

1991

# Industrial Commission of Utah v. Mor-Flo Industries : Reply to Brief in Opposition

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

910403

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IN THE UTAH SUPREME COURT

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INDUSTRIAL COMMISSION OF  
UTAH,

Petitioner,

vs.

MOR-FLO INDUSTRIES, INC.  
and POLARIS WATER HEATERS/  
ARLINGTON PLACE,

Respondent.

\*  
\* CERTIORARI DOCKET NO. 910403  
\*  
\* APPELLATE CASE NO.: 900510-CA  
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\* Priority 13  
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ON WRIT OF CERTIORARI TO  
THE UTAH SUPREME COURT

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REPLY BRIEF OF PETITIONER FOR CERTIORARI

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CLERK SUPREME COURT  
UTAH

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SAFETY DIVISION vs. MOR-FLO INDUSTRIES, INC.  
AND POLARIS WATER HEATERS/ARLINGTON PLACE

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This reply brief responds to assertions made by the respondent Mor-Flo Industries (MFI) to the petition submitted by the Industrial Commission of Utah (IC) in Industrial Commission of Utah v. Mor-Flo Industries, Inc., and Polaris Water Heaters/Arlington Place, Certiorari Docket No. 910403. The IC will respond to the significant arguments presented in the MFI opposition brief.

THE UTAH REGULATORY PROGRAM

MFI asserts that the ASME Code is a construction code for boilers and pressure vessels "to protect the health and welfare of the public." Respondent's Brief (RB) at 3. This statement is partially correct, but the statement does not reflect the broader purpose of the Utah Boiler Code and the American Society of Mechanical Engineers (ASME) which is "to afford reasonably certain protection of life and property and to provide a margin for deterioration in service so as to give a reasonably long, safe period of usefulness." Foreword, ASME Boiler and Pressure Vessel Code (1989). Thus, the statutes under U.C.A. Sections 35-7-5 et seq., and the State of Utah Boiler and Pressure Vessel Rules and Regulations (Utah Boiler Code) adopt the ASME as a means to insure that boilers and pressure vessels are built to meet the rugged safety requirements of industrial, commercial, and public duty.

MFI alleges that "no provision in the Utah Boiler Code or ASME Code addresses the use of otherwise exempt residential-size water heaters to provide both potable water and space heat." RB at 4. This example of the logical gymnastics used by MFI erroneously assumes that such devices are exempt. Also, the transcript portion cited by MFI (R 19-20) shows that the IC expert witness

consistently treated the Polaris as a boiler rather than a water heater due to its space heating function.

STATEMENT OF THE FACTS

MFI fallaciously states that the "ASME has determined that a water heater used with a recirculating loop does not become subject to the ASME Code." RB at 5. That conclusion is false because it is based on a poorly (or cleverly) designed question which MFI posited to the ASME. The question never asked whether a water heater would be subject to the ASME; the question asked was whether a "water heater...installed with an optional recirculating line that returns heated water to a water heater as illustrated in Figs. HLW-809.1 and Fig. HLW-809.2 would...be required to be H-Stamped?" This question is faulty because under no circumstances would a water heater in the HLW section of the ASME Code be stamped with an "H" stamp. "H" stamps are reserved for units described in the "HG" section of the ASME Code. Section HG-533.5, ASME Code (1986 with 1988 addenda). Significantly, a recirculating loop is not a loop for space heating, and the question was not addressed as to space heating loops. Trial Exhibit R-2.

ARGUMENT

I. THE INDUSTRIAL COMMISSION ASSERTED A PROPER JURISDICTIONAL GROUND FOR REVIEW.

The Industrial Commission of Utah asserted jurisdiction in the Utah Supreme Court based on Section 78-2-2(5), U.C.A. as corrected by motion dated November 22, 1991. MFI alleges that the IC has not argued that any of the subsections of Rule 46 justify review. A reasonable reading of Rule 46 states reflects that there is no



precise magic incantation which is required for review. As Rule 46 states, "[t]he following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered...." Although MFI's reading of the rule gives an unduly restrictive meaning to it, the rule is clear that this Court can grant certiorari in this case, and the critical importance of the safety issues at stake justifies such grant.

II. THE DECISION BELOW WAS DEFICIENT, AND DID NOT GIVE ADEQUATE CONSIDERATION TO THE ISSUES.

MFI cavalierly alleges that the IC has not argued the "exact issues which it presented before the Court of Appeals...." RB 11. The IC is surprised that the MFI would make this allegation because a reading of the errors alleged shows this to be untrue. As but one example of MFI's misstatement, the IC argues in its petition that the Court of Appeals erred when it admitted that it neither reviewed the Boiler Code in depth, nor referred to legislative history even though the IC had provided such history in its brief. This argument was not raised by the IC below because the Court of Appeals had not issued an opinion at that time. Thus, the error could hardly have been an "exact" rendition of one raised below. A review of other errors raised by the IC show that the errors alleged are worthy of review by this Court.

A. THE COURT OF APPEALS IMPROPERLY APPLIED UTAH'S STATUTORY PROGRAM OF BOILER AND WATER HEATER REGULATION.

MFI alleges that the IC has taken out of context a statement made by the Court of Appeals that it "need not review the Boiler Code in depth, nor refer to legislative history to determine whether to apply correction of error or a reasonableness standard

of review in this case." RB at 13; Opinion at 5. A careful review of the opinion of the Court of Appeals shows that there is no discussion of legislative history, and the cumulative errors committed by the Court show little understanding of the purpose of the Utah Code and the statutory scheme. There is no support for the statement by the Court of Appeals that "exempting the Polaris from regulation under the Utah Boiler Code does not defeat the purpose of the statutory scheme...." Opinion at 10.

B. THE COURT OF APPEALS IMPROPERLY WEIGHED THE EVIDENCE.

MFI misconstrues the statements of IC's expert witnesses when it alleges that nothing in the Utah Boiler Code says that water heaters cannot be used for space heating. RB at 14. It is clear from a reading of the transcript that MFI's counsel doggedly attempted to get IC's expert witness to say that. R 19-20. However, the witness consistently, although inartfully, characterized the Polaris as a boiler. R 19. The Utah Boiler Code states by implication that only boilers be used in a space heating role. Utah Boiler Code, Part I, Section 5(j).

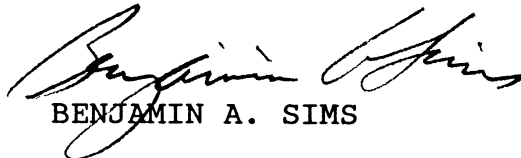
MFI attempts to minimize the experience and expert qualifications of the IC's boiler professionals. These experts had a combined boiler experience of over 52 years; they were both certified, held national board commissions, and were familiar with the Utah boiler statutes, the ASME Code, and the Utah Boiler Code. They were intimately familiar with the requirements of the ASME Code, and stated unequivocally that had the Polaris met the requirements of the ASME Code that it would be safe. Without an ASME stamp, the boiler experts could not say that it was safe.

R 6-9, 11, 29-31.

MFI's argument as to construction standards for the Polaris under the ASME Code seems to be this: MFI did not build the Polaris to ASME specifications, and therefore, because the IC cannot find a replica of the Polaris in the ASME Code, the ASME Code does not provide construction standards. RB at 15. This argument puts the cart before the horse. The ASME Code provides construction standards for boilers such as the Polaris. Charles Allison, a boiler expert from the National Board of Boiler and Pressure vessel Inspectors with over 34 years experience, and who reviewed the quality control procedures of numerous manufacturers, stated that there was nothing peculiar about the Polaris that prevented its being built according to ASME standards. R 31-32. It is presumably true that MFI did not want to build the Polaris to ASME specifications, but it is clearly not true that they had no construction standards.

#### CONCLUSION

The Utah legislature has enacted a minimum safety standard for construction of boilers and pressure vessels using the ASME Code. The ASME Code, if used for construction, provides a thoroughly tested, and engineered product which can be determined to be safe simply by observing the ASME symbol. For the reasons set forth in the petition and in this reply brief, the Industrial Commission of Utah respectfully requests this Court to grant the Petition for Writ of Certiorari.

  
BENJAMIN A. SIMS

CERTIFICATE OF MAILING

I certify that on November 29, 1991, a copy of the attached REPLY BRIEF OF PETITIONER FOR CERTIORARI in the case of Industrial Commission of Utah vs. Mor-Flo et al was mailed to the following persons at the following addresses, postage paid:

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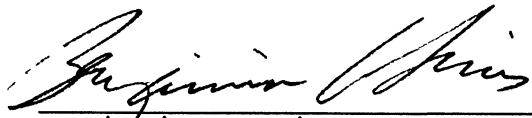
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