>st</sup> day of October, 1988.

13                                   CHAMBERLAIN & HIGBEE

14  
15                                     
16                                   FLOYD W. HOLM  
                                  Attorneys for Plaintiff

17          Plaintiff's Address:

18          1885 Pelican Lane  
19          West Yellowstone, Montana 59758

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 25<sup>th</sup> 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

88 AUG 12 PM 4 13

CLERK [Signature]  
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,	)	<b>AFFIDAVIT OF REX</b>
vs.	)	<b>JACKSON</b>
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 )  
COUNTY OF WASHINGTON ) ss.

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.

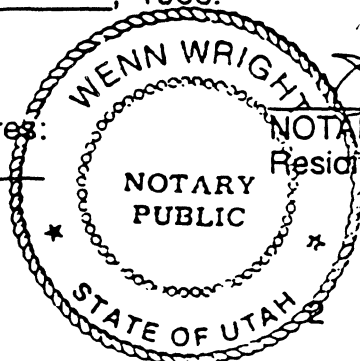
DATED this 12 day of aug, 1988.

Rep L Jackson  
\_\_\_\_\_  
REX JACKSON

SUBSCRIBED AND SWORN to before me this 12<sup>th</sup> 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 E. 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,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF RICHARD SCHMUTZ
	)	IN SUPPORT OF MOTION FOR
vs.	)	SUMMARY JUDGMENT
	)	
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 change 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 18<sup>th</sup> 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 18<sup>th</sup> day of September, 1987.

John 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,	)	
	)	
Defendants.	)	Civil No. 86-1116

---

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: \_\_\_\_\_

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 5<sup>th</sup> day of February, 1988.

24   
25 DAVID A. RAINVILLE

State of Calif  
County of Orange.

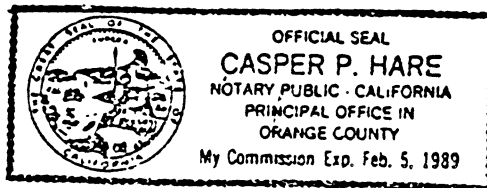
SUBSCRIBED AND SWORN to before me this 5<sup>th</sup> day of  
February, 1988.

Casper P Hare  
NOTARY PUBLIC

My Commission Expires:  
2/5/89

Residing at:

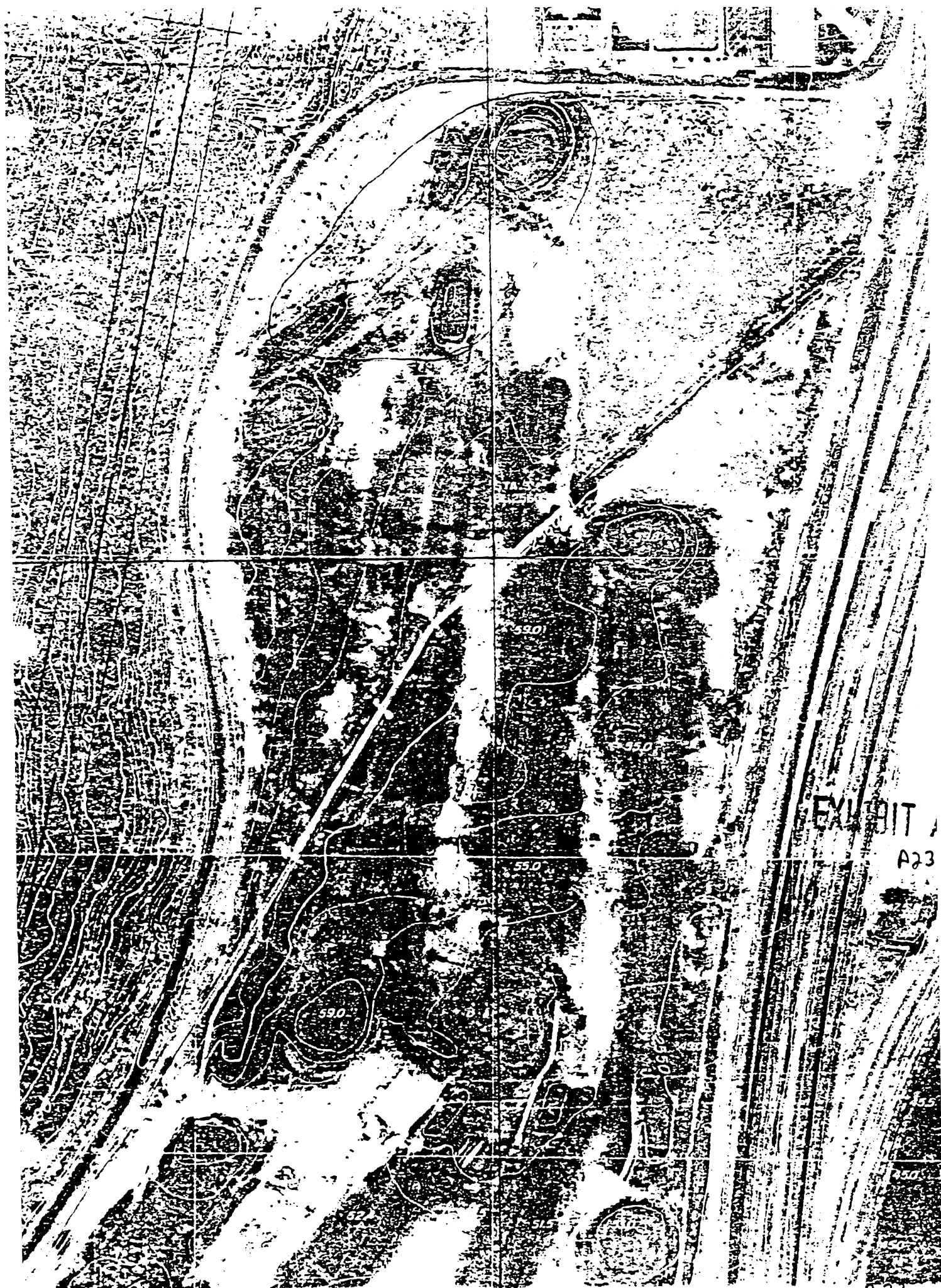
420 E. 2 Camino Real #9  
Tustin, Cal. 92680



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.

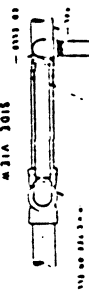
Cheresa Bremholt  
SECRETARY



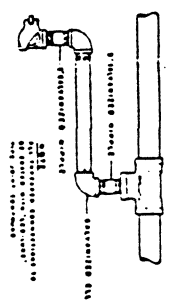
EXHIBIT

A23

A23

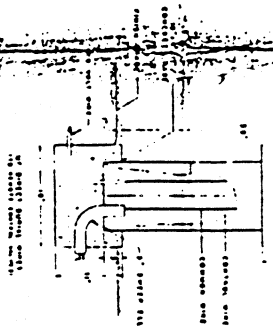


SIDE VIEW



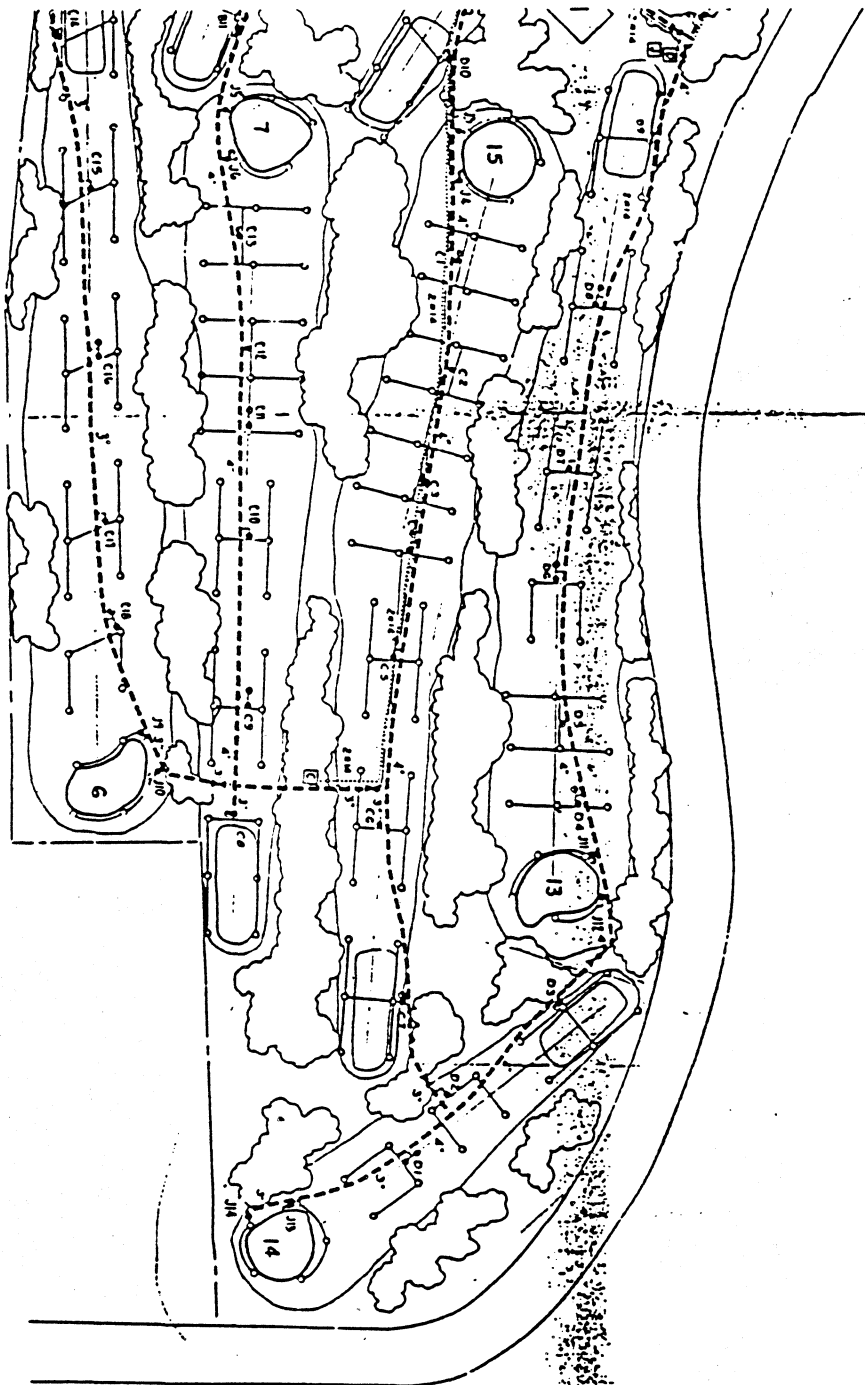
TOP VIEW

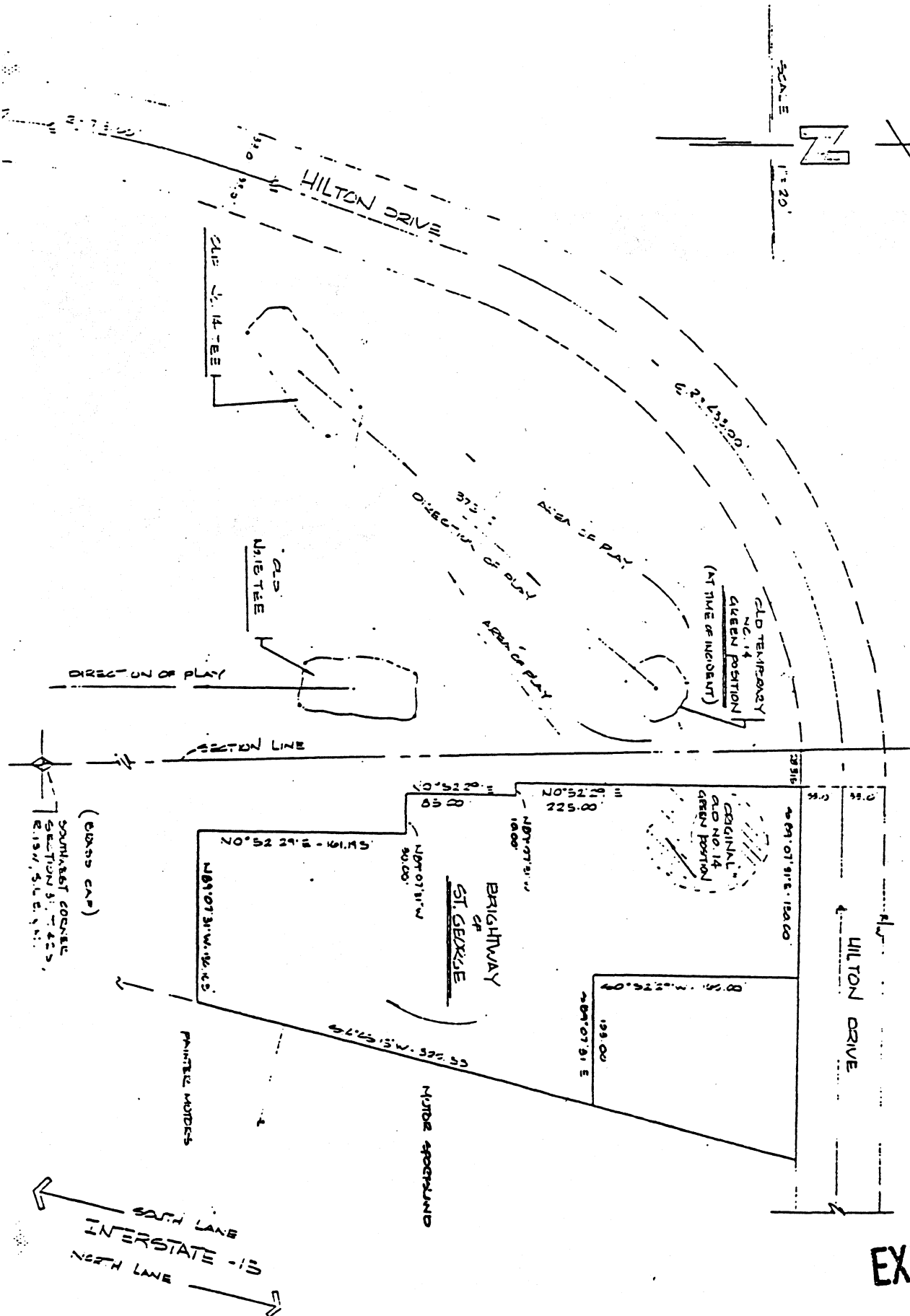
QUICK COUPLER VALVE DETAIL  
03130



CONTROLLER DETAIL  
03130


TYPICAL THRUST BLOCK DETAILS FOR BELL & RING PIPE (AC OR PVC)  
03130

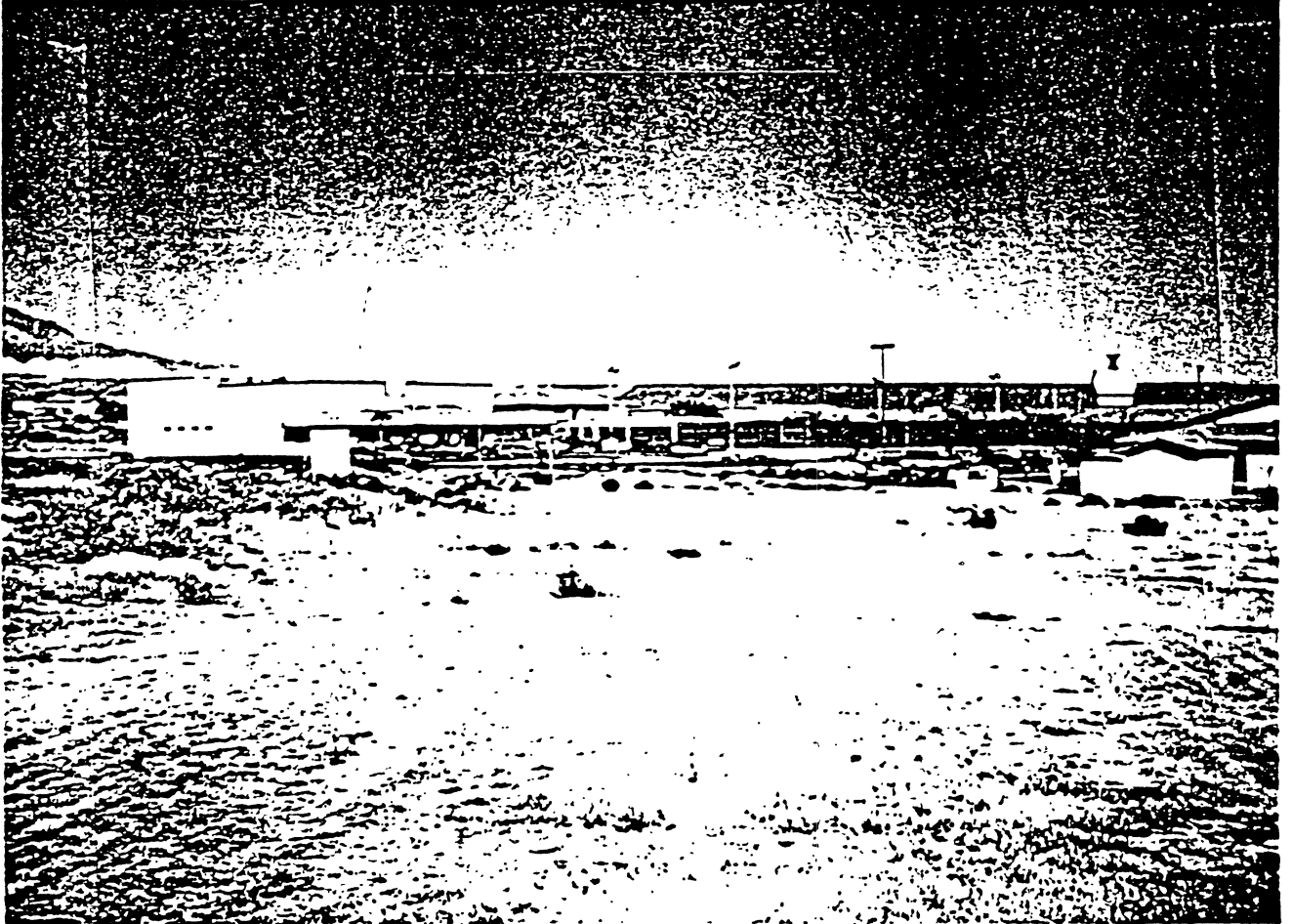




THE TEES AND GREENS ON THIS COURSE ARE NO LONGER IN USE AS OF 5-27-1997. THE LOCATION OF THE TEES AND GREENS ON THIS PLAY ARE FROM FIELD TIES TAKEN ON 9-20-1987.

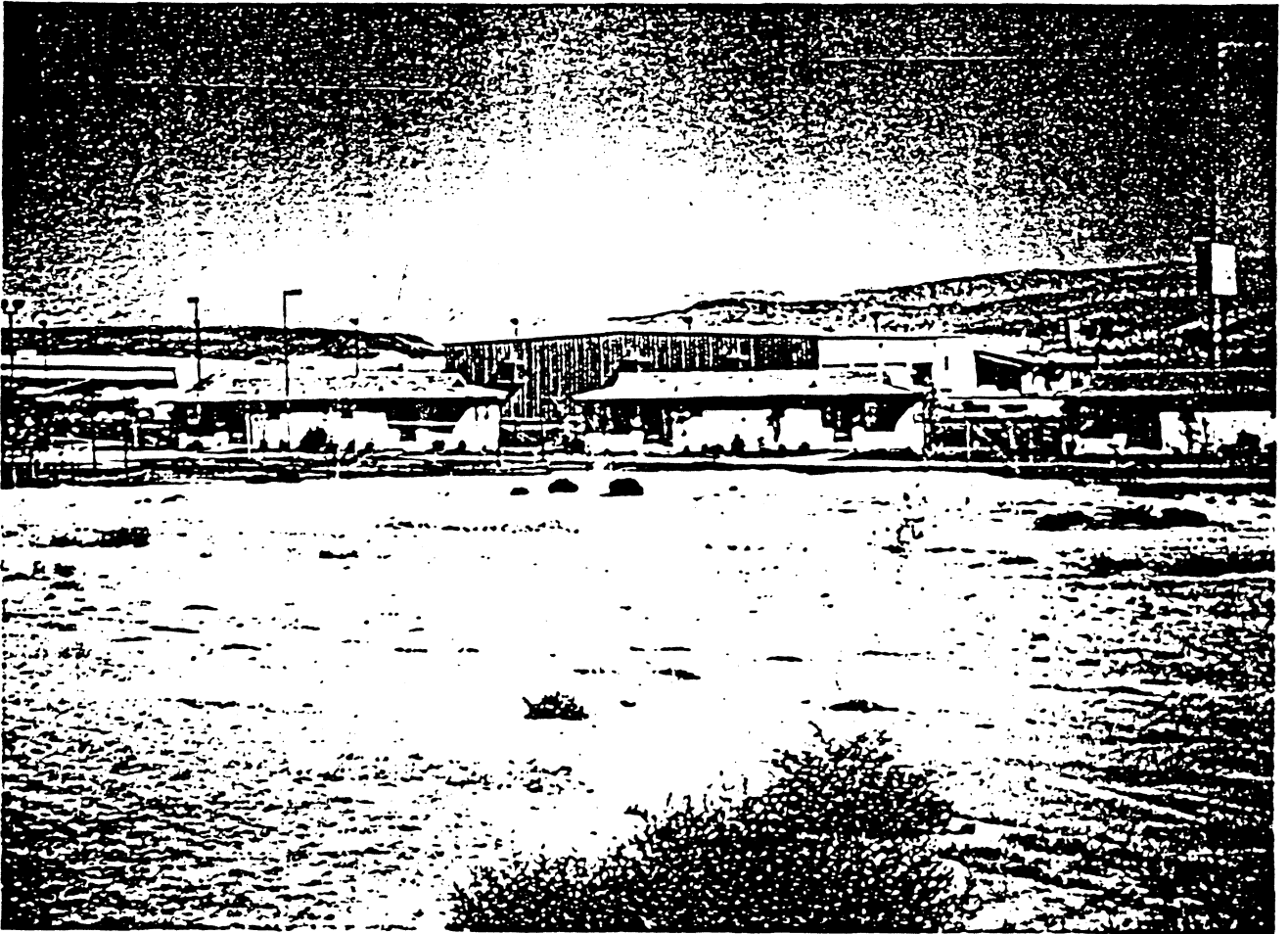
EXHIBIT C  
A25

EXHIBIT D



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

EXHIBIT E



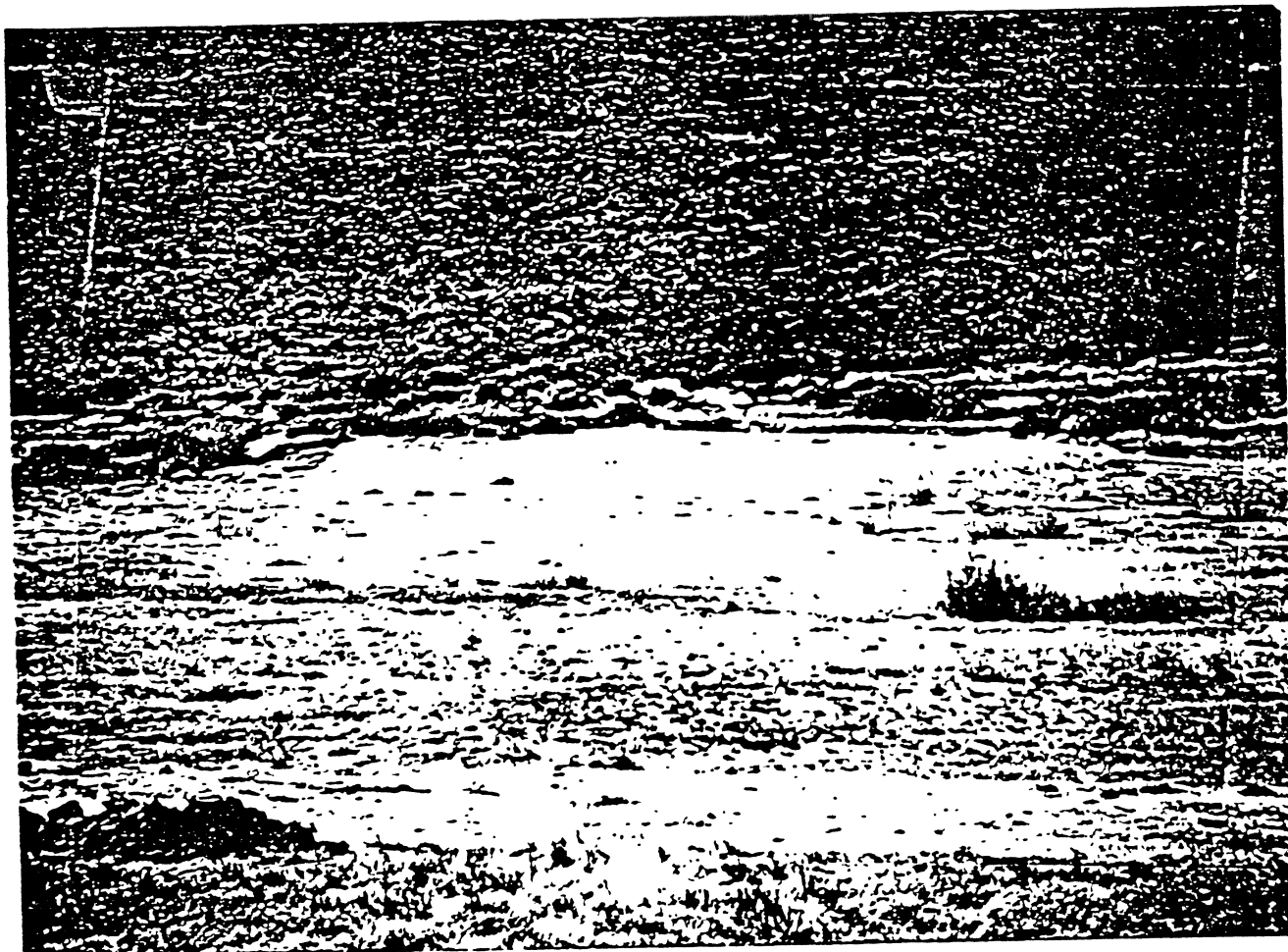
From the 14th tee northeasterly toward the 15th tee.

EXHIBIT F



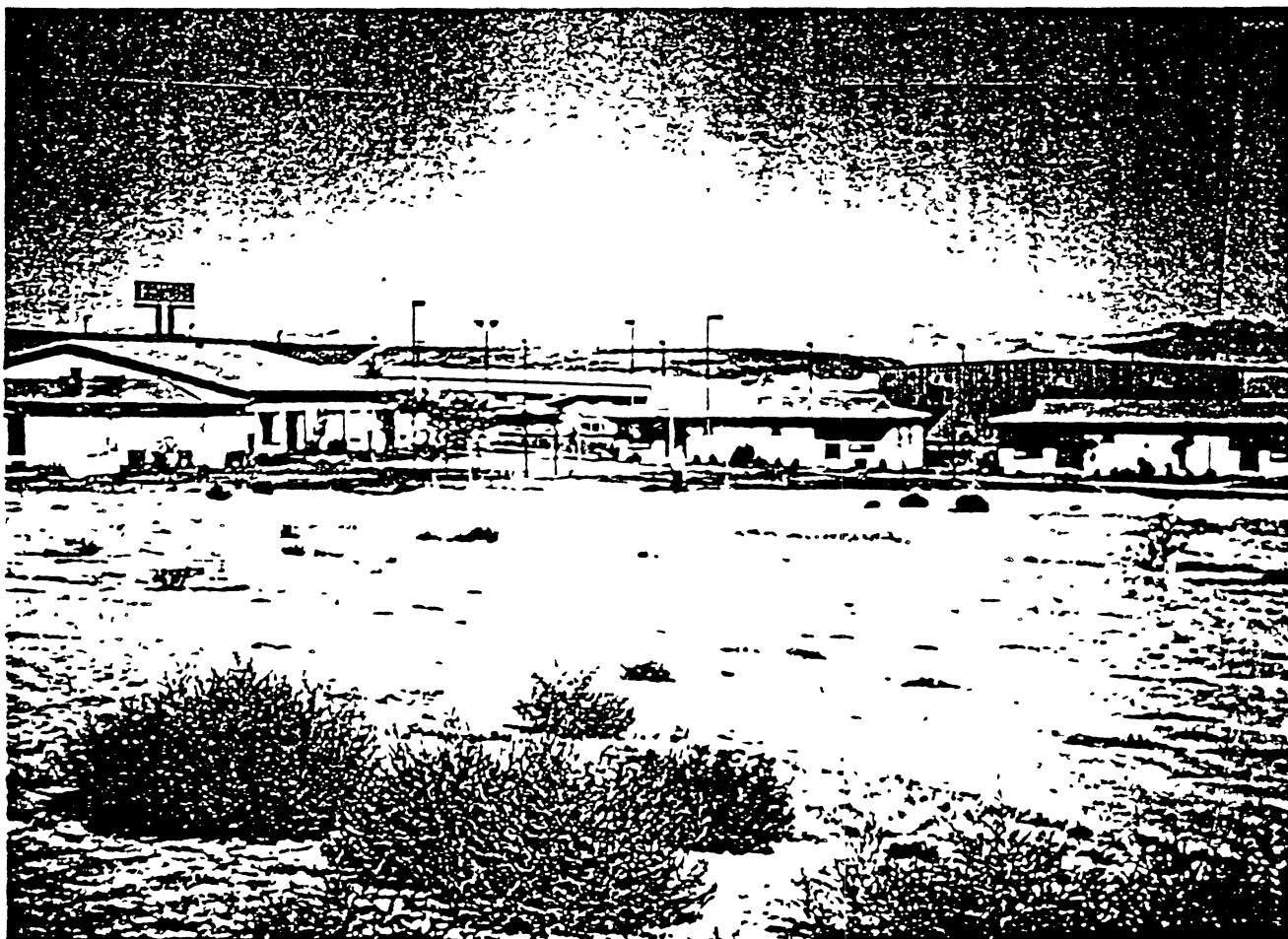
From approximately 50 yards behind the 14th tee (next to the road) showing both the 14th green and 15th tee.

EXHIBIT G



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

EXHIBIT H



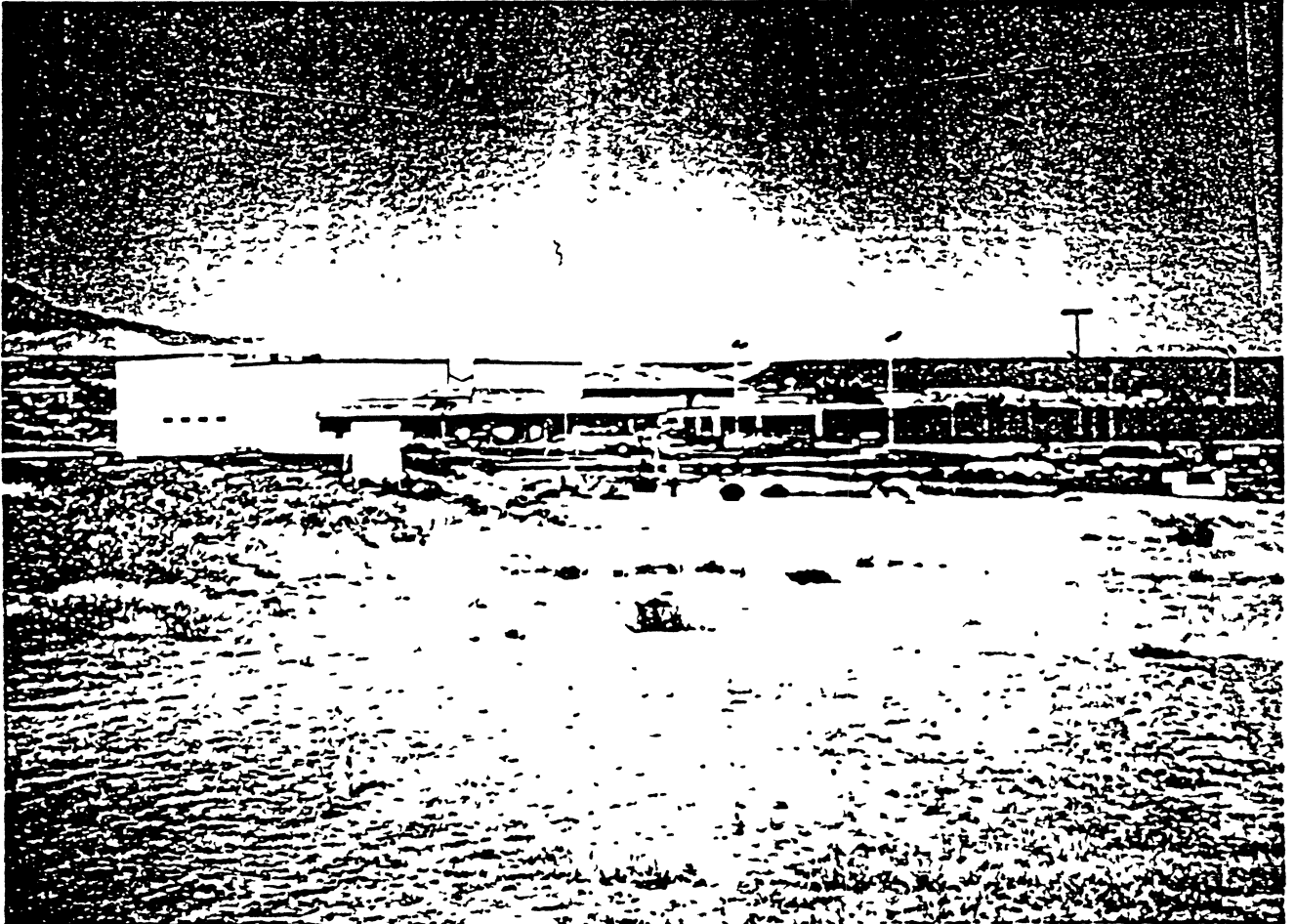
From the 14th tee northeasterly toward the 15th tee  
with a person standing in approximate location of Mrs.  
Klatt on the 15th tee.

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.



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.

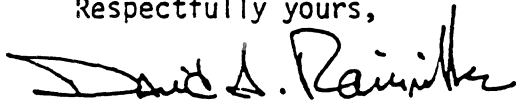
4. Q. Were Mrs. Klatt's injuries caused by the negligence of the golf course in any one or all of the foregoing respects?

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.

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.

MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
OF SOUTHGATE'S MOTION FOR  
SUMMARY JUDGMENT

Civil No.: 86-1116

Defendant, Southgate Golf Course, respectfully submits  
the following memorandum of points and authorities in support of  
its motion for summary judgment:

STATEMENT OF FACTS

1. Southgate Golf Course did not design or construct  
the golf course where the accident occurred. The golf course 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. (Affidavit of Richard Schmutz, paragraph three and affidavit of William Atkin, paragraph two).

2. From the time Southgate Golf Course purchased the golf course until the accident described in plaintiff's complaint, only one modification was made to the course. This modification moved the 14th green approximately 130 feet to the southwest. The affect 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 of the 15th tee would be in or near the line of fire from players on the 14th hole. (Affidavit of William Atkin, paragraph three, and affidavit of Richard Schmutz, paragraph four).

3. Plaintiff is alleging that the course is defective because the 15th tee is too close to the center line of the 14th hole. Additionally, plaintiff is alleging that barriers, such as trees Or fences, should have been place to protect the 15th tee. (Exhibit "L" to the affidavit of David A. Rainville).

4. The only modification made by the Southgate Golf Course increased the distance between the 15th tee and the center line to the 14th hole; thereby, reducing the defect alleged by plaintiff.

5. As originally designed, there was not adequate room available to increase the angle anymore than was done. (See Exhibit "A" and "B" to the affidavit of David A. Rainville).

6. Southgate Golf Course owned the golf course for a mere 11 months prior to the incident described in plaintiff's complaint and had no accidents during that time or other reason to believe that the course was defective. (Affidavit of Richard Schmutz).

7. Co-defendants, Lava Hills Resort Corporation, Rex Jackson, John Willie and John LaGant, owned and operated the golf course for 10 years after it was designed and constructed and had no accidents or reason to believe that the golf course was defective.

8. No agents of Southgate Golf Course were experts in the design and layout of golf courses and no agent of Southgate Golf Course recognized any defect on the golf course in question.

#### ARGUMENT

#### PLAINTIFF HAS FAILED TO SHOW ANY EVIDENCE OF NEGLIGENCE ON THE PART OF THIS DEFENDANT.

The mere fact that misfortune occurs does not necessarily mean that someone else must respond in damages. Eaton v. Savage, 502 P.2d 564 (Utah 1972). Furthermore, the fact that an unfortunate accident occurred on the premises of the

defendant which resulted in serious injuries to the plaintiff is insufficient to establish liability on the part of the property owner. Pollick v. J. C. Penny Co., 473 P.2d 394 (Utah 1970). The case of Steel v. D & R. G. Railroad, 16 Utah 2d 127, 396 P.2d 751 (1964), sets forth the duty of the owner and possessor of premises to a business invitee as follows:

. . . the owner of property is not to be regarded as an insurer for even an invitee upon his property. His duties toward invitees are limited as those risks which are unreasonable, Gaddis v. Ladies Literary Club, 4 Utah 2d 121, 399 P.2d 785, which he has no reason to believe such persons will discover or realize the risk involved, Erickson v. Wallgreen Drug Co., 120 Utah 131, 232 P.2d 210, 31 ALR 2d 177; and which he has reason to anticipate that persons acting with ordinary and reasonable care will encounter, Tempest v. Richardson, 5 Utah 2d 174, 299 P.2d 124. Where the hazardous condition is as easily observable to the invitee as to the owner, the duty to warn does not exist, Lindsa v. Eccles Hotel Co., 3 Utah 2d 264, 284 P.2d 477; Deweese v. J. C. Penney Co., 5 Utah 2d 116, 297 P.2d 898, 65 ALR 2d 399.

Of course, it is elementary that a business invitor is not liable to his business invitees unless he is negligent and his negligence is the proximate cause of the accident. Howard v. Auerbach Co., 20 Utah 2d 355, 437 P.2d 895.

In Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967), a customer slipped and fell on a grape inside a store. The customer alleged that the store manager had passed

by the spot where the accident occurred just prior to the accident, and therefore, either had actual notice or constructive notice of the presence of the substance on the floor and should have removed it. The Utah Supreme Court affirmed a judgment for the defendants notwithstanding the verdict. Negligence could not lie against the store unless it created the dangerous condition or had actual or constructive knowledge of the dangerous condition. Here, Southgate Golf Course did not design the layout of the golf course. If there was a defective and dangerous condition in the golf course, it was created by the original builder and/or designer. The undisputed facts indicate that the slight modifications made by Southgate Golf Course, mitigated and reduced the dangers from a defect, if any, which may have been in the golf course. The Southgate Golf Course should not be held liable for minimizing defective conditions which were created by other parties. The Southgate Golf Course had no knowledge that there was a dangerous or defective condition in the golf course and absent such knowledge or a reason to know, Southgate is not negligent and cannot be held liable.

Additionally, the proximity of the 14th tee to the 15th tee is open and obvious. The plaintiff played on the 14th tee prior to approaching the 15th tee. She was well aware of this

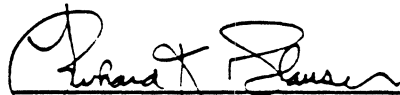
open and obvious condition and there was no cause to give her any warning.

CONCLUSION

Since the undisputed facts failed to show any negligence whatsoever on the part of the Southgate Golf Course, the Southgate Golf Course is entitled to judgment as a matter of law. An unfortunate incident or an accident on the premises of Southgate is not a basis for liability. The alleged defective condition which was not created by Southgate and Southgate was not aware and was not on notice of the condition so there is no basis for liability.

RESPECTFULLY submitted this 19th day of December, 1988.

HANSON, EPPERSON & SMITH

  
\_\_\_\_\_  
RICHARD K. GLAUSER  
Attorney for Southgate  
Golf Course

KLATT.PTS

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 19th day of December, 1988, 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

Mr. John V. LaGant, Pro Se  
c/o Kendrick Municipal Golf Course  
P. O. Box 6145  
Sheridan, Wyoming 82801

Original mailed to:

Washington County Court Clerk  
P. O. Box 579  
St. George, Utah 84770

Cathy S. Alder

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.

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.~~ JTB

~~2. The facts as set forth in Southgate's memorandum in support of its 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.~~ JTB

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

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

DATED this 22<sup>nd</sup> 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 17<sup>th</sup> 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  
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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

FILED *W. LaGant*

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 22<sup>nd</sup> 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 21<sup>st</sup> 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  
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Cathy J. Alder

KLATT.SJ