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IN THE SUPREME COURT OF THE STATE OF UTAH

ARTHUR DENNIS KUSY,

Plaintiff/Appellant,

vs.

Case No. 18360

K-MART APPAREL FASHIONS CORP., a Delaware corporation and JOHN DOE, an individual,

Defendants/Respondent.

On Appeal from the Third Judicial District Court of Salt Lake County, State of Utah

The Honorable G. Hal Taylor

RESPONDENT'S BRIEF

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FILED

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Clerk, Supreme Court, Utah

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ARTHUR DENNIS KUSY,

Plaintiff/Appellant,

vs. Case No. 18360

K-MART APPAREL FASHIONS CORP.,
a Delaware corporation and
JOHN DOE, an individual,

Defendants/Respondent.

RESPONDENT'S BRIEF

NATURE OF THE CASE

Plaintiff Arthur Dennis Kusy brought this action against defendants K-Mart Apparel Fashions Corp. (hereinafter "defendant") and John Doe to recover for injuries he suffered as a result of a fall from a wooden pallet being used by plaintiff for the purpose of unloading trees from a truck on defendant's premises.

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court of Salt Lake County, State of Utah, entered judgment for defendant upon a special jury verdict wherein the jury unanimously found that defendant was not negligent.

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The lower court subsequently denied plaintiff's motion for a new trial.

RELIEF SOUGHT ON APPEAL

Defendant seeks affirmance of the lower court's judgment and order denying plaintiff's motion for a new trial.

STATEMENT OF FACTS

Plaintiff, a heavy truck driver since 1967, was injured on May 21, 1976 at a K-Mart store in Murray, Utah, while he was in the process of unloading shrubbery and trees from his truck. (R. 218, 227-30, 314). Plaintiff was the only witness at trial who had actually seen how the accident occurred. (R. 353, 362). In the statement of facts in his brief, plaintiff has outlined in detail his version of the accident, which version defendant incorporates with the following additions.

Defendant agrees that plaintiff has had extensive background and experience with wooden pallets. Of the million and one-half miles of truck driving that plaintiff had done, approximately 150,000 miles involved loads using wooden pallets. (R. 271). Plaintiff further admits that he has probably seen and worked around at least 250,000 pallets in his life time. (R. 271-72).

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Although defendant admits that it had several pallets in its possession, it had no control over the pallets since most, if not all, of the pallets were provided by the various suppliers of goods to be sold in the garden shop. (R. 336-37, 361). The suppliers were free to retrieve their pallets at any time, although defendant or another supplier might use them in the meantime for loading, unloading or storage. (R. 338, 340-41, 358-60). The pallet that plaintiff fell from, or through, was one of those pallets, although its exact source is unknown. (R. 345).

Mr. Hunt, the garden shop manager for defendant, stated that he did not know whether the pallet had broken or whether plaintiff had simply fallen off of the pallet and admitted that the pallet could have broken. (R. 368-69). Nevertheless, plaintiff attempted to introduce K-Mart's Answers to Interrogatories, specifically Interrogatory No. 9, at trial. (R. 365, 367-68). Therein, defendant K-Mart (not witness Hunt), in answer to a question regarding its version of the accident, stated that the pallet broke. (R. 65-66). The lower court refused to admit the answer and would not allow plaintiff to read the interrogatory and answer to Mr. Hunt. (R. 365, 422).

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The jury, in its special verdict, found that neither plaintiff nor defendant were negligent in causing the accident. (R. 187-88).

Plaintiff moved for a new trial on March 2, 1982 on similar grounds as this appeal. (R. 190-91). The motion was denied by the lower court on March 11, 1982. (R. 195).

ARGUMENT

As grounds for reversal, plaintiff contends: (1) that the trial court improperly failed to give his requested jury instructions on res ipsa loquitur; (2) that the trial court's instruction on unavoidable accident was improper; (3) that the trial court improperly excluded defendant's answer to Interrogatory No. 9 in its Answers to Interrogatories for the purpose of cross examining defendant's witness, Mr. Hunt; and (4) that the jury's failure to award general damages indicated passion and prejudice for which a new trial should have been granted.

Plaintiff has failed to establish that the trial court committed reversible error under any of the above-described circumstances.

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POINT I

THE TRIAL COURT PROPERLY REFUSED TO GIVE PLAINTIFF'S REQUESTED JURY INSTRUCTIONS ON RES IPSA LOQUITUR

Defendant agrees that Wightman v. Mountain Fuel Supply Co., 5 Utah 2d 373, 302 P.2d 471 (1956), sets forth elements of res ipsa loquitur. There, the court stated the following general rule:

> In order to invoke this doctrine it is generally recognized that the following elements must be present: (1) That the accident was of a kind which, in the ordinary course of events, would not have happened had due care been observed; (2) That it happened irrespective of any participation by the plaintiff; and (3) That the cause thereof was something under the management or control of the defendant, or for which it is responsible.

Id., 302 P.2d at 472 (footnotes omitted). With regard to the third element, this court, in Wightman, further stated: "[I]f the evidence reasonably eliminates other explanations than the defendant's negligence, that provides the basis upon which the jury may be permitted to infer that it was the defendant's negligence which resulted in the injury." Id., 302 P.2d at 473.

The elements of res ipsa loquitur are set out, in the Restatement of Torts, in a manner virtually identical to the elements described in Wightman. Section 328D provides:

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

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> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
>
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Restatement (Second) of Torts, § 328D (1965).

Plaintiff has failed to establish that the elements of res ipsa loquitur are present in this case. The fact that the court gave the unavoidable accident instruction (discussed below) and the fact that the jury found neither party was negligent demonstrates that the accident involved in this case, in the ordinary course of events, could have happened and in fact did happen, in the absence of negligence.

Moreover, the evidence has failed to eliminate other explanations (namely, the acts of plaintiff and/or third persons) that reasonably could have caused the accident or that the pallet allegedly causing the accident was under the management, control or responsibility of defendant.

The situation in this case was not unlike a master-servant situation wherein the employee is injured during his employment. Although the doctrine of res ipsa loquitur no longer applies to master-servant situations because of worker's compensation laws, some earlier cases and cases from

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other jurisdictions are instructive with regard to the application of res ipsa loquitur here.

In Gardner v. Seymour, 27 Wash. 2d 802, 180 P.2d 564 (1947), plaintiff brought an action against defendant for the death of her husband resulting from a fall in an elevator shaft at the deceased's place of employment. The trial court entered judgment on a verdict for plaintiff but the Washington Supreme Court reversed, holding that although the plaintiff's deceased was presumed to have exercised due care, the doctrine of res ipsa loquitur was not applicable. The court stated:

> We have here a situation where the person injured knew as much about the elevator and its manner of operation as did the appellants, perhaps more, and there is no element of exclusive control. . . .
>
> . . . When it is shown that the accident might have happened as a result of one of two causes, the reason for the rule [res ipsa loquitur] fails, and it cannot be invoked.

Id., 180 P.2d at 571 (quoting Wellons v. Wiley, 24 Wash. 2d 543, 166 P.2d 852, 855 (1946)).

Similarly, in Sabol v. St. Louis Cooperage Co., 313 Mo. 527, 282 S.W. 425 (1925), plaintiff was injured when a stack of barrel staves fell upon him while he was in the course of his employment for defendant. The lower court entered judgment on a verdict for plaintiff, but the Missouri Supreme

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Court reversed, holding that the doctrine of res ipsa loquitur did not apply. The court made the following statement: "[N]o presumption of negligence on the part of the master arises, where it does not appear that an appliance was originally defective, or that it has been so long in use as to render the duty of inspection necessary, or that the master had due notice of the defect." Id., 282 S.W. at 429. The court further stated: "[W]here the servant or his associates have knowledge or opportunity to know of the defect, the rule does not apply . . . ." Id., 282 S.W. at 430 (emphasis added).

The court in Sabol closely follows Klebe v. Parker Distilling Co., 207 Mo. 480, 105 S.W. 1057 (1907). There, the lower court granted a demurrer to defendant and the Missouri Supreme Court affirmed, holding that an employee injured by the fall of an elevator was not entitled to assert the doctrine of res ipsa loquitur because "[i]f the elevator or the cable was defective or out of repair, there was nothing to prevent plaintiff and his co-employes from seeing them . . . ." Id., 105 S.W. at 1060.

Finally, the Wyoming Supreme Court reversed a judgment for plaintiff in Stanolind Oil & Gas Co. v. Bunce, 51 Wyo. 1, 62 P.2d 1297 (1936), holding that the doctrine of res ipsa loquitur was not applicable when a gas heater provided by the

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employer but lit by the employee, exploded. The court stated: "[I]f the circumstances do not show or suggest that defendant should have that superior knowledge, or if the plaintiff himself possesses equal or superior means of explaining the occurrence, the rule may not properly be invoked." Id., 62 P.2d at 1308.

In the instant case, plaintiff's injuries could have had two possible causes: (1) plaintiff fell off of the pallet for some reason; or (2) the pallet broke because of an undiscovered or latent defect in the pallet. The jury could have drawn an inference from the evidence that plaintiff fell from the pallet. Therefore, there was evidence that plaintiff participated and the res ipsa loquitur instructions were not proper.

Even if plaintiff's injury was caused by a latent or undiscovered defect, the plaintiff had substantial knowledge and experience with regard to wooden pallets. (R. 58-59). It is doubtful that Mr. Hunt or anyone at defendant's store had superior or even equal knowledge to plaintiff regarding wooden pallets. Plaintiff was closest to the pallet at the time of the injury and was best able to detect and observe the defects, if any, in the pallet. Consequently, it does not appear that this accident was one which would have occurred without the participation of plaintiff, whether that

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participation was negligent or not, and the doctrine of res ipsa loquitur does not apply.

Numerous other explanations for the accident can be inferred from the evidence. Also, possible participation by third parties also indicates that the pallet from or through which plaintiff fell was not within the control or responsibility of the defendant. Thus, the doctrine of res ipsa loquitur cannot be applied. At least two Utah cases support this proposition.

In Reich v. Salt Lake City Suburban Sanitary District No. 1, 29 Utah 2d 125, 506 P.2d 53 (1973), several home owners sued the sewer district for a sewer backup causing flooding of raw sewage into their homes. The lower court instructed the jury upon the doctrine of res ipsa loquitur. The jury found that defendant did not have exclusive control of the system but that the defendant did have responsible control. Consequently, the jury awarded damages and judgment was entered in the favor plaintiffs. This court reversed the lower court and held that because there were numerous other possible explanations for the defect in the sewer line (namely, items placed in the line by some 270 users on lateral lines, people entering manholes at their convenience or digging in the area by contractors) that could not have

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been caused by defendant, the doctrine of res ipsa loquitur was inapplicable. Id., 506 P.2d at 54.

Reich indicates that exclusive control, rather than mere responsibility, is required to apply the doctrine of res ipsa loquitur. Id., 506 P.2d at 53. Thus, res ipsa loquitur is not applicable to this case, as defendant clearly did not have exclusive control over the pallet. Nevertheless, the evidence in the instant case does not even show that defendant had "responsible control" of the pallet. Many other explanations for plaintiff's injury would take it out of either the control or responsibility of defendant and indicate that negligence should not be inferred. The suppliers of the pallet could have caused a latent defect when they constructed the pallet. Third parties could have run over or otherwise tampered with the pallets as Mr. Hunt testified. (R. 341, 365-66). As in Reich, the doctrine of res ipsa loquitur should not apply when there are so many possible explanations for the occurrence.

In Milligan v. Coca Cola Bottling Co., 11 Utah 2d 30, 354 P.2d 580 (1960), plaintiff claimed he swallowed a paper clip lodged in a bottle of soda beverage that defendants bottled and retailed. The lower court granted summary judgment for defendant and this court affirmed, holding that the doctrine of res ipsa loquitur did not apply. This court explained

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that since prior to consumption, the plaintiff had stored the beverage in an unlocked fruit room connected with his garage (which was also open on occasion) and since invitees to a birthday party were free to go into the room at any time, defendant did not have management or control of the bottle or beverage contained therein. This court cited an earlier case with approval and stated:

> [I]njustice . . . might eventuate by inferring negligence against a bottler in a case like this, where the container has a cap that easily can be removed and replaced without detection, and over which container the bottler has no further control in the hands of intermediaries including retailers, ultimate consumers, invitees to a party, or others who easily could have had access to the bottle . . . .
>
> . . . To say the bottler here had any control when the plaintiff purchased the bottle from [the retail store], and thereafter, simply would be to blind oneself to the facts.

Id., 354 P.2d at 581 (citing Jordan v. Coca Cola Bottling Co., 117 Utah 578, 218 P.2d 660 (1950)).

Milligan and Jordan are analogous to the facts of the instant case. There is absolutely no evidence that defendant manufactured the pallets used by plaintiff. They were merely provided for plaintiff's convenience. The pallets were accessible to third parties and could easily be tampered with at any time either before or after they came into defendant's possession. (R. 341, 365-66). The facts of this case simply do not justify application of res ipsa loquitur.

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Other jurisdictions have supported the holdings of Reich and Milligan. See, e.g., Grindstaff v. J. Goldberg & Sons Structural Steel Co., 328 Mo. 72, 40 S.W.2d 702, 705 (1931) (other possible explanations, including latent defects or other facts raising equally valid inferrences of negligence, prevent the application of the doctrine of res ipsa loquitur); De Witt Properties, Inc. v. City of New York, 44 N.Y.2d 417, 426-427, 406 N.Y.S.2d 16, 21-22 (1978) (where there is evidence that a gas company could have been responsible for break in water line, negligence of the city cannot be inferred from the mere happening of the break); Winkler v. Seven Springs Farm, Inc., 240 Pa. Super. 641, 359 A.2d 440, 443-44 (1976), aff'd, 477 Pa. 445, 384 A.2d 241 (1978) (because there are "numerous explanations" and the presence of a latent, undiscoverable defect that could have caused a sticking door, plaintiff could not recover on the basis of the doctrine of res ipsa loquitur).

In the case at bar, defendant's employee, Mr. Hunt, testified that it was entirely possible for the pallets to be removed, replaced, run over or otherwise tampered with by third parties. (R. 341, 365-66). In fact, plaintiff affirmatively employs that testimony in his brief. Further, there is evidence that there was a latent defect in the pallet upon which plaintiff was injured, which was not discoverable by a

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reasonable inspection. While plaintiff claims that defendant should have discovered the latent defect, plaintiff has never explained what type of inspection or testing should have been employed by defendant. Surely plaintiff would not require defendant to do any more inspection than he did himself; namely, both a visual inspection and a physical inspection by actually stepping on the pallet and testing its strength. Plaintiff was just as capable, if not more so, of discovering the defect because of his vast experience with pallets.

Finally, Mr. Hunt testified that the pallets were received from various suppliers. (R. 336-37). The pallet upon which plaintiff was injured was one constructed by one of those third persons, rather than by defendant, and there was no evidence that any pallet was constructed or supplied solely by defendant. The manufacturer's faulty construction could have caused a latent defect in the pallet. Because of these many possible explanations, the pallet could not have been within the control or responsibility of defendant and plaintiff should not be entitled to invoke the doctrine of res ipsa loquitur.

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POINT II

THE TRIAL COURT PROPERLY GAVE DEFENDANT'S REQUESTED JURY INSTRUCTION ON UNAVOIDABLE ACCIDENT AND EVEN IF IT WAS ERRONEOUS, IT WAS HARMLESS ERROR

The trial court's instruction on unavoidable accident was proper under the circumstances of the case. Notwithstanding any claimed error in giving the instruction, such error, if any, was harmless.

Plaintiff has already drawn the attention of the court to Woodhouse v. Johnson, 20 Utah 2d 210, 436 P.2d 442 (1968). There, plaintiff brought an action on behalf of her son to recover for the son's injury when defendant, while backing out of a driveway, ran into the boy. Defendant contended that the accident was unavoidable because she could not see the child when she began backing. The evidence apparently supported such a contention because the trial court gave an instruction on unavoidable accident. The trial court entered judgment on a verdict for defendant and plaintiff appealed, claiming the instruction on unavoidable accident was improper. This court affirmed, holding that under the circumstances of the case, the instruction was proper and stated:

> It is obvious that there are some accidents, i.e., unusual and unexpected occurrences, which result in injury and which happen without anyone failing to exercise reasonable care; and when this is so the accident is properly classified as unavoidable inso-

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> far as legal causation or the imposition of liability is concerned.

Id., 436 P.2d at 445. Accord, Anderton v. Montgomery, 607 P.2d 828, 834-35 (Utah 1980); Calahan v. Wood, 24 Utah 2d 8, 465 P.2d 169, 170-71 (1970).

Courts from other jurisdictions have permitted the use of an unavoidable accident instruction in cases where a latent or undiscoverable defect may have been the cause of the accident. In Guanzon v. Kalamau, 48 Hawaii 330, 402 P.2d 289 (1965), plaintiff was struck from behind while sitting at a stop in his vehicle. Defendant, the driver of the vehicle behind, claimed that his brakes failed but that just prior to the accident they worked fine. The lower court gave an instruction on unavoidable accident and entered judgment for defendant pursuant to a jury verdict. The Hawaii Supreme Court affirmed with regard to the unavoidable accident instruction and held that since there was some evidence to show that the accident was unavoidable, under the circumstances the instruction was proper. The court stated that "[m]echanical failure or malfunction due to a latent defect would clearly seem to constitute 'exceptional circumstances' and an instance in which the unavoidable accident instruction 'is peculiarly appropriate.'" Id., 402 P.2d at 297. See also, Ackerman v. Terpsma, 74 Wash. 2d 209, 445 P.2d 19, 23 (1968)

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(where there was some evidence of latent defect, an unavoidable accident instruction was proper).

In this case, plaintiff states that although he observed a crack in one of the boards and a bend in another, he did not observe any defects in the specific boards he claims broke and he allegedly fell through. (R. 235, 296, 308, 314, 322). Similarly, defendant was not aware of any defects in the boards. (R. 360-61). Since plaintiff, who had vast experience with pallets, was unable to observe the defect, it must have been a latent defect in the pallet that caused plaintiff's injury. Thus, the accident may have been unavoidable since neither plaintiff nor defendant observed the defect in the pallet, and were not negligent in failing to do so because the defect was latent and undetectable by any reasonable inspection or testing. Consequently, it was proper for the trial court in this case to give the unavoidable accident instruction.

Even assuming the unavoidable accident instruction was given in error, such error, if any, was not prejudicial and was harmless. This court further stated in Woodhouse:

> [E]ven the cases which disapprove of the instruction as error recognize that whether it is ground for reversal depends on the circumstances of the particular case. In that connection it is important that at the time of the trial of this case it had never been adjudicated in this state that the giving of an instruction on unavoidable accident was prejudicial

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> error. . . . Assuming it to be the repetion of an idea and that it is best to avoid repetion where possible, the mere duplication of an idea in the instruction is not reversable error. If it were, very few if any sets of instructions could be sustained as errorless.

Woodhouse v. Johnson, 20 Utah 2d 210, 436 P.2d 442, 445 (1968). Thus, even if, as plaintiff apparently contends, the instruction was duplicative of the other negligence instructions, it was not reversable error.

This court states in Anderton v. Montgomery, 607 P.2d 828, 834-35 (1980), that an unavoidable accident instruction is not prejudicial or reversible error "unless it results in the instructions given being weighted, as a whole, in favor of the defendant." The instructions in the present case indicate no such "weighting." Further, the instruction was somewhat helpful to plaintiff since it could be used to determine that plaintiff was not negligent either.

POINT III

THE TRIAL COURT PROPERLY REFUSED TO PERMIT PLAINTIFF TO CROSS-EXAMINE DEFENDANT'S WITNESS FROM WRITTEN INTERROGATORY ANSWERS

Rule 33(b) provides: "Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence." Utah R. Civ. P. 33(b). Thus, plaintiff was required to show that the Answers to Interrogatories were

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admissible as evidence before they could be admitted and he could use them for the purpose of cross-examination. Plaintiff claims that the Answers to Interrogatories signed by Mr. Street, defendant's manager, were admissible as evidence because they were to be used for the purposes of impeachment and they were an admission of a party.

The attempted use of the Answers to Interrogatories for impeachment purposes was inappropriate. Mr. Hunt admitted that he did not know whether Mr. Kusy had fallen off the pallet or whether it had broken. (R. 369). Hunt simply said that after the accident he saw no broken boards, but he did not see the event itself. (R. 353, 356, 366). Thus, impeachment by use of the answer to Interrogatory No. 9 (which states that the pallet broke and Mr. Kuzy fell through) would be meaningless since Mr. Hunt admitted that Mr. Kuzy _could_ have fallen through broken boards in the pallet. (R. 369). In light of plaintiff's virtually uncontradicted testimony wherein he stated he fell through a broken board on the pallet and Mr. Hunt's testimony that it could have happened that way, the use of the Answers to Interrogatories for purposes of impeachment was irrelevant and would have added nothing to plaintiff's case.

Plaintiff also argues that the Answers to Interrogatories were admissible as an admission of a party. He cites _Hill v._

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Grand Central, Inc., 25 Utah 2d 121, 477 P.2d 150 (1970), which holds: "In any case where answers to interrogatories are to be used to establish a fact, they can only be used as admissions against the party making them." Id., 477 P.2d at 151.

Rule 63(7) of the Rules of Evidence provides that an admission is admissible if it is "[a]s against himself a statement by a person who is a party to the action in his individual or a representative capacity and, if the latter, who is acting in such representative capacity in making the statement." Utah. R. Evid. 63(7). In the case at bar, Mr. Hunt was not acting in a representative capacity for defendant; he was acting as a witness to the events of the accident. The party who was acting in his representative capacity for defendant by signing the Answers to Interrogatories, Mr. Street, was not present at the trial and was not subpoened by plaintiff. There was no evidence that he was unavailable to be called as a witness at trial. (R. 365, 422). Consequently, the lower court ruled correctly that the Answers to Interrogatories could not be admitted.

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POINT IV

THE FACTS AND CIRCUMSTANCES SURROUNDING THE AWARD OF GENERAL DAMAGES INDICATE NO PASSION OR PREJUDICE AGAINST PLAINTIFF

Plaintiff's claim that the award for general damages was as a result of passion and prejudice against plaintiff by the jury, is unfounded.

Certainly, the best reason for the jury verdict of nominal general damages was the fact that they had already found defendant was not negligent in causing plaintiff's injury, and most certainly knew that defendant would not be required to pay <u>any</u> amount. It was more likely that, instead of the no negligence finding being influenced by the low general damages finding, it was the other way around. Even if the jury improperly awarded no general damages, this court should not find error when the trial judge remedied the situation by causing the jury to return for further deliberation on general damages as provided under Rule 47(r), Utah Rules of Civil Procedure. <u>See</u> <u>Langton v. International Transport, Inc.</u>, 26 Utah 2d 452, 491 P.2d 1211, 1215 (1971).

CONCLUSION

Plaintiff has failed to fulfill the criteria for giving the jury an instruction on res ipsa loquitur. Not only is there evidence that plaintiff's injury could have happened

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without negligence on anyone's part, there is also evidence that the pallet that plaintiff fell through or from, was not within the control or responsibility of defendant. Indeed, plaintiff himself had control over whether he was injured by the pallet because he was at least as able, if not more so, to observe any defects that might be present in the pallet.

The unavoidable accident instruction was proper under the circumstances of the case since there was evidence that a latent defect, undiscoverable by either of the parties, could have caused the accident. Regardless, even if the instruction was given in error, it was harmless since the instruction was at most, duplicative and did not cause the instructions as a whole to be weighted in defendant's favor.

Under the Rules of Evidence, plaintiff has failed to show any reason why Answers to Interrogatories signed by Mr. Street could be admitted at trial for the purposes of cross-examining Mr. Hunt. The Answers to Interrogatories had no impeachment value since Mr. Hunt was not the person who signed the Answers to Interrogatories on defendant's behalf, nor did he deny what was contained in the Answers to Interrogatories. Further, the Answers to Interrogatories could not be admitted as an admission against a party since Mr. Hunt was not acting in his representative capacity for K-Mart at the trial, but simply as a witness. The proper represen-

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tative of K-Mart with regard to the Answers to Interrogatories, Mr. Street, was not present at the trial and plaintiff did not show that he was unavailable.

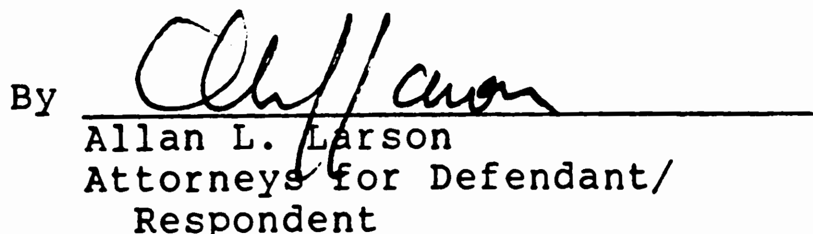
Finally, plaintiff has failed to establish that the lower court improperly denied a new trial on the basis that the jury gave an inadequate general damage award.

The trial court committed no reversible error and its judgment was proper. The judgment for defendant and order denying a new trial should be affirmed.

DATED this 1st day of November, 1982.

Respectfully submitted.

SNOW, CHRISTENSEN & MARTINEAU

By 

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 1982, I personally hand delivered, two (2) copies of this Respondent's Brief on Appeal to:

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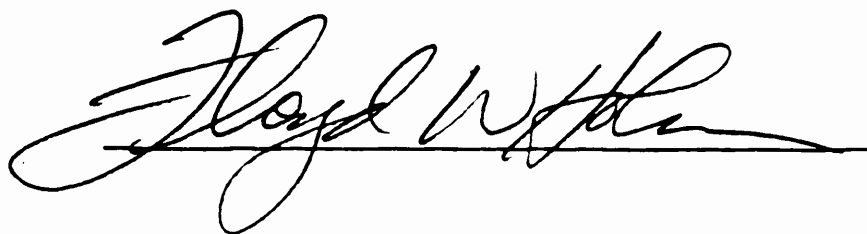

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