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Darren J. Pollick, By and Through His Guardian Ad Litem, John R. Pollick, and John R. Pollick v. J. C. Penney Company : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

DARREN J. POLLICK, by and through his Guardian ad Litem, John R. Pollick, and JOHN R. POLLICK,

Plaintiff-Respondent,

vs.

J. C. PENNEY COMPANY, a corporation,

Defendant-Appellant.

Case No. 11880

BRIEF OF RESPONDENT

Appeal from Judgment of the Third Judicial District Court for Salt Lake County, State of Utah
Marcellus K. Snow, Judge

Richard C. Dibblee
Robert D. Moore
Rawlings, Roberts & Black
530 Judge Building
Salt Lake City, Utah
Attorneys for Plaintiff-Respondent

Stephen B. Nebeker
Ray, Quinney & Nebeker
400 Deseret Building
Salt Lake City, Utah
Attorneys for Defendant-Appellant

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PRELIMINARY STATEMENT

The parties will be referred to as they appeared in the lower Court.

STATEMENT OF THE KIND OF CASE

This is a negligence action to recover damages for personal injuries suffered by Darren J. Pollick, a

minor, as a result of falling over a banister in defendant's store, located at 4849 South State Street, Murray, Utah.

DISPOSITION OF LOWER COURT

The case was tried to a jury which returned a verdict in favor of the minor for damages in the sum of $2,500.00 and awarded the sum of $821.36 to the father for medical expenses.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the jury verdict and granting either a judgment as a matter of law or a new trial. Plaintiff contends the verdict rendered by the jury should be sustained.

STATEMENT OF FACTS

The Statement of Facts contained in the defendant's brief is generally accurate. However, the plaintiffs feel that the following amplification would be helpful in order for this Court to determine the issues presented in this case. It is, of course, the position of the plaintiffs herein that in determining the arguments set forth by the defendant that the facts must be construed most favorable to the plaintiffs for the reason that there is a jury verdict in this case. This is particularly true in regard to Point I of Defendant's Brief. The facts are these:

The plaintiff, John R. Pollick, accompanied by his three year old son on May 5, 1964, went to defendant's store at 4849 South State Street, Murray, Utah, to purchase a Mother's Day gift (R. 122-123). The plaintiff went to the Ladies' Department, which is located on the main floor of the store. Directly opposite the department and in the center of the main floor is a stairwell which leads to the basement. Surrounding three sides of the stairwell is a wooden banister. The banister is approximateyl 36 inches high and attached to the base and extending around the banister is a mopboard 7½ inches high and ⅜ of an inch wide. The child, Darren Pollick, testified that he climbed the banister in question, that is, the mopboard allowed him to stand on the same and he so remembered this before his injury.

Mr. Pollick selected a dress and while standing at the cash register to complete the sale, he heard a scream and went to the stairway where he saw his boy in the arms of the manager of the store. The manager advised plaintiff his boy had fallen over the banister and landed on a display rack approximately eleven feet below in the basement. The boy suffered a broken leg as a result of the accident.

Plaintiffs filed this case to recover damages for the injuries sustained by the minor child and for medical expenses. Plaintiffs proceeded upon the theory they were business invitees and defendant neglected to exercise due care to make the premises reasonably safe for

them by maintaining the aforementioned banister in a dangerous and unsafe condition.

It should be pointed out at this juncture that the plaintiff's theory was simply that the defendant, in allowing a climbable mopboard to be attached to the wooden banister, was negligent under the circumstances in that the store knew and, in fact, encouraged children of tender years to be present on its premises. The defendant throughout its brief seems to indicate that it was the position of the plaintiff that there was some negligence in the construction of the banister but the defendant in stating the plaintiff's position has created a strawman. The fact of the matter is that the plaintiff's theory proceeded on the fact that the defendant, under the circumstances, maintained a dangerous and unsafe condition for children of tender years.

Darren clearly testified that immediately prior to the fall he was standing on top of the mopboard and then he fell (R. 110).

The manager of the store, Mr. Dennis Barlocker, testified as follows:

(R. 161, 162)

"Q. Now, it's a matter of fact isn't it, Mr. Barlocker, that J. C. Penney's as a department store, prides itself in family, or having families come and shop there, isn't that right?

"A. Yes, sir.

"Q. And while you were there for three and

a half years, you saw a lot of little children in that place, haven't you?

"A. Yes, sir.

"Q. And in fact it's a common practice for people to come with small children, isn't that right?

"A. Yes.

"Q. And, of course, you've known that all along and while you were there at the Murray office that's—you've known that, haven't you?

"A. Yes, sir.

"Q. And it's not uncommon for small children to be in and about the store?

"A. No, sir.

"Q. Now, I guess, also, one of your particular duties, isn't it Mr. Barlocker, is to make sure that this place is safe for the patrons when they come in there, isn't that right?

"A. Yes, sir.

"Q. And, now you were familiar were you not with this particular banister that borders this said well?

"A. Very familiar with it.

"Q. And this particular bannister, I guess, it also had a little bit of a beauty sign to it, is that right?

"MR. NEBEKER: Little what?

"MR. DIBBLEE: Was it there for beauty? Was it there for beauty?

"A. No, not necessarily.

"Q. So, therefore, then it was just for the purpose of having this handrail that the people use, is that correct?

"A. Well, it was built to keep people from falling in.

"Q. Falling down the stairs? The stairs this way, is that correct?

"A. Yes, definitely.

* * * *

"Q. Now with respect to this particular bannister, Mr. Barlocker, it would have been practical and would have been possible would it not, sir, to put a little extension along the top of this railing here to raise it a little higher, to make it higher, you could do that couldn't you?

"A. I'm sure it could be done. I am no contractor but I'm sure it could be done.

"Q. Well, as a practical matter it could have been done, couldn't it, just put some sort of extension on, like this, so that it would make this higher and rather than being thirty-six inches from the floor, could have been higher, couldn't it?

"A. Yes.

"Q. And as a matter of fact this particular mop board, here, for all practical purposes could have been removed, could it not, sir?

"A. Defintely.

"Q. And, then, if that particular mop board had been removed, then small children that were in the area would not be able to climb up on this bannister, would they, sir?

* * * *

"A. Would you restate your question?

"Q. (By Mr. Dibblee) I say, if the mop board would have been removed, then, little children that had been walking around wouldn't be able to put their foot up on there, would they?

"A. No, they wouldn't be able to put their foot up there.

"Q. And isn't it also true, Mr. Barlocker, that if J. C. Penney Company had put an extension up on this particular area on the top of this railing and extended it higher it could have been done with all practicality, it could prevent people from falling over the bannister, wouldn't it?

"A. Yes, sir.

"Q. And in fact it would have prevented exactly the accident that happened in this case, wouldn't it?

"A. Yes, sir."

Based on this evidence the trial court presented the case to the jury. The jury returned a verdict in favor of plaintiffs, which verdict should be sustained by this Honorable Court.

ARGUMENT

POINT I

THE EVIDENCE DOES SUPPORT A FINDING THE DEFENDANT WAS NEGLIGENT.

Throughout defendant's argument and Point I in particular, reference is made to the fact that Murray

City has adopted a Building Code that stated that banisters should be of a certain height. The defendant feels and argues most vigorously that this fact relieves him from any responsibility. In this connection it is interesting to note the theory that he requested be presented to the jury in Instruction No. 15. That instruction was as follows:

INSTRUCTION NO. 15

You are instructed that the Uniform Building Code contains the following requirements with regard to guardrails:

> "Guardrails. All unenclosed floor openings, and open and glazed sides of landings and stairs shall be protected by a guardrail or handrail. Guardrails shall be not less than thirty-six inches (36") in height. Intermediate members in open type railings shall be spaced not more than nine inches (9") apart." Uniform Building Code, 64 Edition, Vol. I, Sec. 3305.

If you find from a preponderance of the evidence that the bannister in the defendant's store at Murray, Utah was not less than 36" in height, then I instruct you that the construction and maintenance of the banister would be in compliance with the Uniform Building Code.

It can be seen that this instruction is simply a statement of fact and did not help the jury in determining whether or not the particular circumstances the defendant was or was not negligent in the maintaining

of its premises. The trial court refused to give the instruction. The instruction, to be proper, should have stated, in conformity with well-recognized law, that compliance with the Building Code is some evidence of whether or not there was a breach of duty. As mentioned earlier, the defendant did not articulate this view and now seems to insist that the mere fact of compliance with a Building Code as to the height of a banister (not taking into consideration the fact that the mopboard was climbable) relieves it from any and all obligation. This argument, it is respectfully suggested, is patently erroneous.

The plaintiffs' theory of negligence was set forth in Instructions No. 17 and 18. The trial court gave forth the following instructions and the same, we think, set forth the proper law that th ejury should consider under the circumstances of this case. This was the theory of the plaintiffs.

"INSTRUCTION NO. 17

"You are instructed that business establishments catering to the general public owe a duty to maintain the premises in a reasonably safe condition and in such a manner as not to involve an unreasonable risk of harm to persons who might be reasonably anticipated to be in and about said business establishments.

"In this connection you are instructed that if you find by a preponderance of the evidence that the manner in which the defendant maintained the bannister bordering the stairway leading

from the Main Floor to the Basement constituted a condition that was not reasonably safe and that in allowing said condition to exist defendant failed to exercise the degree of care above described, then, and in that event, defendant was negligent, and if you further find that such negligence, if any, was a proximate cause of injuries to the minor children, then you should find the issues in favor of plaintiff and against defendant and assess damages in accordance with these instructions."

"INSTRUCTION NO. 18

"You are instructed that business establishments catering to the general public owe a duty to maintain the premises in a reasonably safe condition and in such a manner as not to involve an unreasonable risk of harm to persons who might be reasonably anticipated to be in and about said business establishments.

"In this connection you are instructed that if you find by a preponderance of the evidence that defendant maintained a banister bordering the stairway leading from the Main Floor to the Basement at a height that a child of tender years might climb and the defendant could, with reasonable practicality, have placed upon the top of the banister an addition which would have prevented chiddren who may have climbed on the banister from falling over and down to the floor below, and if you further find from a preponderance of the evidence that the failure to so construct the said addition constituted a failure to exercise the degree of care above described, then, and in that event, defendant was negligent, and if you further find that such negligence, if

any, was a proximate cause of the injuries to the minor child, then you should find the issues in favor of plaintiffs and against defendant and assess damages in accordance with these instructions."

There is in the defendant's brief no objection to this theory nor any exception to these instructions. The instructions were defining the standard of care to a business invitee of the defendant in this case, that is, *that it has a duty to maintain the premises in a reasonably safe condition.* The duty, certainly in these instances, is much more broad than that which is claimed by the defendant in smugly stating that the banister met certain height requirements of a Building Code. A case that sets forth the plaintiffs' theory in this case is *Thacker v. J. C. Penney Company* (5th CCA) 254 F. 2d 672, in which a two year, two month old child fell over a 36 inch high railing along the second floor of the store. It was admitted, as in this case, that it was reasonable to foresee that children would be in and about said railing. The trial court granted a motion for summary judgment on the grounds there was no breach of duty and no negligence shown. In reversing the trial court stated stated the following:

"What is the scope of the duty here? A storeowner is not an insurer of an invitee's safety, but he is under the affirmative duty of exercising due care under all circumstances. The Restatement speaks of the liability of a landowner to business visitors 'to exercise reasonable care to make the land safe for [their] reception'. Re-

statement, Torts, Section 343. Harper and James state: 'The occupier must use due care not to injure the plaintiff by negligent activity and also to warn him of latent perils actually known to the occupier. In addition, the occupier owes the duty to inspect his premises and to discover dangerous conditions * * * [as] part of a larger duty of reasonable caret to make the premises reasonably safe.' 2 Harper and James, Law of Torts, Section 27.12, p. 1487.

"A storeowner is under a duty to use due care to make the premises safe for all invitees—for a young child as well as for an adult. He owes the same degree of care to both, but, of course, different precautions must be taken for children, if the storeowner's conduct is to measure up to the standard of due care under all the circumstances. 'The proprietor of a store or shop who invites or induces children to come upon the premises must use care to keep the premises reasonably safe for children. Account is taken, in determining the precautions necessary to be exercised, of childish impulses as well as the fact that certain dangerous conditions in the store or shop may attract small children to their injury.' 38 American Jurisprudence 799, Negligence, Section 177. Age and the ability of a child to realize danger, the peculiar attraction certain installations have for children, childish impulses, the knowledge that young children frequently in the past had been attracted to an installation are all circumstances to be taken into account in determining whether a storeowner has complied with his duty of care to an invitee who is a child. If J. C. Penney, through its employees, had knowledge that children frequently played on the balcony and were attracted to climbing

the balcony railing, and if there was a foreseeable probability of injury by children climbing the railing and falling, defendant was under a duty to avoid the danger by taking precautions to make the premises reasonably safe. Further, even without the actual knowledge of the peril to children generally or to Jada particularly, defendant was 'under an affirmative duty to protect invitees against [dangers] which with reasonable care * * * might [be] discover[ed]'. Prosser, Law of Torts, Sec. 78, p. 453. If therefore the construction of the railing was such that a reasonable person might expect young children on the balcony to be attracted to climbing the railing, defendant was under the duty to use due care to discover this danger and to protect its invitees against the peril.

"Whether J. C. Penney Company breached its duty to use due care to make its store reasonably safe for young invitees is the basic issue in this case. We believe that there was a sufficient showing of a breach of duty for the issue to be decided by a jury."

Plaintiffs respectfully submit that the facts in the above quoted case are similar to this case. In the case at bar the record was clear defendant knew that children of the tender age of plaintiff would be in its store and near the banister. In spite of this knowledge defendant permitted the banister to remain unguarded and with a climbable mopboard that permitted children to do what was done in this case. Again it is repeated that the evidence clearly shows defendant completely failed to take any precautionary measure to protect small children that were in the store.

As mentioned at the onset in this case, the assumption defendant makes that compliance with a building code, *ipso facto,* relieves it of any further liability, is contrary to the law.

In Wigmore on Evience, Vol. 2, Sec. 461, at page 489, the author compares the effect of a statute or ordinance with evidence of custom and habit and states as follows:

> "This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law.
>
> * * * *
>
> "The proper method is to receive it, with an express caution that it is merely evidential and is not to serve as a legal standard."

The author then cites the case of *Texas and P R Company v. Behymer,* 189 U.S. 468, 23 S.Ct.Rpr. 622, wherein Justice Holmes stated:

> "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence whether it usually is complied with or not."

It is clear from the foregoing authority the compliance with the Code does not excuse this defendant from liability.

It is respectfully submitted that certainly there were sufficient facts for the jury to consider whether

or not the defendant was guilty of negligence in this particular instance. The only uncontroverted and unimpeached evidence that the defendant relies upon is the conclusion of the Building Code which is not an insulation from liability to a storeowner. The question is whether or not the jury was unreasonable in finding negligence when defendant invited children to be in the store and permitted a banister to be in the area where the children would be which was climbable.

POINT II

THE TRIAL COURT DID NOT ALLOW INTO EVIDENCE IN ANY MANNER THE FACT THAT DEFENDANT MADE REPAIRS TO THE BANISTER SUBSEQUENT TO THE ACCIDENT.

The defendant has cited persuasive authority that once an accident has occurred evidence of subsequent repairs is not admissible to show that there was negligence at the earlier period of time. *The plaintiff does not disagree with this rule.* There was no evidence that was introduced which in any manner showed the fact that the defendant subsequent to the accident increased the height of the bannister by 17 inches. What did occur is that the following questions were asked to defendant's store manager:

> "Q. Now, with respect to this particular bannister, Mr. Barlocker, it would have been prac-

tical and would have been possible would it not, sir, to put a little extension along the top of this railing here to raise it a little higher, to make it higher, you could do that couldn't you?

"A. I'm sure it could be done. I man no contractor but I'm sure it could be done.

"Q. Well, as a practical matter it could have been done, couldn't it, just put some sort of extension on, like this, so that it would make this higher and rather than being thirty-six inches from the floor, could have been higher, couldn't it?

"A. Yes."

It appears that what counsel is arguing is that he was caught on the horns of a dilemma by the discussion of counsel outside of the presence of the jury. It was the counsel for plaintiffs' position that if the store manager claimed it was not practical to make an extension, then at that point he would ask that the same had been done. It should be noted, however, that stage of the proceeding has never reached this point because the store manager answered it was practical to extend the height of the railing. What counsel seems to be arguing is that if plaintiffs' counsel had not forewarned him of what his next question might be then perhaps the store manager may have answered the question in a different manner. Of course, we assume that the store manager answered truthfully and to the best of his ability. In this case the store manager testified that he was present for some years prior to the accident and that it was his duty to observe danger-

ous conditions in the store. The questions presented were proper. To argue what may have happened if the manager would have answered differently is quite remote. Again, it is repeated there is no place in the record where evidence was introduced or attempted to be introduced that showed, in fact, Penneys had extended the height of its banister.

POINT III

THE TRIAL COURT DID NOT ERR IN SUSTAINING PLAINTIFFS' OBJECTIONS TO DEFENDANT'S PROFERRED EVIDENCE.

Defendant argues the trial court committed prejudical error by sustaining an objection to a proposed question. Before this ruling may be subject to review by this Court the record must indicate the answer which the witness would have given to the question. This rule is set forth in 4 Am. Jr. 2d, Appeal and Error, Sec. 520, page 956, wherein it is stated:

> "It appears to be the decided weight of authority that where an objection to a question propounded to a witness is sustained, the ruling will not be reviewed unless the record shows what his answer would have been, or at least what the questioner expected or proposed to prove by the witness, since otherwise the record does not affirmatively show that the answers would have been competent and material or that the appellant was prejudiced by the ruling."

In Re Young's Estate, 33 Utah 382, 94 P. 731, set forth the general rule to be as follows:

> "It is argued, however, that the protestants, in this connection, made certain offers of proof respecting the contents of the prior will, and that it was made to appear what the changes were, and hence the proof offered was immaterial.
>
> ". . . Nor are we inclined to depart from the general rule that unless it appears from the offer the evidence is material the ruling of the court will be upheld. The reason upon which the rule rests is that the party offering the testimony must know what it is, and if, upon his statement, it is not material, no error can be committed by its exclusion. . ."

This rule is also supported by other cases. *John C. Blackard et al. v. Monarch's Manufacturers and Distributors, Inc.,* 169 N.E. 2d 735, 97 A.L.R. 2d 1255, explained.

> "Appellants, in urging that the trial court erred in sustaining objections to various questions propounded by them, have failed to show how these rulings could have prejudiced their case. Excluded testimony is not available on appeal unless the court was advised of the specific testimony sought to be elicited. In order to preserve for review the refusal of the court to permit a witness to answer a question on direct examination, the motion for new trial must show the question, the objection, and the offer to prove what evidence would have been given by the witness in answer to the question."

And in *State of New Mexico vs. Hyman Roy,* 60 P.2d 646, 110 A.L.R. 1, it is stated:

> "As to the sixth assignment of error, predicated upon the refusal of the trial court to permit certain witnesses to answer questions propounded to them in an attempt to show that the defendant was of a peculiar nature, we are compelled to rule against the defendant. We cannot tell from the record whether the defendant was prejudiced. The record is silent as to what the evidence would have been if not excluded by the court on objection of the prosecution. The defendant failed to make a tender of the testimony which he expected to elicit from the witnesses.

In the case at bar the question sustained by the trial court was as follows:

> "Q. During the time that you have worked at the store, did work at the store, from 1961 up until the time of this accident, to your knowledge had there been any children or other people that had fallen over the stairs?
>
> MR. DIBBLEE: I object to that, your Honor, as being immaterial.
>
> MR. NEBEKER: I think it is material. I think it goes to the question of notice and under Walgreen, the case of *Erickson vs. Walgreen,* we're entitled to show this is a safe area. At Walgreen's they did let them show how many people went through the doorway without any falls or any accidents."

Plaintiffs respectfully submit that the record, in light of the above authorities, simply does not support the defendant's claim of error.

Furthermore, the reasons set forth on page 12 of the defendant's brief do not support his claim that "defendant should have been allowed to introduce evidence of the absence of prior accidents for two critical, independent reasons". He asserts that these two reasons are as follows:

1. "* * * such testimony would be evidence that the banister was not a dangerous fixture in defendant's store."

2. "* * * the testimony, if allowed, would have shown that the defendant had no notice of the allegedly dangerous condition."

As to his first contention, the Court in *Erickson v. Walgreen Drug Co.* 120 Utah 31, 232 P.2d 210, held that:

> "Evidence of the absence of accidents occurring prior to the accident complained of may not be admissible to establish that an unsafe condition did not exist at the time of the accident in question."

His second contention is equally as untenable. In *Owen v. Rheem Manufacturing Co.*, Cal. 187 P.2d 785, the Court held:

> "On examination of one of defendant's witnesses counsel for defendant asked the witness if he had ever heard of a similar accident. Objection to this question was sustained. Exception is now made to the ruling, arguing that by the admission of such evidence it would show that defendant had not expected any similar accident and would

have no reason to believe that any harm would come from the loading of the barrels in the manner in which they were loaded, citing Hyland v. Seaver, supra. The ruling was not error. While a plaintiff may prove previous accidents, for certain limited purposes, a defendant may not, at least in the first instance, prove absence of previous accidents. (Thompson v. B. F. Goodrich Co., 48 Cal. App.2d 723, 729, 120 P.2d 693.)

See also *Hawke v. Barnes, et al,* 294, P.2d 1008, which stated:

> "It is next argued that the court erred in refusing to allow defendant to testify that no person had previously fallen in this area. Plaintiff produced no evidence to the contrary. It was held that for certain limited purposes the plaintiff may prove previous accidents but a defendant at least in the first instance, may not prove absence of previous accidents."

In the case of *Erickson v. Walgreen Drug Co.,* supra, the court discussed the circumstances which makes such evidence admissible by stating:

> "But such evidence is clearly admissible to prove that a possessor of land had no knowledge nor could he be charged with knowledge that an unsafe condition existed, particularly when the unsafe condition complained of is latent. In the instant case the appellant can only be liable if the terrazzo floor when wet subjected business visitors to an unreasonable risk and the appellant either knew or by the exercise of reasonable care could have discovered that such a condition existed. Evidence that thousands of business visitors had walked through the entranceway in all

> kinds of weather and that none of them had ever complained to the appellant of slipping on the terrazzo slab, while not conclusive on the question, as heretofore pointed out, does have probative value upon the question whether the appellant knew or should have known of the existence of an unreasonable risk to customers entering and leaving the store."

It is clear that the foregoing ruling applies to cases where the charged unsafe condition is latent and hidden. The alleged unsafe condition in the *Erickson* case was transient in nature and became unsafe by the application of some outside element, that is, rain on the terrazzo. Certainly, in this type of case, evidence of the absence of anyone slipping could have had probative value. In the case at Bar, however, the charged unsafe condition concerns the construction aspect of the banister and is a strictly patent and obvious condition. It was not incumbent upon plaintiffs to prove that defendant knew small children would be in the store. Nor were they required to prove that the banister was only 36 inches high, contained a 7½ inch climbable mopboard around its base, or that it had no extension to increase its height. These facts were all known to the defendant because it constructed and maintained in the store the banister. These conditions, considered as a whole, were obvious defects which rendered this banister unsafe in an area where children were expected to frequent.

In view of the foregoing, proof of the absence of any prior accidents is immaterial and gives the defend-

ant no additional notice as to the condition of this banister. Thus, the allegation that "such testimony was critical to the defendant's case, and under Utah law should clearly have been admitted" stands totally unsupported under the circumstances.

Another factor which makes this question objectionable is that it was limited in its application. The requested information only concerned the three year period during which the witness had worked for the store. It did not encompass the time from the original construction of the store and banister to the date of the accident. The question was also limited to the knowledge of the witness and did not include the full and complete records of the defendant company.

CONCLUSION

Plaintiffs respectfully submit the evidence clearly presented an issue of fact as to the unsafe condition of the banister which the small boy fell over. The record shows the trial court properly instructed the jury as to the law applicable to the facts of the case and after due deliberation the jury found defendant failed to discharge its duty toward plaintiffs and awarded judgment

to plaintiffs. The evidence clearly supports the finding of the jury, and in the interest of justice, this Court should sustain the verdict rendered by the jury.

Respectfully submitted,

RICHARD C. DIBBLEE
ROBERT D. MOORE of
RAWLINGS, ROBERTS & BLACK

Attorneys for Plaintiffs and Respondents.