2016

Lisa Penunuri and Barry Siegwart, Plaintiffs/ Appellants, vs. Sundance Partners, Ltd; Sundance Holdings, LLC; Sundance Development Corp; Robert Redford; Redford 1970 Trust; Rock Mountain Outfitters, l.c.; And Does I-X. Defendants and Appellees.

Utah Supreme Court

ORIGINAL

IN THE SUPREME COURT OF UTAH

LISA PENUNURI and BARRY SIEGWART, Plaintiffs/Appellants, vs. SUNDANCE PARTNERS, LTD; SUNDANCE HOLDINGS, LLC; SUNDANCE DEVELOPMENT CORP; ROBERT REDFORD; REDFORD 1970 TRUST; ROCK MOUNTAIN OUTFITTERS, L.C.; and Does I-X. Defendants/Appellees.	APPELLANTS' REPLY BRIEF Case No. 20160683-SC Trial Case No: 08040019 Court of Appeals Opinion: 2016 UT App 154.

REPLY BRIEF OF THE APPELLANT

ON CERTIORARI FROM UTAH COURT OF APPEALS
The Honorable Frederick Voros, Presiding

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Oral Argument and Published Decision Requested

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ARGUMENT

A) *Blaisdell* Holds that Summary Judgment is Appropriate in Gross Negligence Cases *Only* Where a Plaintiff Cannot Establish Ordinary Negligence

Rocky Mountain Outfitters ("RMO") contends that, "*Blaisdell* represented 'the original and best reading' of *Berry*." (Def. Opp at p. 17). The Supreme Court of Utah in *Berry* determined that when a plaintiff can withstand a summary disposition on ordinary negligence, then summary judgment on gross negligence is inappropriate unless the standard of care is fixed by law and reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances.[1] The *Blaisdell* Court's holding is entirely consistent with this reading, in that, if a plaintiff cannot establish ordinary negligence he cannot establish gross negligence.[2]

Ms. Penunuri contends, that neither the Court of Appeals nor RMO fully understood *Blaisdell* and its interpretation of *Berry* as they completely missed *Berry's* condition precedent. In particular, in *Berry*, the Supreme Court of Utah noted:

> **[w]ere we evaluating this case as one of ordinary negligence**, we would have little difficulty discerning the presence of genuine issue of material fact sufficient to overcome a motion for summary judgment. Mr. Berry presented testimony of an experienced ski racer, coach, and jumper who witnessed Mr. Berry's accident and faulted the jump design. A second expert in ski racecourse design and safety was likewise critical of the configuration of the accident site.[3]

After the *Berry* Court found that there was a basis for ordinary negligence, it then determined:

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[1] *See Berry v. Greater Park City Co.*, 2007 UT 87, ¶¶28, 30, 171 P.3d 442.
[2] *See Blaisdell v. Dentrix Dental Systems, Inc.*, 2012 UT 37, ¶15, 284 P.3d 616.
[3] *See Berry*, 2007 UT 87, at ¶ 28.

> We have held that where a standard of care is not 'fixed by law,' the determination of the appropriate standard is a factual issue to be resolved by the finder of fact. *Wycalis*, 780 P.2d at 825. Identification of the proper standard of care is a necessary precondition to assessing the degree to which conduct deviates, if at all, from the standard of care—the core test in any claim of gross negligence. Absent the presence of identified, applicable standard of care to ground the analysis, we hold that the district court improperly granted [the defendants'] summary judgment and dismissed [the plaintiff's] gross negligence claim.[4]

The *Berry* Court then applied the *Wycalis* rule; regarding gross negligence,

> summary judgment is inappropriate unless the applicable standard of care is fixed by law, **and** reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances.[5].

The *Blaisdell* Court did not overturn or alter the rule reiterated in *Berry* and certainly does not change the highlighted "and" to an "or" as the Court of Appeals interpreted the case; rather the *Blaisdell* Court determined that plaintiff's facts did not establish ordinary negligence, particularly identifying:

> [The plaintiff's] claim is less complicated [than *Berry* and *Pearce v Utah Athletic Found, Inc.,* 2008 UT 13, ¶26 n.2]. 'Summary judgment is generally inappropriate to resolve negligence claims and should be employed only in the most clear-cut case.' Here it is undisputed that [the defendant] warned [the plaintiff] to back up his data. In fact, before [the plaintiff's] employee began installing the G2 Upgrade, the [defendant's] technical support employee asked for and received oral confirmation from [the plaintiff's] employee that the office had a current backup. [The defendant] apparently relied on this confirmation, which, if true, would have ensured that no data was lost."[6]

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[4] *See Id* at ¶ 30.

[5] *See Id* at ¶ 27 see also *White v. Deseelhorst*, 879 P.2d 1371, 1374 (Utah 1994), which recognized the rule established in 1989 in *Wycalis v. Gardian Title of Utah*, 780 P.2d 821, 825 (Utah Ct. App. 1989)

[6] *See Blaisdell*, 2012 UT 37 at ¶15.

Said otherwise, in *Blaisdell* the Supreme Court of Utah recognized that the plaintiff could not establish ordinary negligence and therefore could not establish gross negligence.[7] The standard of care in *Blaisdell* was that the data needed to be backed up so no data would be lost when the computer upgrade was installed.[8] The duty to back up the data was the plaintiff's not the defendant's.[9] The plaintiff breached his own duty to back up his own data.[10] It therefore is axiomatic that the defendant could not be held liable for the plaintiff's breach in the standard of care in ordinary negligence; it is also therefore axiomatic that if the defendant could not be held liable for ordinary negligence, then the defendant could not be held liable for gross negligence on the same set of facts.[11]

The rule has not changed from *Berry*: First, to establish gross negligence the Plaintiff has to have facts sufficient to survive a motion for summary judgment on ordinary negligence. If the plaintiff's facts can establish ordinary negligence, and the standard of care ***is not*** 'fixed by law,' then motion for summary judgment is inappropriate. If the plaintiff's facts can establish ordinary negligence and the standard of care ***is*** fixed by law, then the court can determine if reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances. Ms. Penunuri's case can easily survive a motion for summary disposition on ordinary negligence, and the standard of care is not fixed by law, therefore summary disposition was inappropriate on gross negligence.

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[7] *See Id.*
[8] *See Id.*
[9] *See Id.*
[10] *See Id.*
[11] *See Id.*

B) The Court of Appeal's alteration of the *Berry, White, and Wycalis* test/rule is illogical.

The Rule expressed in *Wycalis,* and reiterated in *Berry* and *White*, that in gross negligence, "summary judgment is 'inappropriate unless the applicable standard of care is fixed by law, ***and*** reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances,'"[12] would be unintelligible if the highlighted "and" became an "or" as the Court of Appeals determined.[13] Instead of one rule, there would be two rules that would warrant summary disposition of gross negligence cases and neither rule would serve justice. If *Blaisdell* created two separate rules regarding gross negligence, by changing the "and" to an "or" as the Court of Appeals suggested in *Penunuri*: The first rule would be "summary judgment is appropriate where the applicable standard of care is fixed by law," and the distinct second rule would be "summary judgment [in gross negligence] is appropriate where reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances."[14]

What the Court of Appeals failed to address is: How would courts interpret the first rule? If 'the standard of care is fixed by law' can there only be negligence and not gross negligence? The plain language would suggest such a result, and would absolve defendants from gross negligence, even for defendants who violated a law, say someone going 150 mph down the highway, as well as defendants who were not violating the law,

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[12] *See* 2007 UT 87, ¶ 27, 171 P.3d. 442. (quoting *White v. Deseelhorst*, 879 P.2d 1371, 1374 (Utah 1994) and *Wycalis v. Guardian Title of Utah*, 780 P.2d 821, 835 (Utah Ct. App. 1989).

[13] *See Penunuri v. Sundance Partners, Ltd.*, 2016 UT App 183, ¶20, 301 P.3d 984.

[14] *See Id at ¶21.*

say someone going 65 mph. In arguendo, if the rule only applied to the defendant who is compliant with the law, it still would be fraught with problems.

For instance, say there is a fatal accident on Highway I-70 involving a single bus conclusively determined to have travelled at 79 mph. The claims for gross negligence were based upon the bus driver driving too fast. The speed limit on I-70 between the Colorado line and Cove Fort, UT is 80 mph; therefore the driver was within the 80 mph standard of care fixed by law. In addition, the bus passed its safety inspection every year and was compliant with the law. The gross negligence cause of action would be dismissed as a matter of law pursuant to 12(b)(6), Motion to Dismiss. As a matter of law the defendant cannot be found grossly negligent, regardless of any additional facts, because the "reasonable minds question" has been severed from the "fixed by law question." Such a rule that a defendant can escape gross negligence if a "standard of care was fixed by a law" would be unjust.

For instance, in the above example it would not matter if the facts revealed: that the bus driver knew that when he drove faster than 65 mph his bus shimmies and when he goes over 70 mph he knows he will lose control; that in the past whenever the driver has gone over 70 mph, he's lost control of the bus and drove off the road; that on each occasion when he's driven off the road his passengers have been injured; yet that even knowing the dangers, the driver accelerated to 79 mph when he arrived at Cove Fort; that everyone in the bus started yelling at the driver to slow down, but he ignored them; that as anticipated the bus went off the road and killed some of the passengers; and that he ultimately admitted that he was utterly indifferent to the consequences of going up to 79

mph. Obviously, reasonable minds could conclude that the driver was grossly negligent, but under the first test, the speed limit is the standard of care fixed by law and since he did not violate the speed limit, he cannot be found to be grossly negligent. If the passengers had also signed a pre-injury release the negligence claims would be dismissed and the bus driver would not be held liable for any negligence regardless of how reckless he was.

The second rule that "summary judgment is appropriate where reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances," works only in regards to ordinary negligence. If it applies to gross negligence then district courts are again faced with the same dilemmas and issues they faced prior to *Berry* and its ilk.

As *Berry* noted, without a standard of care fixed by law, it is inevitable that a finder of fact will have to weigh the facts to determine the "appropriate standard of care" and assess "the degree which conduct deviates, if at all, from the standard of care—the core test in any claim of gross negligence."[15] In *Berry* the Court ruled "[a]bsent the presence of an identified, applicable standard of care to ground the analysis, we hold that the district court improperly granted [defendant's] summary judgment and dismissed."[16] Likewise in the present case without an applicable standard of care to ground the analysis it was also improper for the trial court to dismiss and for the Court of Appeals to affirm.

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[15] *See Berry,* 2007 UT 87 at ¶30.
[16] *See Id.*

C) Ms. Penunuri's Claims Would Survive a Motion for Summary Judgment On Ordinary Negligence.

The plaintiff in the *Blaisdell* Court could not make it through this step but the plaintiff in the *Berry* Court had no problem establishing ordinary negligence, and likewise Ms. Penunuri can easily succeed on a motion for summary judgment on ordinary negligence.[17] The facts between *Berry* and Ms. Penunuri's case are remarkably similar. The plaintiff in *Berry* failed to negotiate the course's jump and fell during a skiercross race. *Berry*, 2007 UT 87 at ¶28. Ms. Penunri failed to stay on her horse when it suddenly and unexpectedly to her accelerated (R. at 941-942, 946). The plaintiff in *Berry* fractured his neck, which caused spinal cord syndrome and paralysis. *Berry* 2007 UT 87 at ¶5 Ms. Penunuri suffered a C5-C7 subluxation neck fracture, which caused spinal cord syndrome (R. at 946, 948-949). The plaintiff in *Berry* offered expert opinion that pointed to significant design flaws in the jump that was the site of the fall.[18]. The plaintiff in *Berry* testified that the flaws in the design caused Mr. Berry to fall and his injuries.[19] The Berry Court determined that on these facts, the plaintiff would survive a motion for summary judgment on ordinary negligence.[20] Ms. Penunuri has an expert, Scott Earl, who has testified that the guide breached the standard of care when she allowed large gaps to form in her train of horses (R. at 594, 941-942, pp 89-90; 943, p. 85; 949 p.58-59). Mr. Earl also testified that the guide breached the standard of care when she failed to stop and close the gaps at the moment when she came upon a steep incline, a sharp

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[17] *See Blaisdell*, 2012 UT 37 at ¶15, and *Berry*, 2007 UT 87 at ¶28.
[18] *See Id* at ¶6
[19] *See Id* at ¶28.
[20] *See Id.*

blind bend with hikers on the inside of the bend (R. at Id). Mr. Earl testified that the gaps caused the horse to suddenly, and unexpectedly to Ms. Penunuri, accelerate (R. at 948-949,955, 941-942,949-950, 946).

If the few facts iterated in *Berry* were enough for its plaintiff to survive a motion for summary judgment on ordinary negligence, then under Ms. Penunuri's facts she should expect the same result. The facts in Ms. Penunuri's case certainly are plenty sufficient to survive a motion for summary judgment on ordinary negligence; in particular:

Ms. Penunuri's expert, Dennis Earl, testified that the standard of care requires that the gaps between horses cannot extend greater than 4 horse length or 32 feet, and if gaps do extend beyond four horse lengths the trailing horse will suddenly accelerate and likely cause the rider to fall (R. at 941-942 p. 89-90, 1256). Mr. Earl also testified that the standard of care of 4 horses shrinks to 2 horses (16 feet) if the guide comes upon a danger, such as a sharp bend, a steep incline, or hikers, and as long as there are large gaps over 16 feet, the added dangers will cause the horse to suddenly accelerate (R. at Id). RMO's own owner, Joseph Loverage, confirmed Mr. Earl's testimony when he testified that two to three horse lengths are the maximum distance between horses to keep a straggling horse from unexpectedly accelerating, and he testified that hazards, such as hikers, increase the likelihood that a horse will suddenly accelerate if there are gaps in the train of horses (R. at 590, 1254).

RMO's employee and another guide, Braydon Whitely, testified that two horse lengths are where he tries to keep the horses, and that RMO's horses in particular are

likely to suddenly accelerate if the horses get to three horse lengths or 24 feet (R. at 590,1253, 1262, 644,632). Mr. Whitely testified that RMO's horses **would** accelerate when the gap is ten horse lengths or 80 feet (R. at 644, 632, 1262). RMO's expert testified that gaps should be two to three horses apart at the maximum (R. at 590,1253). The gap in front of Ms. Penunuri's horse, when it came upon the sudden steep section, the hikers, and the sharp turn, and suddenly accelerated throwing her off and fracturing her neck, was 125 feet or 16 horse lengths (R. at 1261). Observably, Ms. Penunuri's case can survive a motion for summary judgment on ordinary negligence, it therefore becomes a factual issue as to how far RMO's conduct deviated from the standard of care. Logically, to determine how far a defendant deviated from the standard of care, there has to be an identifiable applicable standard of care. *Berry* 2007 UT 87, ¶30.

D) Applicable Standard of Care is Not Fixed By Law

As RMO recognizes the applicable standard of care is not fixed by law, therefore determining how far RMO deviated from the standard of care is a factual issue to be determined by the trier of fact.[21] In *Pearce v. Utah Athletic Foundation,* this Court recognized the similarities between its plaintiff and the plaintiff in *Berry*.[22]. The Pearce Court acknowledged that the plaintiff brought a gross negligence claim the against the defendant, UAF, and that the district court granted summary judgment on the gross

[21] *See Pearce v. Utah Athletic Foundation*, 2008 UT 13, ¶26, 179 P.3d 760.
[22] *See Id.*

negligence claim because the plaintiff had not "set forth sufficient evidence of gross negligence."[23]

However, in *Pearce* as in *Berry*, there was no standard of care fixed by law.[24] In particular, the *Pearce* Court determined that there was no standard of care regarding the operation of public bobsled rides upon which the district court could have based its analysis of gross negligence.[25] The Pearce Court noted that the district court itself acknowledged that the expert witness in the case "did not opine to the standard of care in such an industry."[26] The Supreme Court of Utah held that without an identified, applicable standard of care, it was an error for the district court to rule on summary judgment that, as a matter of law, Pearce could not show gross negligence.[27] Therefore, the Supreme Court of Utah held that the district court improperly granted summary judgment to the defendant on Pearce's gross negligence claim, and it reversed and remanded the case to the district court for a jury trial.[28]

In the present case, RMO has repeatedly stated and the district court accepted as an undisputed fact that there was no standard of care fixed by law, therefore there was no basis to grant the motion for summary judgment. In RMO's Appellees' brief at footnote 7, RMO twisted Ms. Penunuri's expert's testimony, when RMO claims "[s]ignificant to the district court was Mr. Earl's admitted unfamiliarity with the industry standard

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[23] *See Id.*
[24] *See Id.*
[25] *See Id.*
[26] *See Id.*
[27] *See Id.*
[28] *See Id.*

applicable to the trail guiding business and his lack of commercial horseback riding experience."[29] Mr. Earl testified that he knows of no publication or regulation regarding the standard of care regarding the allowable gaps between horses in a guided trail ride, for good reason as there are no regulations or publications; Mr. Earl testified as follows:

> Q. With respect to trail guides, there's really not – ***is there a publication or regulation or something I can go to figure out what the industry standard*** [for gaps between horses] would be?
>
> A. [Mr. Earl response] I have no idea.
>
> Q. Do you have any idea how we would determine what [the] industry standard would be?
>
> A. ***Well, most of its common sense***. And among horse people, it's not that hard to figure out what works and what doesn't work, but I don't know where you would come up with a standard.
>
> Q. So you would say it would be ***based largely on experience***, then?
>
> A. Right (R. at 591, 1067, 959).

RMO's own expert confirmed that there was no standard of care fixed by law, when he testified that there were no publications or regulations or any promulgated set standards for gaps between horses and that he determines the gaps the same way Mr. Earl does, through experience (R. at 1066, and 1084 p.60 lines 1-9). Since the law does not fix the standard of care, and it is a question of fact for the trier of facts to determine the degree that RMO deviated from the standard, the inquiry should stop here and Ms.

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[29] Although not part of the present certiorari, Mr. Earl was paid to guide riders in a commercial setting a total of 960 times, and guided people on trips thousands of times as the owner of six to ten horses throughout his life; he is well qualified to testify as to his experience as to what is needed to keep horses from suddenly and unexpectedly accelerating on a trail.

Penunuri's case should go to trial. If this Supreme Court of Utah alters the rule, and the inquiry continues, then nonetheless Ms. Penunuri's case should proceed as she certainly has the facts to establish that RMO was grossly negligent.

E) Ms. Penunuri's Fact Support Gross Negligence

As discussed supra, it is undisputed that the guide breached the standard of care when she allowed a 125-foot gap to form to between the riders, and further breached the standard of care when she came upon three dangers simultaneously and she did not stop at that moment to close the 125-foot gap (See supra). First, in regards to the 'slight care' requirements of recklessness, it is axiomatic that the 'slight care' is required to be observed at the moment that the negligence occurred. For example a driver who stops at a green light to allow an elderly person to cross the road is showing slight care, but that same driver cannot escape gross negligence if he runs the next three red lights and he runs a forth light at an excessive speed and hits and injures a person, as he is not exhibiting slight care at the moment of the breach of the standard of care. This is true, even though he testified that he intended to stop at the fifth light.

Second, as RMO points out, "recklessness includes conduct where the actor knew or had reason to know of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference, to that risk.[30] In this instance, Ms. Wright the guide, was taught and instructed each year that she as the guide must watch out for hazards, watch out for steep

[30] See Appellee's Brief at p.24 (quoting *Daniels v. Gamma West Brachytherapy*, 2009 UT 66, ¶ 42, 221 P.3d 256 and Rst 2nd of Torts, § 500 cmt. a (1965)).

inclines, watch out for steep blind turns, watch out for hikers, warn her guests of upcoming hazards, and above all else keep her train of horses together, as she is instructed, "adjust your pace so that large gaps do not form between horses in your string, [as] gaps encourage horses to trot un-expectedly" (R. at 898, 1252, 1575 at p. 40, 42). Therefore, RMO's guide, Ms. Wright, knew or had reason to know that gaps created an unreasonable risk to RMO's guests.

Nonetheless, Ms. Wright had a 125-foot gap between her horses when she climbed the steep section of trail, passed the steep blind curve, and passed the hikers hiding in the bushes, and continued to ride up the trail. Ms. Wright had a gap in her train of horses which was nearly 9 times the distance that even her boss, her coworker, RMO's expert and Ms. Penunuri's expert considered safe, at the time when she passed three known hazards on the trail. Additionally, Ms. Wright ignored the pleas of the other riders, and in particular Suzanne Moag, to stop and wait until everyone caught up; instead she proceeded up the trail, past the hazards (R. at 848). (It is irrelevant why she continued up the trail, as at the moment she came upon the hikers the standard of care required her to stop and close the gap). Lastly, Ms. Wright was taught and it is recognized that only the guide can close the gaps when they form and Ms. Wright missed her last opportunity to keep Ms. Penunuri safe when she knowingly and recklessly proceeded to go up the trail after passing the steep incline, sharp blind curve and hikers without closing the 125 foot gap (R. at 898, 1252, 1575, at p. 40,42).

F) The Bright Line Berry Test Works and It Is Fair to Both Plaintiff and Defendants

RMO claims, "under Penunuri's position, summary judgment would be unattainable in any case of alleged gross negligence, so long as the standard of care is not 'fixed by law.' If adopted, such a rule would deprive litigants and the courts of what has been described as a 'valuable and necessary' tool in our judicial system." See Appellee's Brief at Page 20-21. Since 1989, *Wycalis*'s opinion has been the rule adopted by this Court and it is RMO that is requesting that the rule be abandoned. If this Court abandons the rule, it will be Plaintiffs who will be deprived of having the facts of their case decided by the jury. Defendants would seek summary judgment rulings on every gross negligence case to see how the district court rules on each set of fact pattern. There is no downside to seeking a motion for summary judgment, if the district court is permitted to weigh the facts on gross negligence. As *Blaisdell* recognized, if the facts do not support ordinary negligence and the defendant can succeed with a motion for summary judgment on ordinary negligence then summary judgment is also appropriate for gross negligence, but if the defendant cannot succeed in a motion for summary judgment on ordinary negligence, then the deviation from the standard of care is a factual issue to be determined by the finder of fact; the jury. [31]

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[31] Defendants claim, "*Blaisdell* is not the first Utah appellate decision to affirm summary judgment on a claim of gross negligence." In both cases cited by RMO where this Court actually found that summary judgment was appropriate for gross negligence, neither case had actually pled gross negligence. In *Blaisdell,* as discussed supra, and found to be unable to establish ordinary negligence, the complaint "does not separately caption gross negligence," but does allege the defendant "breaches of its duty of care were willful and wanton, and committed with recklessness to a degree that shows utter indifference to the

RMO's claims that the "application of the fixed by law standard would also weaken the ability of parties to contractually allocate risks" is unfounded. RMO has contractually limited itself from ordinary negligence. A plaintiff who has signed a pre-injury release has contractually allocated his risk, as he no longer just needs to establish that a defendant breached the standard of care and the breach caused the injury, he needs to establish that the defendant failed to "observe even slight care; [and that] it [was] carelessness or recklessness to a degree that shows utter indifference to the consequences that may result." According to RMO, "any claim of gross negligence would be impervious to summary judgment." First, that is not true, if there are not facts to establish ordinary negligence, as Blaisdell revealed, then the gross negligence claims will also be dismissed. Second, RMO's assumption is that plaintiffs will file 'unsupportable or unsustainable' gross negligence claims, so that they can litigate a losing case for years at huge costs. The rule has been in place since 1989, and if there were a host of unsupportable or unsustainable gross negligence claims "already afoot" RMO would surely know of them. RMO has contractually limited its liability for negligence when

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consequences that may result" in its ordinary negligence cause of action. The plaintiff in *Blaisdell* did not plead gross negligence, but he was requesting punitive damages, and the language placed in his ordinary negligence cause of action comes from Utah's punitive damage statute, Utah Code Ann. §78B-8-201. The other case cited by RMO, *Moon Lake Electric Ass'n Inc. v. Utrasystems Western Constructors, Inc.*, 767 P.2d 125 (Utah Ct. App. 1988), which was decided a year before Utah adopted the "fixed by law" rule, dealt with forfeiture of bids on construction projects. The standard for forfeiture is a "bidder has acted in good faith, *without gross negligence*, . . ." The Court recognized the plaintiff only alleged ordinary negligence, then noted that the "standard, however [in forfeiture], is gross negligence. . ."

Ms. Penunuri's signed the release, it should not be able to extend that contract to include its gross negligence.

Costs

This Supreme Court of Utah should not change the rule governing gross negligence that summary judgment is inappropriate unless the applicable standard of care is fixed by law, **and** reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances. In addition it should not find that Ms. Penunuri's facts could not establish gross negligence under the law. But if this Supreme Court of Utah does decide to deprive Ms. Penunuri of her chance to have her case heard by a jury, it would be unfair to then award costs to RMO after depriving her of her right to have a trial that she had when she had filed her case before the rule was changed.

CONCLUSION

For the foregoing reasons and those in Ms. Penunuri's Appellate Brief, Ms. Penunuri respectfully request that this Supreme Court of Utah find in her favor and reverse the Court of Appeals and remand this case for trial. Ms. Penunuri also requests that this Supreme Court reverse the costs awarded to RMO.

Respectfully submitted this 24th day of March 2017.

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Requirements

I hereby certify that this reply brief complies with the type volume limitations of Utah R. App. P 24(1)(A) because the brief contains 4,960 words excluding parts of the brief exempt by Utah Rules App. P. 24(f)(1)(B) This brief complies with the typeface requirements of Utah Rules Appellate Procedure 27(b) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 13 point Times New Roman font.

and

MAILING CERTIFICATE

I hereby certify that on this 24th day of March 2017, I caused to be hand delivered two true and correct hard copies and one CD of the Reply Brief of Appellants and to be served on Appellees:

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