

1991

Herring v. BandB Amusements : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

910018

IN THE SUPREME COURT OF THE STATE OF UTAH

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TAMMY HERRING (LAMB),	:	
	:	APPELLANT'S BRIEF
Plaintiff-Appellant,	:	
	:	
-v-	:	
	:	
B & B AMUSEMENTS CORP., an	:	Case No. 910018
Arizona corporation, and	:	(Priority 16)
CURTIS INDUSTRIES, INC., a	:	
Delaware corporation,	:	
	:	
Defendants-Appellees.	:	

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APPEAL FROM JUDGMENTS AND FINAL ORDERS
OF THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE KENNETH R. RIGTRUP

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UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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LIST OF ALL PARTIES

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the undersigned counsel for appellant represents that the only natural person who has been a party to this litigation and whose name does not appear in the caption of this appeal is one Anthony Herring, appellant's minor son, whose claims were settled prior to trial in the District Court. Undersigned counsel further represents that no non-natural-person entity, other than those whose names appear in the caption, has been a party to this litigation.

The parties to this appeal -- Tammy Herring Lamb, B & B Amusements Corp., an Arizona corporation, and Curtis Industries, Inc., a Delaware corporation -- are the only entities with remaining interests in this litigation.

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APPEAL FROM JUDGMENTS AND FINAL ORDERS
OF THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE KENNETH R. RIGTRUP

JURISDICTION

1. Rule 3(a) of the Utah Rules of Appellate Procedure confers jurisdiction on this Court to hear this Appeal.

2. This Appeal is from judgments and final orders (denominated (1) Order and Judgment [granting defendant Curtis Industries' Motion for Summary Judgment], dated June 13, 1990; (2) Judgment on the Verdict [in favor of defendant B & B Amusements], dated September 18, 1990; and (3) Order [denying plaintiff's Motion for a New Trial], dated December 5, 1990)

entered by the Third Judicial District Court of Salt Lake County, State of Utah (the Honorable Kenneth R. Rigtrup).

ISSUES PRESENTED FOR REVIEW

1. Whether, in this two-defendant tort action, the District Court committed reversible error in granting defendant-appellee Curtis Industries' Motion for Summary Judgment and, thereby, denying plaintiff-appellant Ms. Lamb her day in court against that defendant and affording the remaining defendant-appellee, B & B Amusements, an "empty chair" at which that defendant might point.

The applicable standard of appellate review regarding this issue is summarized as follows:

"We accord no deference to a trial court's legal conclusions given to support the grant of a summary judgment, but review them for correctness." Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988). In reviewing summary judgments, all the evidence and reasonable inferences are liberally construed in favor of the party opposing the motion. The court is free to reappraise the trial court's legal conclusions. Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1039 (Utah 1989). "[W]hen on an appeal from a motion for summary judgment, we inquire whether there is any genuine issue as to any material fact and, if there is not, whether the moving party is entitled to judgment as a matter of law." Arrow Indus. v. Zions First National Bank, 767 P.2d 935, 937 (Utah 1988).¹

¹Credit for this and other statements of the appropriate standard of appellate review is given to Judge Norman Jackson of the Utah Court of Appeals, with those statements being taken, verbatim, from Judge Jackson's "Summary of Standards of Review."

2. Whether the District Court committed reversible error in ruling that the standard of care, with respect to Ms. Lamb's claim against B & B Amusements, was simple negligence, as opposed to the extraordinarily high standard of care to which common carriers are held.

The applicable standard of appellate review regarding this issue is summarized as follows:

An appeal challenging the refusal to give jury instructions presents questions of law only. Therefore, we grant no particular deference to the trial court's rulings. Ramon v. Farr, 770 P.2d 131, 133 (Utah 1989).

3. Whether the District Court committed reversible error in allowing (given the procedural history of the case and given, specifically, its granting of the Curtis Industries Motion for Summary Judgment) B & B Amusements' expert to give the testimony he gave (including his conclusion that the subject accident was, most likely, the result of a defective or "flawed" bolt or of a "counterfeit" bolt).

The applicable standard of appellate review regarding this issue is summarized as follows:

Admissibility of Evidence: "It is well settled that trial court rulings on the admissibility of evidence are not to be overturned in the absence of a clear abuse of discretion." State v. Griffiths, 752 P.2d 879, 883 (Utah 1988) (citing State v. Gray, 717 P.2d 1313, 1316 (Utah 1986); Utah R. Evid. 103(a)); accord State v. Aase, 762 P.2d 1113, 1116 (Utah App. 1988); State v. Jamison, 767 P.2d 134, 137 (Utah Ct. 1989).

"In reviewing questions of admissibility of evidence at trial, deference is given to the trial court's advantageous position; thus, that court's rulings regarding admissibility will not be overturned absent an abuse of discretion." Whitehead v. American Motors Sales Corp., 101 Utah Adv. Rep. (1989);

4. Whether the District Court committed reversible error in denying Ms. Lamb's Motion for a New Trial and rejecting, specifically, in addition to the Rule 59(a)(7) "error in law" arguments appertaining to the foregoing three claims of error, Ms. Lamb's Rule 59(a)(3) argument regarding "surprise" and her Rule 59(a)(6) argument regarding "insufficiency of the evidence."

The applicable standard of appellate review regarding this issue is summarized as follows:

"We consider the evidence in the light most favorable to the verdict, and we will not overturn that verdict when it is supported by substantial and competent evidence." Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987); accord Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985). Resolution of factual dispute is a matter for the jury which will not be upset on appeal unless evidence on the issue "'so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case.'" Cambelt, 745 P.2d at 1242 (quoting E.A. Strout Western Realty Agency, Inc. v. W.C. Foy & Sons, Inc., 665 P.2d 1320, 1322 (Utah 1983)).

"To successfully attack the verdict, an appellant must marshall all the evidence supporting the verdict and then demonstrate that, even viewing the evidence in the light most favorable to that verdict, the

evidence is insufficient to support it.'" Cambelt, 745 P.2d at 1242 (quoting Von Hake at 769, which in turn cites Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)); see id. at 1242 n.1 (Scharf burden still relevant to challenge to jury's factfinding after 1987 amendment of R.52(a)).

A trial court's grant or denial of a motion for new trial will not be overturned on appeal absent an abuse of discretion. Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067, 1068 (Utah 1987); Moon Lake Electr. Ass'n v. Ultrasystems W. Constr. Inc., 767 P.2d 125, 128 (Utah App. 1989). The general rule concerning abuse of discretion is that the appellate court "will presume that the discretion of the trial court was properly exercised unless the record clearly shows the contrary." Goddard v. Hickman, 685 P.2d 530, 534-35 (Utah 1984) (quoted with approval in Donohue, 748 P.2d at 1068). But a trial court has no discretion to grant a new trial absent a showing of at least one of the grounds set forth in Rule 59(a). Tangaro v. Marrero, 13 Utah 2d 290, 373 P.2d 390, 391 n.2 (1969); Moon Lake, 767 P.2d at 128.

"[A]n insufficiency-of-the-evidence based challenge to a denial of [a Rule 59(a)(6) new trial motion] is governed by one standard of review: we reverse only if, viewing the evidence in the light most favorable to the party who prevailed, we conclude that the evidence is insufficient to support the verdict." Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988) (citing King v. Fereday, 739 P.2d 618, 620-21 (Utah 1987); Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, 713 P.2d 55, 57-58 (Utah 1986)). Appellants making such a claim must marshal all the evidence supporting the verdict and then show that the evidence cannot support the verdict. Hansen, 761 P.2d at 18.

If the Motion was denied, the appellate court is to sustain the denial if there was

"an evidentiary basis for the jury's decision." Nelson v. Trujillo, 657 P.2d 730, 732 (Utah 1982). The appellate court can reverse the denial of the motion only if "the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable or unjust." Id. (quoting McCloud v. Baum, 569 P.2d 1125, 1127 (Utah 1977)).

RELIEF SOUGHT ON APPEAL

Ms. Lamb seeks reversal of the granting of the Curtis Industries Motion for Summary Judgment, reversal of the Judgment on the Verdict in favor of B & B, and remand to the District Court with instructions that one new trial be held, at which both defendants will appear as defendants. She also seeks her costs of court, assessable against both defendants, in connection with this Appeal.

STATEMENT OF THE CASE

Plaintiff Tammy Herring (Lamb)² was injured on or about September 4, 1986, while attending the Utah State Fair. The concessionaire at the fair was defendant-appellee B & B Amusements Corp. ("B & B"), an Arizona corporation. The accident occurred while plaintiff, with her three-year-old son, was riding the children's roller coaster owned and operated by B & B.

²Ms. Lamb was between her two marriages at the time of the subject accident and at the time of the initiation of the lawsuit. Her first husband is surnamed Herring. Shortly before trial, plaintiff remarried. She is now known as Tammy Lamb.

Ms. Lamb and her son were riding in the third car of a five-car train when the second and third cars of that train became separated while the train was in motion. Ms. Lamb allegedly sustained serious bodily injuries as a result of the separation of the cars.

Ms. Lamb filed her Complaint against B & B, alleging, inter alia, negligence in the maintenance and/or inspection of the subject train. In response to an Interrogatory, B & B stated that the reason that the cars had separated was that a bolt connecting the cars had broken. In response to a later Interrogatory, B & B identified defendant-appellee Curtis Industries, Inc. ("Curtis") as the manufacturer and seller to B & B of the subject bolt. After obtaining that information, Ms. Lamb (without necessarily accepting the proposition that the bolt broke (as opposed to its having fallen out after losing its restraining nut or cotter pin)) amended her Complaint to name Curtis as an additional defendant and asserted claims against that defendant sounding in strict products liability and negligence in connection with Curtis's manufacture and sale of the subject bolt to B & B.

Both defendants moved for summary judgment. Judge Rigtrup denied the B & B Motion, but granted the Curtis Motion.³

³The Curtis Motion was primarily based on the fact that Ms. Lamb's expert witness was of the opinion that the fault in connection with the separation lay entirely with B & B. Judge Rigtrup issued no memorandum opinion accompanying his granting (continued...)

Ms. Lamb then sought--unsuccessfully--via pre-trial motions, to prevent B & B from putting on evidence supporting the proposition that the separation of the cars was due to a defective bolt. At trial, B & B's expert offered his opinion that the most likely explanation for the separation was that a "flawed" bolt broke. Six of the eight jurors answered in the negative to the first question on the special verdict form, to wit: "Was B & B Amusements negligent?" Judge Rigtrup entered Judgment of No Cause of Action on that Verdict.

Ms. Lamb then filed a Motion for a New Trial, contending that she should be granted a new trial against both defendants and, specifically, that Judge Rigtrup erred, as a matter of law, in (1) granting the Curtis Motion for Summary Judgment; (2) failing to instruct the jury that an extraordinarily high standard of care, such as that imposed by law on common carriers, was the standard to which B & B should be held; and (3) allowing (given the procedural history of the case and given, specifically, the Court's granting of the Curtis Motion for Summary Judgment) B & B's expert to give the said opinion

³(...continued)
of the Curtis Motion, but he did issue a Minute Entry (Record at 504). It appears that he based his ruling on his view that res ipsa loquitur does not apply to strict liability issues and on his belief that no evidence of negligence would be presented at trial against Curtis, given Ms. Lamb's expert's opinion, and given the fact that neither the bolt nor any part thereof could be produced as evidence (B & B's agents having testified in depositions that they found and discarded the only part of the bolt that they claimed was found).

testimony he gave. Ms. Lamb also contended, in connection with that New Trial Motion, (a) that she was, in the rubric of Rule 59(a)(3) of the Utah Rules of Civil Procedure, prejudicially surprised by the Court's allowing B & B's expert to testify as he did, in light of, among other things, the Court's granting of the Curtis Motion for Summary Judgment, B & B's agents' supposed discarding of the supposedly broken bolt, and B & B's failure to supplement, prior to trial, its answers to Ms. Lamb's expert-witness Interrogatories; and (b) that, in the rubric of Rule 59(a)(6) of these Rules, there was insufficient evidence to support the verdict of B & B's non-negligence.

Judge Rigtrup denied Ms. Lamb's Motion for a New Trial, and this Appeal ensued.

STATEMENT OF FACTS

The following is a statement of facts and procedural history material to a consideration of the questions presented:

1. On or about September 4, 1986, while attending the Utah State Fair, and while, specifically, she and her son were riding, for a fare (Tr. at 264), a "kiddie" roller coaster owned and operated by B & B, Ms. Lamb was injured. She claims to have suffered severe and permanent neck and related injuries, including debilitating and disabling headaches. She put on evidence that she had incurred, up to the time of trial, medical expenses in the principal amount of \$7,948.37 (Trial Exhibit 10); and lost income, up to the time of trial, in the

amount of \$31,862.00 (Trial Exhibit 19). She also put on evidence, through expert testimony, of future economic losses of a then-present value in excess of \$600,000.00 (Trial Exhibit 19).

2. B & B took the position, at trial, that Ms. Lamb reported, in the immediate aftermath of the incident, that she had sustained an injury, albeit a relatively very minor one, consisting of bumps to her knees suffered when the subject cars separated. Tr. at 60 (testimony of Buddy Mertin, B & B's president); Tr. at 460 (testimony of Dr. Tom Blotter, B & B's expert).

3. B & B contends that the disconnection of the two cars of the kiddie roller coaster was caused by a bolt that broke (e.g., Buddy Mertin testimony, Tr. at 69-81); and that B & B people, possibly as many as six, searched for an hour to find the parts of the bolt, found one part of the bolt, did not find the other part, and discarded the part of the bolt that they did find (Buddy Mertin testimony, Tr. at 71-75).

4. B & B purchased the bolt from Curtis. B & B's Answer to Interrogatory No. 1 of Plaintiffs' Second Set Interrogatories.

5. Ms. Lamb initially sued B & B only and, after B & B so identified Curtis as the seller of the bolt that allegedly broke, named Curtis as an additional defendant. Third Amended

Complaint, Record at 123-32. In that pleading Ms. Lamb asserted claims against Curtis sounding in strict liability (Record at 128-29) and in negligence (Record at 129-30).

6. On or about February 5, 1990, B & B filed a Motion for Summary Judgment. Record at 153-54.

7. On or about May 11, 1990, Curtis filed a Motion for Summary Judgment. Record at 221-22.

8. Judge Rigtrup heard both defendants' Summary Judgment Motions at the same hearing (Tr. at 1-39). He granted the Curtis Motion, apparently for reasons discussed in footnote 3 hereto, pages 7-8 hereof.

9. With respect to the B & B Motion, Judge Rigtrup ruled that Ms. Lamb could proceed to trial on her negligence claim. Record at 520-21.

10. In response to Interrogatories regarding expert witnesses, the only responses B & B ever gave were the following:

INTERROGATORY NO. 3 [of Ms. Lamb's First Set of Interrogatories to B & B]: Identify all expert witnesses.

ANSWER: Defendants [sic] have not yet determined whether or not it will call any expert witnesses. As soon as that decision has been made, these interrogatories [sic] will be supplemented and that information will be provided.

INTERROGATORY NO. 4 [of that same set of Interrogatories]: With respect to each expert witness you have identified in your answer to Interrogatory No. 3, state:

- (a) His profession or occupation, and the field in which he is claimed to be an expert;
- (b) The formal education and specialized training he has received in his field;
- (c) Licenses which he now holds authorizing him to practice in his field;
- (d) The professional experience and work he has had in his field during the past five years;
- (e) The compensation, if any, he is to receive for his work and efforts in connection with this litigation;
- (f) The subject matter on which he is expected to testify;
- (g) Describe any tests, examinations or studies he performed;
- (h) The substance of the facts and opinions to which he is expected to testify;
- (i) A summary of the grounds for each such opinion;
- (j) Identify any written or recorded statements, reports, documents or correspondence received from him by you, or your counsel, agents, or employees;
- (k) Identify all persons who assisted him in preparing any reports or documents, in conducting any test, examination or studies, or in preparing his opinions or his testimony and describe the nature of the assistance rendered;
- (l) Describe any previous experience in his field which involved matters similar to those encountered in this accident;

- (m) If he has testified previously as an expert witness in any court, before any administrative tribunal, in arbitration proceedings, or before any governmental or legislative body, state when, identify on behalf of whom such testimony was given, state the opinions and inferences to which he has testified, the facts and data upon which the opinions and inferences were based, and identify before whom such testimony was given, including for any adversary proceeding, the names of all parties, plaintiff and defendant, the name and division of the court or other tribunal, the civil action number, the identity and location of the court and reporter or other custodian of the pleadings and transcript, the identity of the lawyers representing each party and the citation to any appeals arising out of the trial;
- (n) Identify all articles, treatises, manuscripts, books or other writings authorized in whole or in part by him;
- (o) Describe each course taught by him, identify each instruction for whom the course was taught, and state the date of each teaching;
- (p) State whether any professional licenses held by him have been suspended, or revoked, and if so, identify by whom, state when, and describe all reasons for such suspension or revocation.

ANSWER: Not applicable.

(Emphasis added.)

11. On or about January 25, 1990, in support of its Motion for Summary Judgment, B & B submitted the Affidavit of P. Thomas Blotter. The only substantive opinions set forth in that Affidavit are the following:

. . .

7. That the normal wear experienced by the bolt would not be observable from the car performance or from a visual inspection of the roller coaster.
8. That if the regular maintenance procedures were followed, they were adequate and the failure of the bolt was not the result of operation or maintenance practices.

Record at 149.

12. At no time, prior to trial, did B & B inform Ms. Lamb, formally or informally, that Dr. Blotter was going to give the crucial opinion testimony that he ultimately gave (Tr. at 417-20; 426), to wit: that the bolt B & B purchased from Curtis was or may have been defective, either in terms of its having had a "flaw" or its having been a "counterfeit bolt," and that those two explanations were the two most likely explanations for the bolt's failure.

13. On or about June 14, 1990, Ms. Lamb submitted a "Memorandum in Support of Plaintiffs' [her son was still in the case at that time] Position that the Standard of Care for Common Carriers should be Applied to Defendant B & B Amusements." Record at 489-94.

14. On or about August 17, 1990, B & B submitted, in response to that Memorandum and by way of setting forth its own view with respect to which standard of care should apply, "Defendant's Reply Memorandum in Support of its Position that the Standard of Ordinary Care should be Applied to B & B

Amusements." Record at 271-82.

15. In the course of a pre-trial meeting in chambers, Judge Rigtrup determined to adopt B & B's position with respect to the appropriate standard of care and to reject Ms. Lamb's. E.g., Tr. at 494-95. The ordinary care standard was the standard used in the instructions to the jury. Jury Instruction No. 12, Record at 374.

16. On or about August 13, 1990, Ms. Lamb submitted her First Motion in Limine. Record at 539-40. That Motion asked, among other things, "that the Court rule that B & B had an extraordinary duty of care, with respect to plaintiffs, commensurate with that of a common carrier"; and

that the Court rule, as suggested in plaintiffs' Memorandum in Support of Plaintiffs' Objection to Curtis Industries' Proposed Order and Judgment, dated June 11, 1990 [Record at 497-500], that (the Court having heretofore granted defendant Curtis Industries, Inc.'s Motion for Summary Judgment) B & B should not be allowed to, and may not, seek to adduce evidence in any way related to a supposedly defective bolt (please note that B & B has stated, under oath, in answers to Interrogatories, that it purchased the bolt in question from defendant Curtis Industries).

17. On or about August 16, 1990, B & B filed its "Objection to Plaintiffs' First Motion in Limine." Record at __.⁴ In that submission, B & B argued, without mentioning

⁴For whatever reason, this submission appears not to be included in the Record. A copy is attached hereto, at pages 12-15 of the Appendix.

Dr. Blotter's proposed testimony, as follows:

Defendant B & B has maintained throughout the course of this litigation that the bolt utilized in the connector between the cars failed in this application. Plaintiffs have produced no rationale why that evidence, as testified to by the witnesses in their depositions, should not be presented to the jury. The reasonable inferences that the jury may or may not draw from that is left to the sound discretion of the jury.

Record at __ (see footnote 4). (Emphasis added.)

18. Ms. Lamb then submitted "Plaintiffs' Reply to B & B's Objection to Plaintiffs' First and Second Motions in Limine."

Record at 309-14. That submission included, in pertinent part, the following:

With respect to paragraph 3 of Plaintiffs' First Motion in Limine (seeking to prevent B & B from presenting evidence relating to [a] supposedly "defective" bolt), plaintiffs are of the view that the appropriate resolution will be for the Court to allow the B & B agents to describe what they claim they saw (i.e., for at least one of B & B's agents, a part of a broken bolt), but that B & B should not be allowed to attempt to produce evidence or make direct commentary regarding the supposedly "defective" bolt. Plaintiffs rely, in this regard, on the following, in addition to the reasons set forth in their initial Motion: Interrogatory No. 11 of Plaintiffs' First Set of Interrogatories provides:

State whether you claim that the roller coaster was in any way defective at the time of the accident and, if so, describe in detail and with particularity the nature of all defects.

B & B answered as follows:

Defendant has not yet determined whether or not any part of the roller coaster was defective at the time of the accident. If defendant claims that the roller coaster was defective, this information will be supplemented to provide that information.

This answer has not been supplemented, in any fashion.

Record at 310-11. That Answer to that Interrogatory was never supplemented.

19. At trial, as indicated hereinabove, Judge Rigtrup instructed the jury on the simple negligence, ordinary standard of care, as opposed to the common carrier, extraordinarily high standard of care. Record at 374.

20. At trial, counsel for B & B, in the course of cross-examining Ms. Lamb's expert witness on liability, raised the question of whether "there might be a problem with the bolt itself, with the actual manufacture of [the] bolt." Tr. at 203. Later in the course of that cross-examination, the following exchange occurred between B & B's counsel, Ms. Lamb's counsel, and the Court:

Q. [by B & B's counsel]: Excuse me. Were-n't there some problems -- haven't there been some problems with some imported Taiwanese bolts that had improper markings and were defective and causing problems in this area?

[Ms. Lamb's counsel]: I think it has been established in this case, through discovery, that there is no contention, in this lawsuit and there is [sic] no facts to support the proposition, that there was any defect in manufacture involved here. . . .

[The Court]: Overruled. Proceed.

Tr. at 222.

21. In the course of the direct examination of Dr. Tom Blotter, B & B's expert, the Court allowed, over Ms. Lamb's counsel's objection⁵ (Tr. at 417), Dr. Blotter to testify about the possibility of flaws and counterfeit bolts (Tr. at 417 to 420) and that the two most likely explanations for the failure were "flaw" and "counterfeit" bolt. Tr. at 426.

22. As reflected in the Judgment on the Verdict, dated September 18, 1990 (Record at 401-04), six of the eight jurors determined that B & B was not negligent and, accordingly, Judge Rigtrup entered a Judgment of No Cause of Action against Ms. Lamb and in favor of B & B.

23. Ms. Lamb then filed her Motion for a New Trial, along with a supporting Memorandum (Record at 412-30), and the affidavit of her undersigned trial counsel (with respect to the testimony of Dr. Blotter) (Record at 410-11). B & B filed its Memorandum in Opposition to Plaintiff's Motion for a New Trial (Record at 435-44), along with the affidavit of its trial counsel (with respect to the testimony of Dr. Blotter) (Record at 445-47). Curtis submitted its Memorandum in Opposition to

⁵No Transcript mention is made of Ms. Lamb's counsel's objection, per se, but the context of the sidebar conference requested (Tr. at 417; lines 10-11) is quite clear, especially in light of the above-cited record of earlier proceedings in this case.

Plaintiff's Motion for a New Trial (Record at 431-34).

Ms. Lamb submitted her reply memoranda to the memoranda of both defendants (Record at 452-64 with respect to B & B and Record at __⁶ with respect to Curtis). Oral argument was had on Ms. Lamb's Motion, and Judge Rigtrup denied the Motion.

SUMMARY OF ARGUMENT

I.

Judge Rigtrup committed reversible error in granting the Curtis Motion for Summary Judgment. Ms. Lamb's claims against Curtis sounded in both strict liability and negligence. Record evidence existed and was brought to Judge Rigtrup's attention, in the course of the Curtis Summary Judgment Motion proceedings, to support the proposition, for purposes relevant to the Curtis Summary Judgment Motion, that the injuries complained of by Ms. Lamb may have come about, at least in part, by virtue of the breaking of a defective bolt. The mere fact that Ms. Lamb's expert was of the view (as set forth in his Affidavit (Record at 166-67) and deposition testimony), that the failure was solely the result of B & B's negligence, was not dispositive on the issues of Curtis's liability. Ms. Lamb's expert's holding and giving that opinion did not mandate dismissal of the claims against Curtis, especially in the face of B & B's contention, made in its own Motion for Summary

⁶For whatever reason, this submission appears not to be included in the Record. A copy is included herewith, at pages 16-18 of the Appendix.

Judgment, that its people followed a satisfactory and non-negligent regimen of maintenance and inspection and that that rendered B & B non-negligent. Judge Rigtrup should have followed clear precedent from other jurisdictions and nearly clear precedent from this Court and should have, accordingly, denied the Curtis Motion. Ms. Lamb is entitled to go to trial against Curtis.

II.

Judge Rigtrup committed reversible error when he rejected Ms. Lamb's contention that the standard on which the jury should be instructed, with respect to B & B's alleged negligence, was the extraordinarily high standard to which common carriers are held. There is, as of yet, no Utah appellate court law with respect to the standard of care demanded of amusement park operators. This Court should follow the better view and adopt, in the interest of sound public policy, the extraordinarily high standard adopted by other states and should lay down the law that Utah amusement park ride operators are to be held to that high standard. This Court should remand this matter for a new trial against B & B on that basis alone.

III.

Judge Rigtrup committed reversible error, in the circumstances and dynamics of this case, in allowing Dr. Tom Blotter, B & B's liability expert, to testify that the subject bolt may have been "flawed" or "counterfeit" and to testify that the two

most likely causes of failure were (a) that the bolt was "flawed" and (b) that the bolt was "counterfeit." Contrary to the letter and spirit of Rule 33(a) and Rule 26(e)(1) of the Utah Rules of Civil Procedure, B & B failed to notify Ms. Lamb, in timely fashion, prior to trial, that Dr. Blotter would testify as he did. In the circumstances of this case, Ms. Lamb was unfairly and prejudicially surprised by such testimony. When it came out she had no meaningful opportunity to rebut it. If Dr. Blotter had not been allowed to testify as he did, there would have been, from any reasonable perspective, given the other trial evidence, a legally insufficient basis for the jury to conclude that B & B was not negligent. This is especially true given the fact that the Court properly instructed the jury on res ipsa loquitur with respect to B & B and, by doing so, informed the jury, in essence, that B & B was legally obligated to come forward with evidence reasonably countering the inference of negligence.

IV.

Judge Rigtrup committed reversible error in denying Ms. Lamb's Motion for a New Trial against both defendants. In the context of Ms. Lamb's Motion for a New Trial and proceedings appertaining thereto, Ms. Lamb brought to Judge Rigtrup's attention errors of law which had been the subject of pre-trial proceedings (the granting of the Curtis Motion for Summary Judgment and the decision to instruct the jury on the simple

negligence standard of care), as well as a ruling made, in the course of trial, over Ms. Lamb's pre-trial and trial objections, to allow Dr. Blotter to testify as he did. In that Motion for a New Trial, Ms. Lamb also argued that there was insufficient evidence to support the jury's 6-2 verdict of non-negligence. Judge Rigtrup's failure to order a new trial, in the circumstances and dynamics of this case, constitutes an abuse of discretion and a basis independent from the foregoing three points to order a new trial against both defendants.

V.

This Court should order a new trial against both defendants, even if it finds that the only reversible error that Judge Rigtrup committed was in granting the Curtis Motion for Summary Judgment. This is not a criminal case to which principles of double jeopardy attach. Public policy and fundamental fairness dictate that Ms. Lamb's claims against B & B be retried even if this Court determines that no reversible error was committed with respect to the claims against B & B, so that Curtis will not be able to do what B & B did in the first trial, which is to point at an "empty chair" in the courtroom.

Ms. Lamb did nothing wrong. She was injured, to one degree or another, either as a result of a defectively or negligently manufactured bolt or as a result of negligence of the operator of the roller coaster, or both. It makes no sense

that she has, to date, been denied recovery. She should be allowed to go to trial against both defendants simultaneously.

A contrary result would work a continued frustration of the doing of justice in this case.

ARGUMENT

POINT I.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE CURTIS MOTION FOR SUMMARY JUDGMENT.

As is suggested in the foregoing discussion, there came a time in this litigation, after Curtis had been named as a defendant and after Ms. Lamb's liability expert, David Stephens, had been deposed, that Curtis Industries, the manufacturer of the subject bolt, filed a Motion for Summary Judgment. The Memorandum of Curtis Industries (Record at 214-20) offered utterly no legal authority in support of that Motion. It appears to have been based solely on the notion that Ms. Lamb's expert was of the view that it was B & B's negligence, rather than Curtis's allegedly defective bolt, which caused the accident. The mere fact that an expert, even a plaintiff's expert holds such a view is, however, not dispositive and should not have been so viewed by Judge Rigtrup. This is especially true in a case, such as this, where there was record evidence (here, the B & B assertions that they did everything right, from a maintenance and inspection perspective) of contrary factual assertions. See, e.g., Hughes v.

American Jawa, Ltd., 529 F.2d 21, 23-25 (8th Cir. 1975);
Webster v. Offshore Food Service, Inc., 434 F.2d 1191, 1193
(5th Cir. 1970); Gillentine v. McKeand, 426 F.2d 717, 722 (1st
Cir. 1970); Elliott v. Massachusetts Mutual Life Ins. Co., 388
F.2d 362, 365-66 (5th Cir. 1968); G. D. Searle & Co. v. Chas.
Pfizer & Co., 231 F.2d 316, 318 (7th Cir. 1956); Castleberry v.
Collierville Med. Ass., Inc., 92 F.R.D. 492, 494 (W. D. Tenn.
1981). B & B contended, at the same summary judgment stage of
the proceedings, that the bolt broke and that it was not
negligent and offered record evidence in support of those
propositions. See B & B's Memorandum in Support of Motion for
Summary Judgment, at 2-4 (Record at 137-42). Ms. Lamb also
brought such things to the District Court's attention, in
Plaintiffs' Memorandum in Opposition to Curtis Industries'
Motion for Summary Judgment (Record at 230) and in the course
of the oral argument on the Curtis Motion for Summary Judgment
(Tr. at 33-34). The fact that Ms. Lamb's expert happened to
agree with the contention advanced by Curtis Industries should
not, especially on the record established in this case at that
time, have caused the District Court to conclude that the
Curtis Motion should be granted.

Judge Rigtrup should have recognized, in short, that it
was for the jury to determine whether Curtis or B & B, or both,
was or were liable in damages to Ms. Lamb who, unquestionably,
did nothing wrong in connection with the subject incident.

As Ms. Lamb contended in her Memorandum in Support of Plaintiffs' Objection to Curtis Industries' Proposed Order and Judgment (Record at 497-500), by way of response to some things that came up in the course of the oral argument on the Curtis Motion, the doctrine of res ipsa loquitur may be applied against two or more defendants in joint control of the instrumentality in question. See, First National Bank of Arizona v. Otis Elevator Co., 406 P.2d 430, 435 (Ariz. 1965); Jackson v. H. H. Robertson Co., 574 P.2d 822, 825-26 (Ariz. 1978). As Ms. Lamb's undersigned counsel sought to explain to Judge Rigtrup, control over the bolt in question was exercised, first, by Curtis Industries during the manufacturing stage. Any negligent (and/or strict liability-related) conduct, with respect to the manufacture of the bolt, would have occurred during the time the bolt was in the control of Curtis. The bolt was sold directly by Curtis to B & B. Judge Rigtrup should have recognized that it was wrong to grant summary judgment to a party (Curtis) whose acts or omissions were, by the process of elimination, the cause of Ms. Lamb's injuries if, indeed, (as the jury ultimately found) the other possible actor (B & B Amusements) was found to be non-negligent and non-liable. Judge Rigtrup should certainly have recognized, as Ms. Lamb ardently sought to convince him, that, consistent with the spirit of the res ipsa doctrine, the burden should have been placed on Curtis (as it ultimately was, at the trial,

placed on B & B) to show that it was not liable when Ms. Lamb was in an inferior position in terms of her ability to prove negligence or strict liability against Curtis. See, Siegler v. Kuhlman, 473 P.2d 445, 449-450 (Wash. App. 1970), reversed on other grounds, 502 P.2d 1181 (Wash. 1972).

Ms. Lamb also brought to the attention of Judge Rigtrup, by her submission entitled "Plaintiffs' Supplemental Memorandum in Opposition to Curtis Industries' Proposed Order and Judgment" (Record at 506-19), the fact that certain well-reasoned cases of some other jurisdictions pointed the way toward the Judge Rigtrup's recognizing that it would be inappropriate and contrary to the interests of justice, in the circumstances of this case, to cut loose the manufacturer of the bolt. The cases are Anderson v. Somberg, 338 A.2d 1 (N.J. 1974), and Ybarra v. Spangard, 154 P.2d 687 (Cal. 1945). Copies of both were attached to plaintiff's said Supplemental Memorandum. Both of those cases addressed the application of the res ipsa loquitur doctrine when multiple defendants are involved in a tort case.

Ybarra involved a patient who was injured during the course of a surgical operation. The plaintiff in that case brought suit against several health care providers who participated in his care and who might have caused his injuries. The defendants' two primary defenses to the application of res ipsa were: (1) that where there are several defendants, where there

is a division of responsibility in the use of an instrumentality causing the injury, and where the injury might have resulted from the separate act of one of two or more persons, the rule of res ipsa loquitur cannot be invoked against any one of them; and (2) that where there are several instrumentalities, and no showing is made as to which caused the injury or as to the particular defendant in control of it, the doctrine cannot apply. Id. at 688-89.

The California Supreme Court, more than 45 years prior to Judge Rigtrup's ruling, rejected those defenses to the application of res ipsa loquitur and held that neither the number of defendants nor the relationship of defendants alone determines whether the doctrine applies. Id. at 690. That court criticized a limited application of res ipsa loquitur because such an application would "preclude its application . . . in cases where it is most important that it should be applied." Id. at 689.

Anderson v. Somberg involved a plaintiff who was injured during surgery when part of the forceps used during the procedure broke off in his spine. The plaintiff brought suit against the doctor, the hospital, the manufacturer, and the supplier of the forceps. The New Jersey Supreme Court there recognized that the doctrine of res ipsa loquitur had been expanded to cover multiple defendants even where a plaintiff could not show that it was more probable than not that the

injury resulted from the negligence of one particular defendant. 338 A.2d at 5. The Anderson court recognized, some 15 years before Judge Rigtrup granted the Curtis Motion for Summary Judgment, that the res ipsa doctrine had been expanded to embrace cases "where the negligence cause was not the only or most probable theory in the case, but where the alternate theories of liability [together] accounted for the only possible causes of injury." Id. (citations omitted). The Anderson court noted, furthermore, that in cases of this type, "no defendant can be entitled to prevail on a motion for judgment until all the proofs have been presented to the court and jury." Id. at 7 (emphasis added).

Based on the rationale of Ybarra and Anderson, Curtis should, clearly, not have been granted summary judgment with respect to Ms. Lamb's claims. Ms. Lamb should have been granted a trial against Curtis, on those authorities alone.

Also most instructive on the question of whether the Curtis Motion should have been granted are cases such as the following, all dealing with products liability claims, and all supporting Ms. Lamb's contention, made before Judge Rigtrup in connection with the Curtis Motion, that Curtis should not have been cut loose, by anything other than a jury verdict, in the dynamics of this case: Jenkins v. Whittaker Corp., 785 F.2d 720 (9th Cir. 1986); Higgins v. General Motors Corp., 699 S.W.2d 741 (Ark. 1985); Fain v. GTE Sylvania, Inc., 652 S.W.2d

163 (Mo. App. 1983).

Ms. Lamb is of the view that all of these non-Utah authorities point, quite clearly, toward the correctness of the proposition that she had advanced a claim easily sufficient to defeat the summary judgment contentions of Curtis.

Finally and perhaps most importantly, with respect to the Curtis Motion, Ms. Lamb also bring to the Court's attention its own opinion in Dalley v. Utah Valley Regional Medical Center, 791 P.2d 193 (Utah 1990). Dalley was a multiple-defendant case dealing with alleged medical malpractice. This Court, after favorably discussing such cases as Ybarra (Id. at 198-99), had the following to say with respect to the matter of "multiple-defendant liability":

The second issue on appeal is whether multiple defendants may be held liable under the doctrine of res ipsa loquitur, thus relieving plaintiff of showing that particular defendants were involved. The very purpose of the doctrine of res ipsa loquitur is to allow a plaintiff who is unaware of the circumstances of his or her injury to establish the elements of negligence, including the possible defendants.

Consistent with our opinion above, we hold that where the foundation of res ipsa loquitur is established, all defendants who are charged with the safety of a helpless patient may be held liable where the only possible instrumentalities that could cause injury were within the defined area of an operating room under the control of all defendants and where the injury occurred to a part of the plaintiff's body not involved in the operation itself. Without some further explanation by defendants of how plaintiff was injured, they are considered

in control of the instrumentality, including the hospital and the anesthesiologist.

If any defendant can come forward with a conclusive exculpatory statement or explanation of how the injury occurred, then the doctrine of res ipsa loquitur will not apply because there is no longer a need for an inference of negligence or causation. The justification for placing the inference of negligence and cause upon defendants in lieu of an explanation of how the injury occurred arises from the necessity to protect their rights of an innocent and helpless patient.

Id. at 200 (emphasis added; citations omitted).

The unanimous Dalley Court cited, in footnote 23, the case of Siegler v. Kuhlman, 473 P.2d 445, 449 (Wash. App. 1970), reversed on other grounds, 502 P.2d 1181 (Wash. 1972), discussed hereinabove. Ms. Lamb recognizes that this is not a medical malpractice case and that the alleged fault of Curtis did not occur at the same time as the alleged fault of B & B. She submits, however, that those facts are irrelevant when one understands the dynamics and purpose of the res ipsa loquitur doctrine. See, Jackson v. H. H. Robertson Co., 574 P.2d 822, 825-26 (Ariz. 1979). She suggests that it is unlikely that, strictly speaking, the alleged misdeeds of the various health care professionals named as defendants in Dalley occurred, literally, at the same time. She suggests that the correct inquiry has to do with the universe of people in control of the subject situation. She suggests that, just as the various health care professionals involved in the care of the patient

in Dalley were, to one degree or another, in one capacity or another, and at one specific time or another, "in control" of the care of the patient in that case, Curtis and B & B were, on the record herein, the only two entities "controlling" the fate of Ms. Lamb. There is no good reason, in law or in logic, why this situation should be treated differently from the situation in Dalley.

POINT II.

THE DISTRICT COURT COMMITTED
REVERSIBLE ERROR IN REFUSING TO IMPOSE
ON B & B A STANDARD OF CARE TANTAMOUNT
TO THAT IMPOSED ON COMMON CARRIERS.

The primary rationale for an increased standard of care -- "the highest degree of care, skill, and diligence," the "highest practicable care," "extraordinary care and caution," -- 13 C.J.S. Carriers, §678 -- appears to be that paying passengers surrender themselves, for pay, to the care and custody of the carrier in question. They give up their freedom of movement and actions. They are, generally, unable to prevent accidents. See, Lewis v. Buckskin Joe's, Inc., 396 P.2d 933, 939 (Colo. 1964). The application of common sense suggests that these same considerations apply when one surrenders herself to the care of the operator of an amusement ride.

Some courts have been willing to apply the highest standard of care, which common carriers owe to their passengers, to operators of certain amusement rides and devices. 4 Am.Jur.2d, Amusements and Exhibitions, §88. E.g., Pajak v. Mamsch, 87

N.E.2d 147 (Ill. 1949) (operator of a ferris wheel held to the standard of care of a common carrier); Best Park & Amusement Co. v. Rollins, 68 So. 417 (Ala. 1915) (operator of a scenic railway held to the same high degree of care that was required of a common carrier). Some courts have applied the common carrier standard of care specifically to roller coaster and scenic railway rides. See, Cooper v. Winnwood Amusement Co., 55 S.W.2d 737 (Mo. 1932) (roller coaster operator must use the highest degree of care for passengers' safety); Bibeau v. Fred W. Pearce Corp., 217 N.W. 374 (Minn. 1928) (operators of a roller coaster or scenic railway owe passengers the highest degree of skill and diligence); O'Callaghan v. Dellwood Park Co., 89 N.E. 1005 (Ill. 1909) (common carrier standard of care to be applied to operator of scenic railroad).

The upshot of these cases is that, even though the operator of an amusement ride may not, technically, meet the classic definition of a common carrier, numerous courts have been willing to impose the common carrier standard of care on amusement ride operators by reason of the fact that passengers of the rides in question have essentially entrusted their safety to the care and custody of the amusement ride operators, just as passengers of universally recognized "common carriers," such as bus, train, or airline companies, have implicitly entrusted their safety to the care and custody of those carriers.

Although there is no case law in Utah concerning whether a roller coaster operator should be held to the same high standard to which a traditionally recognized common carrier is held, Ms. Lamb believes that the reasoning of the above-cited cases is sound and points the way toward the appropriateness of the imposition of the highest standard of care on B & B's roller coaster operation. "It is not important whether [the] defendant [was] serving as a common carrier or [was] engaged in activities for amusement." Lewis v. Buckskin Joe's, Inc., 396 P.2d at 939 (Colo. 1964). The important factors include these: "the plaintiffs had surrendered themselves to the care and custody of the defendant; they had given up their freedom of movement and actions; [and] there was nothing they could do to cause or prevent the accident." Id. These factors appear, unquestionably, to apply to the conditions of Ms. Lamb at the time of the incident.

The question of whether a passenger on a conveyance-for-hire, such as a bus, a train, or a plane -- or an amusement ride -- is picked up at "point A" and dropped off at "point B" (as opposed to -- for hire -- being picked up at "point A" and, after whatever thrilling, scintillating, or interesting excursion, returned to "point A") is, for purposes germane to the present world at large, as well as for purposes specific to the instant dispute, simply irrelevant. Just as thousands of people, on an annual basis, travel on jetliners from Salt Lake

City to Hawaii and back again purely for "recreation," a person who rides an amusement ride, such as that which was ridden by Ms. Lamb and her son, is riding solely for recreational purposes. The fact that there may be a "destination stop," however brief or lengthy, in Hawaii, prior to the return trip, should not make the recreational trip to Hawaii any more significant, for purposes of the present discussion, than the kiddie roller coaster ride (which did not include a planned stopover), that was supposed to be enjoyed by Ms. Lamb and her son. The key consideration, as the better cases, discussed hereinabove, have recognized, is that one such as Ms. Lamb totally surrenders and entrusts herself to the expertise, care, inspection ability, maintenance ability, and operating ability of an operating entity such as B & B, and hopes to be safely transported (as a function of that surrendering and entrustment) from the point of the beginning of her excursion to the point of its expected safe conclusion. The fact that she is not, for some interim (however long or short), being deposited for business, further recreational, or other purposes, before her putative return trip begins (here to the starting point of the ride) should be recognized, as Judge Rigtrup failed to recognize it, as utterly insignificant.

The significance of the instruction, which Ms. Lamb would have proposed for inclusion in the jury's charge, if Judge Rigtrup had not ruled, prior to trial, that the ordinary

negligence standard applied to the amusement park ride in question, cannot be overstated. The stock "JIFU" (Jury Instruction Forms/Utah) instruction, relating to the "Duty of Common Carrier Toward Passenger," JIFU 31.6, based on law laid down by Sine v. Salt Lake Transportation Co., 147 P.2d 875 (Utah 1944), and Johnson v. Lewis, 240 P.2d 498 (Utah 1952), provides:

As a common carrier the defendant . . . was required by law to use the highest degree of care for the safe carriage of plaintiff, to provide everything reasonably necessary for that purpose and to exercise a reasonable degree of skill.

(Emphasis added.)

If Judge Rigtrup had, as he should have, ultimately employed this language, or something substantially similar to it, rather than the "ordinary care" language that he did use in his charge, the jury would reasonably have been expected, in the context of this case, to have found B & B negligent.

If such a correct instruction had been given (and if Judge Rigtrup had ruled, in the course of the pre-trial proceedings, that such an instruction would be given), the complexion of the case would have changed dramatically. Ms. Lamb would then have been able to present evidence and to argue, against the backdrop of such an instruction, that B & B simply did not do everything reasonably imaginable that it could have done and should have done, in connection with (without limitation) such things as testing the bolts it used, inspecting the bolts on a

more frequent and more thorough basis than was done, and more frequently replacing, on a routine basis, the bolts in use (not to mention, in the above-emphasized language of the form instruction, "provid[ing] everything [including safe bolts] reasonably necessary for [the] purpose [of Ms. Lamb's 'safe carriage']"). In light of the "ordinary care" instruction which Judge Rigtrup determined, prior to the commencement of the evidence (Record at 494-95), to give, Ms. Lamb was foreclosed from focusing on "utmost care" areas of inquiry, in the course of the evidentiary phase of the trial, and from arguing, in the course of her summation, that B & B failed to act in accordance with the "highest" standard of care. Judge Rigtrup's pre-trial ruling that the ordinary care standard, rather than the common carrier standard, was applicable to B & B's operation of the roller coaster was, thus, not only erroneous, but also most harmfully so.

POINT III.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN DENYING MS. LAMB'S MOTION FOR A NEW TRIAL.

It is Ms. Lamb's contention that, in addition to the errors discussed hereinabove, that Judge Rigtrup erred when he allowed Dr. Blotter, B & B's expert, to testify, as he did, concerning the supposedly "flawed" or "counterfeit" bolt; that that evidence, and the allowance thereof, constituted a prejudicial surprise to Ms. Lamb; that, without that testimony,

there would have been insufficient evidence, even on a simple negligence basis, to support the jury's verdict, and that Judge Rigtrup erred, given those circumstances, in denying Ms. Lamb's Motion for a New Trial.

A. Dr. Blotter's Testimony Should Not
Have Been Allowed And It Constituted
Prejudicial Surprise.

As Ms. Lamb's recitation of certain aspects of the procedural history of this case (see discussion at pages 11 to 17 hereof) should make clear, she was surprised by and prejudiced by Judge Rigtrup's decision to allow Dr. Blotter to testify as he did. Not only had B & B failed, prior to trial (in violation of the letter and spirit of Rules 33(a) and 26(e)(1) of the Utah Rules of Civil Procedure), to disclose the substance of Dr. Blotter's factual inquiry and opinions in response to Interrogatories. B & B had also, less than two weeks before trial, given out the clear signal that it would be offering no "defect" testimony of the kind Dr. Blotter gave.⁷ This led Ms. Lamb to believe that B & B's defense to the claim of negligence would be limited to their own employees' testifying that they found part of a broken bolt, that the bolt they found must have been the bolt that they claim broke, and that they adhered to a regular inspection and maintenance process. See, also, the Affidavit of Dr. Blotter (Record at 149), in which

⁷Please see footnote 4 (p. 15) hereof and emphasized portion, appearing at page 16 hereof, of B & B's "Objection to Plaintiffs' First Motion in Limine."

the only opinions he offered were that, (a) the normal wear experienced by the bolt would not be observable from the car performance or from a visual inspection of the coaster, and that (b) if B & B adhered to its inspection and maintenance procedures, those procedures were adequate and the failure was not the result of operation or maintenance practices. Blotter Affidavit, paragraphs 7 and 8.

B. In The Absence Of Dr. Blotter's
Testimony, There Would Not Have Been
Reasonably Sufficient Evidence To Overcome
The Inference Of B & B's Negligence.

Judge Rigtrup correctly instructed the jury on res ipsa loquitur. Jury Instruction Number 14 (Record at 377-78).

Except for the testimony of Dr. Blotter (a rocket scientist, Tr. at 380-83) that the failure of the roller coaster most likely occurred because of a flawed or counterfeit bolt (Tr. at 426), the evidence pointed clearly to the conclusion that B & B was negligent. Dr. Blotter did not even testify, at trial, concerning his summary-judgment stage, affidavit-given opinion (Record at 149) that the maintenance and inspection procedures were reasonable and that if such procedures were followed, there was no negligence. Nor did Dr. Blotter did testify, at trial, despite B & B's counsel's persistent efforts to adduce such testimony, that, in his opinion, B & B was not negligent with respect to its maintenance, inspection, and operation of the coaster (Tr. at 426-31).

1. The deposition testimony (read at trial) of Stephen J. "Corky" Mertin IV (Buddy Mertin's son, the Safety Coordinator and their man in charge of maintenance for the First Unit (including the subject roller coaster, Tr. at 43-44) that "you just give [the roller coaster] a visual inspection for cracks and bolts and worn areas and things" (Tr. at 50);⁸

2. The testimony of Al Scanlin that ride inspections were done on a daily basis (Tr. at 295-97; 320) (Mr. Scanlin also testified (Tr. at 308-09) regarding Corky Mertin's supposed role in repairing the ride after the subject incident, in contradistinction to Corky Mertin's abject lack of memory (Tr. at 54-57) of the details surrounding the incident); and

3. Buddy Mertin's (B & B's president's) testimony that the connecting bolts were replaced every spring (Tr. at 93); that his men were trained to inspect the rides every day (Tr. at 64; 93-94; 101-04); that if they did not do so and did not turn in their inspection sheets to prove that they had done their inspections, they would not get clean shirts or their pay (Tr. at 132); and that the part of the bolt that was supposedly found showed no unusual wear (Tr. at 108) or no wear at all (Tr. at 131).

On the other side of the equation, on a sufficiency-of-evidence analysis, is the evidence that Ms. Lamb adduced in

⁸Corky did not remember why the cars separated. Tr. at 57.

(Tr. at 131).

On the other side of the equation, on a sufficiency-of-evidence analysis, is the evidence that Ms. Lamb adduced in support of her contention that B & B was negligent. That evidence includes:

1. The lengthy testimony of her expert, David Stephens, culminating in his opinion that the bolt either (a) fell out because it was not tightened properly or (b) broke only after manifesting a condition of imminent failure that would have been readily observable to a reasonably vigilant B & B employee, prior to the failure itself (Tr. at 204-10); and

2. The fact (Trial Exhibit P-1) that inspections appear in fact to have been done on only a very sporadic basis and that no inspection had been done between August 2, 1986 and September 4, 1996 (the date of the accident) (see, especially, the last page of Trial Exhibit P-1; see, also, Tr. at 95-96). The ride was operated at three or four other stops between those dates. Tr. at 120. Buddy Mertin's explanation for the paucity of inspection records was that there had been a truck rollover in which certain records had been lost (Tr. at 122-24) (neither side sought to put on other evidence, through Utah Highway Patrol accident investigation reports or otherwise, of this supposed occurrence) and that the B & B people who were supposed to do the inspections and fill out the inspection reports were not exactly "college graduates." Tr. at 136.

B & B's Al Scanlin acknowledged (Tr. at 315) that pieces of paper, unless they were "missing," would be the only proof that inspections had, in fact, taken place. Perhaps the most telling of evidence, in connection with B & B's supposed non-negligence and in connection, especially, with the question of whether Buddy Mertin was reasonably credible with respect to his testimony that the inspections were in fact done on a daily basis, was the testimony of B & B's own Mr. Scanlin, its ride supervisor (whose duties included supervision of inspections (Tr. at 295)). When asked about another area of Mr. Mertin's testimony (Tr. at 132) -- that the inspections were done on a daily basis and the inspection reports were turned in on a daily basis because, if they weren't, his men would receive neither clean shirts nor their pay -- Mr. Scanlin (who was, as ride supervisor, presumably B & B's main person with respect to the inspection and safety program) testified (Tr. at 314) that he had no knowledge of any such policy.

There was, in sum, absent Dr. Blotter's crucial testimony, utterly no credible evidence from which the jury could reasonably have concluded that B & B was not negligent.

In these circumstances, Judge Rigtrup should have recognized, prior to or in response to Ms. Lamb's Motion for a New Trial, that a miscarriage of justice had been done. He should have ordered a new trial for Ms. Lamb against both defendants.

His failure to do so constituted, in the most unusual circumstances of this case, an abuse of discretion. When the verdict came back as it did, Judge Rigtrup should have righted the wrongs which began when he granted the Curtis Motion for Summary Judgment, which continued when he ruled that the jury would be instructed on an ordinary care standard, which continued through his allowing Dr. Blotter to testify as he did, and which culminated in the jury's verdict.

CONCLUSION

Ms. Lamb implores this Court to recognize what has happened in this case and to recognize, particularly, that she was a fare-paying passenger (Tr. at 264) who rode on the kiddie coaster (consistent with B & B policy; Tr. at 139) for the purposes of a fun ride with her young son; that through utterly no fault of her own the cars separated and she was injured; and that, in these circumstances, she is entitled to recover something from somebody.

As contended hereinabove, she believes that grievous errors were committed at various stages of the proceedings and that those issues together worked to allow a palpably unjust result to be worked in this case to date. She urges this Court to correct those errors and to rule that she be allowed to go to trial, simultaneously, against both defendants, and to let a new jury sort out and determine the issues of strict liability, negligence, and causation.

If this Court recognizes that it was reversible error for Judge Rigtrup to have granted the Curtis Motion for Summary Judgment but determines, for whatever reason, that no reversible error was committed with respect, specifically, to Ms. Lamb's claims against B & B, she urges the Court nonetheless to adopt the wise approach taken by the Court in Westinghouse Elevator Co. v. Herron, 523 A.2d 723, 728 (Pa. 1987), and to order that a new trial against both defendants be held. Her concern is that, if she is afforded a new trial against Curtis only, the roles between B & B and Curtis will simply be reversed; Curtis will be able to point to the empty chair that should be occupied by B & B and effectively contend, before that new jury, that the failure was the fault of B & B; and her nightmare of injustice will likely continue.

Respectfully submitted this 16th day of December, 1991.

WINDER & HASLAM, P.C.


By 

Peter C. Collins
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that, on the 16th day of December, 1991, I caused four true and correct copies of the foregoing Appellant's Brief to be mailed, postage prepaid, to each of the following: Scott W. Christensen, Esq., HANSON, EPPERSON &

SMITH, P.C., 4 Triad Center, Suite 500, Post Office Box 2970,
Salt Lake City, Utah 84110-2970; and Robert H. Henderson, Esq.,
SNOW, CHRISTENSEN & MARTINEAU, 10 Exchange Place, 11th Floor,
Post Office Box 45000, Salt Lake City, Utah 84145.

A handwritten signature in dark ink, appearing to be 'R.H. Henderson', is written over a horizontal line.

skt#2 HERR.BRF

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

HERRING, TAMMY	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 860907252 PI
	:	DATE 06/13/90
VS	:	HONORABLE KENNETH RIGTRUP
	:	COURT REPORTER
B & B AMUSEMENTS CORP	:	COURT CLERK CUG
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

PLAINTIFFS' OBJECTION TO CURTIS INDUSTRIES' PROPOSED ORDER AND JUDGMENT HAS BEEN CONSIDERED BY THE COURT AND IS HEREBY DENIED. THE ORDER AND JUDGMENT SUBMITTED BY CURTIS INDUSTRIES, INC. HAS BEEN SIGNED AND ENTERED BY THE COURT JUNE 13, 1990.

"RES IPSA LOQUITUR IS AN EVIDENTIARY RULE THAT PERMITS AN INFERENCE OF NEGLIGENCE ON THE PART OF DEFENDANT UNDER WELL-DEFINED CIRCUMSTANCES." KUSY V. K.MART APPAREL FASHION CORP., 681P. 2D 1232, 1235 (UTAH, 1984). IT DOESN'T APPLY TO STRICT LIABILITY ISSUES. PLAINTIFFS DEMONSTRATED NO PRIMA FACIE EVIDENCE AS TO DEFENDANT CURTIS INDUSTRIES, INC., "THAT THE ACCIDENT WAS OF A KIND WHICH, IN THE ORDINARY COURSE OF EVENTS, WOULD HAVE HAPPENED HAD DUE CARE BEEN DESERVED."

CC: FILE / JUDGE /
ROBERT H. HENDERSON - ATTY
10 EXCHANGE PLACE, 11TH FLR
P.O. BOX 45000
SLC, UT 84145

PETER C. COLLINS - ATTY
175 WEST 200 SOUTH, #4004

00504

ROBERT H. HENDERSON (A1461)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Curtis Industries, Inc.,
a Delaware Corporation
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

FILED DISTRICT COURT
Third Judicial District

JUN 13 1990

By Cl George SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

TAMMY HERRING, an individual,
and as Guardian Ad Litem for
Anthony Herring,

Plaintiff,

vs.

B & B AMUSEMENTS CORP., and
CURTIS INDUSTRIES, INC., an
Ohio corporation,

Defendants.

ORDER AND JUDGMENT

Civil No. C 86-7252

Judge Kenneth Rigtrup

The Motion of defendant Curtis Industries, Inc. came on regularly for a hearing pursuant to Rule 4-501 of the Judicial Council Rules of Judicial Administration on June 4, 1990. The plaintiffs were represented by their lawyer, Peter C. Collins, of the law firm of Winder & Haslam. Curtis Industries, Inc. was represented by its lawyer, Robert H. Henderson, of the law firm Snow, Christensen & Martineau. The Court had previously reviewed the file, including all memoranda. The Court fully heard the oral argument of counsel. The Court being fully advised in the

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premises, NOW, THEREFORE, IT IS ORDERED: that the Motion for Summary Judgment of Curtis Industries, Inc. be, and hereby is granted.

Based thereon, NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

Judgment be, and hereby is entered in favor of defendant Curtis Industries, Inc. and against plaintiffs, no cause of action.

DATED this 13th day of June, 1990.

BY THE COURT:


KENNETH RIGTRUP
DISTRICT COURT JUDGE

INSTRUCTION NO. 12

The terms "negligence", "ordinary care", and "proximate cause", as used in these instructions, are defined as follows:

A. "Negligence" means the failure to do what a reasonably prudent person would have done under the circumstances of the situation, or doing what such person under such existing circumstances would not have done. The essence of the fault may lie in acting or omitting to act. The duty is dictated and measured by the exigencies of the occasion.

B. "Ordinary care" is that degree of care which a reasonably prudent person would use under the same or similar circumstances. "Ordinary care" implies the exercise of reasonable diligence and such watchfulness, caution and foresight as under all the circumstances of the particular case would be exercised by a reasonably careful, prudent person.

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a general standard of conduct.

C. By "proximate cause" is meant that cause which in a natural, continuous sequence, unbroken by any new cause, produced the injury and without which the injury would not have occurred.

The law does not necessarily recognize only one proximate cause of an injury, consisting of only one factor, one act, or

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INSTRUCTION NO. 12
Page Two

the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of any injury, and in such case, each of the participating acts or omissions is regarded in law as a proximate cause and both may be held responsible.

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FILED DISTRICT COURT
Third Judicial District

SEP 18 1990

By M. J. [Signature] ^{SALT LAKE COUNTY}
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

TAMMY HERRING, an individual	:	JUDGMENT ON THE
and as Guardian Ad Litem for	:	VERDICT
Anthony Herring,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
B & B AMUSEMENTS CORP., and	:	Civil No. C 86-7252
CURTIS INDUSTRIES, INC., an	:	
Ohio corporation,	:	Judge Kenneth Rigtrup
	:	
Defendants.	:	

The above entitled matter came on for trial beginning August 28, 1990, before the Honorable Kenneth Rigtrup, Judge of the Third Judicial District Court, in and for Salt Lake County, State of Utah. A jury was duly impaneled. The plaintiff, Tammy Jean Herring (Lamb), appeared in person and through her attorney, Peter C. Collins. The defendant, B & B Amusements Corp., appeared through its president, Steven J. (Buddy) Merten, and through its attorney Scott W. Christensen.

Evidence was produced by each party through testimony and exhibits. The court instructed the jury on the law

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applicable to the issues of liability and damages. Counsel for each of the parties presented closing arguments.

The court then submitted the issues to the jury on special verdict. The jury, having retired to consider the matter, and after deliberations, returned a special verdict as follows:

We, the jury in the above entitled case, deliver the following answers to the questions submitted to us:

QUESTION NO. 1: Was B & B Amusements negligent?

Answer "yes" or "no".

ANSWER: No.

QUESTION NO. 2: Was B & B Amusements' negligence a proximate cause of injury to Tammy Lamb?

Answer "yes" or "no".

ANSWER: _____

If you answer Question Nos. 1 and 2 "no," sign and return this verdict.

If you answer Question Nos. 1 and 2 "yes," then answer Question No. 3.

QUESTION NO. 3: What is the total amount of "Category 1" damages (as defined in Instruction No. _____) suffered by Tammy Lamb as proximate results of the accident?

ANSWER: _____

QUESTION NO. 4: What is the total amount of "Category 2" damages (as defined in

Instruction No. _____) suffered by Tammy Lamb as proximate results of the accident?

ANSWER: _____

QUESTION NO. 5: Did Ms. Lamb fail, to any degree, reasonably to mitigate her damages from the accident?

Answer "yes" or "no".

ANSWER: _____ If you answer Question No. 4 "yes," then answer the following question. If you answer Question No. 4 "no," sign and return this verdict.

QUESTION NO. 6: By what amount, if any, do you find that Ms. Lamb failed to mitigate her damages through reasonable efforts?

ANSWER: _____

DATED: Sept. 4, 1990 Frank R. Davis
FOREPERSON

Thereafter, the special verdict to the jury was received by the court. The court at the request of plaintiff's counsel, polled the jury as to each of the questions answered. Six of the eight jurors affirmed the answer to the special verdict interrogatory to be their own.

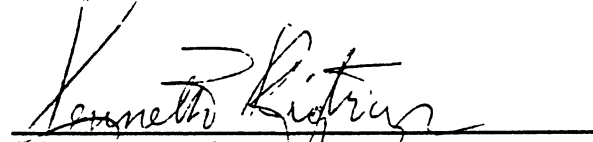
Based upon the jury verdict, IT IS HEREBY ORDERED
ADJUDGED AND DECREED:

1. Judgment is hereby entered in favor of the defendant B & B Amusements and against the plaintiff Tammy Herring (Lamb) "no cause of action".

2. Defendant is awarded its taxable costs, to be established upon submission of an affidavit by defendant's attorney, subject to court approval as to the amount.

DATED this 18th day of September, 1990.


BY THE COURT:


KENNETH RIGTRUP
THIRD DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 5th day of September, 1990, a true and correct copy of the foregoing to the following:

Peter C. Collins, Esq.
WINDER & HASLAM, P.C.
Attorneys for Plaintiff
175 West 200 South, #4000
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Salt Lake City, UT 84110-2668



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FILED DISTRICT COURT
Third Judicial District

DEC 5 1990

By Constance George
Deputy Clerk

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A Professional Corporation
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

TAMMY HERRING, an individual,	:	ORDER
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
B & B AMUSEMENTS CORP., and	:	Civil No. C 86-7252
CURTIS INDUSTRIES, INC., an	:	
Ohio corporation,	:	Judge Kenneth Rigtrup
	:	
Defendants.	:	

Plaintiff's Motion for a New Trial, having come before the court on Monday, November 19, 1990, as regularly scheduled, plaintiff being represented by Peter C. Collins, defendant Curtis Industries being represented by Robert H. Henderson, and defendant B & B Amusements being represented by Scott W. Christensen; the court having heard oral argument, having reviewed the file, and being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's Motion for a New Trial is denied.

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DATED this 5th day of December, 1990.

BY THE COURT:

Kenneth R. Rigtrup
KENNETH RIGTRUP
THIRD DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 17 day of November, 1990, a true and correct copy of the foregoing to the following:

Peter C. Collins, Esq.
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Salt Lake City, UT 84110-2668

Robert H. Henderson, Esq.
SNOW, CHRISTENSEN & MARTINEAU
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Seadell

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SCOTT W. CHRISTENSEN, UBN 0649
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Attorneys for Defendant
4 Triad Center, Ste. 500
Salt Lake City, UT 84180
Telephone: (801) 363-7611

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

TAMMY HERRING, an individual	:	OBJECTION TO PLAINTIFFS'
and as Guardian Ad Litem for	:	FIRST MOTION IN LIMINE
Anthony Herring,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
B & B AMUSEMENTS CORP., and	:	Civil No. C 86-7252
CURTIS INDUSTRIES, INC., an	:	
Ohio corporation,	:	Judge Kenneth Rigtrup
	:	
Defendants.	:	

COMES NOW the defendant, B & B Amusements Corp., and responds to Plaintiff's First Motion in Limine.

Defendant objects to plaintiffs' request in paragraph 1 of their motion for a ruling that the principles of res ipsa loquitur apply to plaintiffs' claims against B & B.

Utah Rules of Evidence, Rule 104(a) deals with questions of admissibility generally. Rule 104(a) states:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court subject to the provisions of subdivision (b).

Plaintiffs' request is outside the scope of Rule 104 and as such, is improper.

Paragraph 2 of plaintiffs' motion requests an express ruling by the court that David Stephens is qualified to render the opinions set forth in his affidavit. This defendant renews its motion to strike which was previously presented to this court. It is B & B's position that Mr. Stephens does not have the necessary expertise to render opinions in this case. He has neither the training nor the experience which would allow him to render the kinds of opinions found in his affidavit. It is therefore respectfully submitted that the court deny paragraph 2 of Plaintiffs' First Motion in Limine.

Defendant further objects to paragraph 3 of Plaintiffs' First Motion in Limine. In this motion, plaintiffs seek to prevent B & B from presenting evidence "in any way related to a supposedly defective bolt". Defendant B & B has maintained throughout the course of this litigation that the bolt utilized in the connector between the cars failed in this application. Plaintiffs have produced no rationale why that evidence, as testified to by the witnesses in their depositions, should not be presented to the jury. The reasonable inferences that the jury may or may not draw from that is left to the sound discretion of the jury.

Defendant objects to paragraph 4 of Plaintiffs' First Motion in Limine. Defendant will submit its memorandum upon the issue of common carrier liability immediately.

Defendant further objects to paragraph 5 of Plaintiffs' First Motion in Limine. Plaintiffs have filed an action against Curtis Industries. That is a matter of record and is part of the pleadings. It certainly is an allegation which they have made and are preserving their right to pursue. If during the course of the trial this becomes an inconsistent position, this defendant feels that such evidence would be relevant to a jury's evaluation of plaintiffs' claims.

DATED this 16th day of August, 1990.

HANSON, EPPERSON & SMITH


SCOTT W. CHRISTENSEN
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered this 16th day of August, 1990, a true and correct copy of the foregoing to the following:

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Telephone: (801) 322-2222

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

TAMMY HERRING, <u>et al.</u> ,	:	REPLY MEMORANDUM TO CURTIS
Plaintiffs,	:	INDUSTRIES' OPPOSITION TO
	:	PLAINTIFF'S MOTION FOR
	:	A NEW TRIAL
-v-	:	
	:	
B & B AMUSEMENTS CORP., <u>et al.</u> ,	:	Civil No. C86-7252
Defendants.	:	Judge Kenneth Rigtrup
	:	

Plaintiff Tammy Herring (Lamb) replies as follows to Curtis Industries' Memorandum in Opposition to her Motion for a New Trial:

1. This case is now, contrary to Curtis Industries' contention, in a radically "different posture" from the posture it was in when the Court granted Curtis Industries' Motion for Summary Judgment. The trial result, which was a mere unlikely possibility when the Court granted that Motion, has now come to pass: the Court allowed B & B Amusements to put on evidence and contend that the Curtis bolt was defective; and the jury found that B & B was not negligent.

2. As the Court will recall, the Court granted the Curtis Motion for Summary Judgment because Ms. Lamb was unable to produce satisfactory evidence that the bolt was defective. If the bolt was defective, her chance to produce such evidence was lost when B & B threw the bolt away.

3. This case is now not only in a decidedly "different posture." It is in an absurd posture. For, either the B & B bolt was defective, or B & B was negligent, or both. But Ms. Lamb has, to date, been denied recovery from either defendant. She respectfully suggests that something has gone awry and that, on the facts of this case, our system ought not countenance such a result.

DATED this 8th day of October, 1990.

WINDER & HASLAM, P.C.

By 

Peter C. Collins
Attorneys for Plaintiff

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I caused a true and correct copy of the foregoing Reply Memorandum to Curtis Industries' Opposition to Plaintiff's Motion for a New Trial to be hand-delivered on the 8th day of October, 1990 to Robert H. Henderson, SNOW, CHRISTENSEN & MARTINEAU, 10 Exchange Place,

Eleventh Floor, Post Office Box 45000, Salt Lake City, Utah
84145, and Scott W. Christensen, HANSON, EPPERSON & SMITH, 4
Triad Center, Suite 500, Post Office Box 2970, Salt Lake City,
Utah 84110-2970.

A handwritten signature in black ink, appearing to be "Scott W. Christensen", is written above a horizontal line.