IN THE UTAH SUPREME COURT

CRAIG FEASEL, Plaintiff/Respondent, vs. TRACKER MARINE, LLC and BRUNSWICK CORPORATION, Defendants/Petitioners.	**BRIEF OF AMICI CURIAE UTAH ASSOCIATION FOR JUSTICE AND AMERICAN ASOCIATION FOR JUSTICE** Case No. 20200327-SC Appellate Court No. 20180332 Trial Court Case No. 140500037

APPEAL ON GRANT OF PETITION FOR REVIEW OF APPELLATE COURT DECISION

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PARTIES

The caption of the case contains the names of all the parties to the proceedings in the Utah Court of Appeals. Monty Martinez was a party in the district court but settled out before the final judgment was entered.

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CONSENT FOR AMICUS FILING

The Court granted the Motion of the Utah Association for Justice and American Association for Justice for Leave to File an Amicus Curiae Brief on November 24, 2020.

STANDARD OF REVIEW, STATEMENT OF THE CASE AND ISSUES PRESENTED ON APPEAL

The Utah Association for Justice and the American Association for Justice incorporate the Plaintiff's[1] Statement of the Issues and Statement of the Case.

This amicus brief is devoted to the second issue in the June 26, 2020 Order granting the Petition for Writ of Certiorari, which is stated as follows:

> 2. Whether the Court of Appeals erred in reversing the district court's conclusion that Petitioners had no duty to warn Respondent directly as a passenger.
>
> In answering the second question, the Court requests that the parties address whether the duty recognized by the Court of Appeals is supported by the Restatement provisions on which it relied or on other authority, the proper nature and extent of a duty, if any, to warn a passenger, and how such a duty, if any, could be satisfied by an owner or operator.

STATEMENT OF INTEREST

AAJ Statement of Interest

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest

[1] The Plaintiff/Respondent Craig Feasel is referred to as Plaintiff in this Amicus Brief.

plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Utah. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

UAJ Statement of Interest

The Utah Association for Justice ("UAJ") is a statewide organization comprised of attorneys committed to protecting the rights of persons who have been injured in their person or property, and who turn to the courts for judicial redress. In promoting these interests, UAJ seeks to preserve the fair, prompt, open and efficient administration of justice.

UAJ members represent injured people in the vast majority of personal injury tort actions in this state. The court's decision in this case will impact many of these cases, as well as future personal injury litigation. Thus, the resolution of this case significantly impacts the parties to this action, as well as thousands of tort victims throughout the State of Utah.

CONSTITUTIONAL PROVISIONS

None.

SUMMARY OF ARGUMENT

The Court has asked in this case whether a recreational boat manufacturer has a duty to warn boat passengers directly about the recreational boat's known, latent dangers. As part of that issue, the Court has asked the parties to outline the scope of that duty. This brief analyzes both the duty and the scope of that duty.

First, Utah case law and Sections 388 and 402A of the Restatement Second of Torts each recognize that recreational boat manufacturers **do have a duty** to warn recreational boat passengers about risks that the manufacturer knows or should know of but of which the passenger is unaware.

Second, Utah law recognizes the boat manufacturer's duty to warn includes the duty to disclose all risks as well as the extent of those risks. Such a warning must (1) be designed so it can reasonably be expected to catch the attention of the consumer; (2) be comprehensive and give a fair indication of the specific risks involved with the product; and (3) be of an intensity justified by the magnitude of the risk. The boat manufacturer may also be required to take action to directly warn boat passengers about the risk if the danger is great and the boat manufacturer can easily provide notice directly to the passengers such as by placing a warning in the passenger area.

Whether the boat manufacturer's warnings are reasonable is a question for the jury. A court should not take the adequacy/reasonableness of the warning issue from the jury unless a reasonable jury could only reach one conclusion based on undisputed evidence.

ARGUMENT

I. Recreational Boat Manufacturers Have a Duty to Warn Boat Passengers About Risks the Manufacturer Knew or Should Have Known About Which Are Unknown to the Passengers.

This Court in *House v. Armour of America, Inc.*, 929 P.2d 340 (Utah 1996), recognized that a manufacturer has a duty to warn product users about risks which the manufacturer "knows or should know."

> Where a manufacturer "knows or should know of a risk associated with its product," the absence or inadequacy of warnings renders that product "unreasonably dangerous," subjecting the manufacturer to strict liability. *House*, 886 P.2d at 547 (citing *Grundberg v. Upjohn Co.*, 813 P.2d 89, 97 (Utah 1991)).

Id. at 343; *see also* *Slisze v. Stanley-Bostitch*, 979 P.2d 317, 321 (Utah 1999) ("A manufacturer has a duty to warn against a product's latent hazards that are known to the manufacturer but unknown to the consumer.").

The Court's analysis in *B.R. ex rel. Jeffs v. West*, 2012 UT 11, 275 P.3d 228,[2] and Sections 388 and 402A of the Restatement Second of Torts all support the conclusion that a recreational boat manufacturer has a duty to warn passengers about risks that the manufacturer knows or should know about and that are unknown to the passengers.

A. Courts Determine Duty Using Factors Analyzed at a Broad Categorical Level Rather Than on a Case-Specific Level.

This Court in *Jeffs* outlined five factors relevant to determining whether a defendant owes a duty to a plaintiff:

> (1) whether the defendant's allegedly tortious conduct consists of an affirmative act or merely an omission; (2) the legal relationship of the parties; (3) the foreseeability or likelihood of injury; (4) public policy as to which party can best bear the loss occasioned by the injury; and (5) other general policy considerations.

2012 UT 11, ¶ 5 (citations and internal quotation marks omitted). "[E]ach factor must be 'analyzed at a broad categorical level for a class of defendants' rather than a factually

[2] The application of the *Jeffs* factors is appropriate because the strict liability duty to warn elements follow negligence principles. *House*, 929 P.2d at 343.

intensive inquiry 'decided on a case-by-case basis.'" *Scott v. Universal Sales, Inc.*, 2015 UT 64, ¶ 29, 356 P.3d 1172 (citations omitted).

This Court in *Jeffs* discussed how these factors should be applied:

> Not every factor is created equal, however. As we explain below, some factors are featured heavily in certain types of cases, while other factors play a less important, or different, role. . . . [T]he legal-relationship factor is typically a "plus" factor—used to impose a duty where one would otherwise not exist, such as where the act complained of is merely an omission. . . . [T]he final three factors . . . are typically "minus" factors—used to eliminate a duty that would otherwise exist.

Jeffs, 2012 UT 11, ¶ 5.

B. The Application of the Five *Jeffs* Factors Establishes That the Defendants[3] Have a Duty to Warn Boat Passengers About Risks Which the Manufacturer Knows or Should Have Known That Are Unknown to the Passengers.

The specific issue in this case is whether recreational boat manufacturers have a duty to warn recreational boat passengers about known, latent risks associated with their products. Applying the *Jeffs* factors to this case establishes that the Defendants owed such a duty to boat passengers such as Plaintiff in this case.

1. The *Jeffs* Plus Factors Favor Recognizing a Duty.

a. The Defendants' Conduct Consisted of an Affirmative Act Which Carried an Obligation to Warn About Hidden Dangers Known to the Manufacturer.

"The long-recognized distinction between acts and omissions—or misfeasance and nonfeasance—makes a critical difference and is perhaps the most fundamental factor

[3]The Defendants/Petitioners are referred to in this brief as the Defendants.

courts consider when evaluating duty." *Jeffs*, 2012 UT 11, ¶ 7. "Acts of misfeasance, or 'active misconduct working positive injury to others,' typically carry a duty of care." *Id* (citation omitted). "As a general rule, we all have a duty to exercise care when engaging in affirmative conduct that creates a risk of physical harm to others." *Id.* ¶ 21; *see also Graves v. North Eastern Services, Inc.*, 2015 UT 28, ¶ 19, 345 P.3d 619 ("[W]e all generally have a duty of due care in the performance of our affirmative acts . . . ."). A defendant engages in an affirmative act when it manufactures or markets a product.

In this case, Defendants engaged in the affirmative act of manufacturing, marketing and selling a recreational boat. Applying this "most fundamental factor," Defendants in manufacturing and marketing a recreational boat had a duty to warn anyone using the boat about dangers that the Defendants were aware of and the users were not. *House*, 929 P.2d at 343; *Slisze*, 979 P.2d at 321.

b. A Special Relationship Between the Defendants and Boat Passengers Like Plaintiff Was Not Necessary to Establish the Defendants' Duty in This Case.

This Court recognizes a special relationship as a "plus" factor in establishing a duty. However, "[o]utside the government context . . . a special relationship is not typically required to sustain a duty of care to those who could foreseeably be injured by the defendant's affirmative acts." *Jeffs v. West*, 2012 UT 11, ¶10.

2. The *Jeffs* "Minus" Factors Favor Recognizing a Duty.

a. The Foreseeability Factor Weighs in Favor of Recognizing a Duty.

This Court in *Normandeau v. Hanson Equipment, Inc.*, outlined the foreseeability factor in determining duty:

> Foreseeability as a factor in determining duty does not relate to the specifics of the alleged tortious conduct but rather to the general relationship between the alleged tortfeasor and the victim. "Whether a harm was foreseeable in the context of determining duty depends on the general foreseeability of such harm, not whether the specific mechanism of the harm could be foreseen." [Citation omitted]; *see also* *Steffensen v. Smith's Mgmt. Corp.*, 862 P.2d 1342, 1346 (Utah 1993) ("What is necessary to meet the test of negligence . . . is that [the harm] be reasonably foreseeable, not that the particular accident would occur, but only that there is a likelihood of an occurrence of the same general nature." (alteration in original) (internal quotation marks omitted)).

2009 UT 44, ¶ 20, 215 P.3d 152. *Jeffs* emphasized the difference between foreseeability as it relates to duty formation and foreseeability in proximate cause. The Court noted "that duty is a question of law determined on a categorical basis, while breach and proximate cause are questions for the fact finder determined on a case-specific basis." *Jeffs*, 2012 UT 11, ¶ 25. "The appropriate foreseeability question for duty analysis is whether a category of cases includes individual cases in which the likelihood of some type of harm is sufficiently high that a reasonable person could anticipate a general risk of injury to others." *Id.* ¶ 27.

Accordingly, here, the relevant category of cases on a broad categorical level consists of passengers in recreational boats. The inquiry, then, is whether it is foreseeable that a manufacturer's failure to provide warnings could cause injury to passengers. The answer is of course "yes." It is just as foreseeable that a boat passenger would get injured as it is that the owner or operator of the recreational boat would get injured. As such, the

foreseeability factor weighs in favor of imposing a duty on manufacturers to provide warnings to passengers on a boat.

b. The Public Policy Factor Weighs in Favor of Recognizing a Duty to Boat Passengers.

The Court in *Jeffs* outlined the public policy factor:

> [T]his factor considers whether the defendant is best situated to take reasonable precautions to avoid injury. Typically, this factor would cut against the imposition of a duty where a victim or some other third party is in a superior position of knowledge or control to avoid the loss in question.

2012 UT 11, ¶¶ 30-31 (concluding that physicians were in the best position to avoid the loss because of their expertise).

This factor cuts strongly in favor of recognizing a duty on the defendants to warn passengers of known, latent defects. The boat manufacturers are in the best position to take reasonable precautions to reduce injuries to those using their products. The manufacturers are the ones with knowledge of the dangerous condition and are in charge of the manufacturing process. The manufacturers are thus in the best position to provide and post clear warnings of known, latent dangers.

In contrast, boat owners and operators are not necessarily the best ones to protect the passengers' interest. The boat operator may not know about certain dangers with the boat. For example, in this case, the boat owner and operator were not aware that the boat would turn in a tight deadly circle if the boat was unmanned and under power. As between the boat manufacturer, who can equip the boat with adequate warnings that passengers are likely to see, and the boat operator, who may not be a sophisticated user of

the product, the manufacturer is in the best position to warn of the dangers it knows about.

c. Other Policies Weigh in Favor of Recognizing a Duty to Boat Passengers.

Other policy considerations weigh in favor of finding that Defendants had a duty in this case. For example, after this Court remanded *Normandeau*, the appellate court recognized that "the public policy behind tort law is to hold tortfeasors accountable for harms occasioned by their fault." *Normandeau v. Hanson Equip., Inc.*, 2010 UT App 121, ¶ 4, 233 P.3d 546. Boat manufacturers who fail to warn about hidden dangers from passengers should be held accountable for the harms occasioned by their fault. Holding manufacturers responsible also serves public policy in that it incentivizes manufacturers to act reasonably and consider the effect of their actions on third parties. *Jeffs*, 2012 UT 11, ¶ 34 ("tort duties incentivize professionals—whether physicians, mechanics or plumbers—to consider the potential harmful effects of their actions on . . . third parties").

C. The Defendants' Duty to Provide Warnings to Boat Passengers Is Consistent with the Restatement and Case Law.

Section 402A of the Restatement Second of Torts, which this Court expressly adopted in *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 158 (Utah 1979), recognizes that manufacturers are liable for harm caused to the "ultimate user or consumer" from an unreasonably dangerous product. Restatement (Second) of Torts § 402A(1). Comment *l* further explains that the term "'[u]ser' includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes. . . ." *Id.*, comment *l*.

Section 388 of the Restatement Second of Torts recognizes that manufacturers owe a duty to warn those whom they "should expect to use the chattel with the consent of the other or to be endangered by its probable use." Restatement (Second) of Torts § 388. Comment *a* explains that this duty runs to "all those who are members of a class whom the supplier should expect to use [the product] or occupy it or share in its use," including a "passenger or guest" in a car. *Id.* , comment *a*. Thus, by the same reasoning, the Defendants' duty to "users" includes a duty to "passengers" in a recreational boat.

This conclusion is also supported by case law. *See, e.g.*, *Colombo v. BRP US Inc.*, 230 Cal. App. 4th 1442, 1446, 179 Cal. Rptr. 3d 580 (2014) (watercraft passengers had a valid claim concerning the placement of a warning on watercraft); *Egbert v. Nissan Motor Co.*, 2010 UT 8, 228 P.3d 737 (injured occupants of vehicle brought products liability claim against vehicle manufacturer alleging passenger window defectively designed); *Richardson ex rel. Richardson v. Navistar Int'l Transp. Corp.*, 2000 UT 65, 8 P.3d 263 (passengers in a car brought action against manufacturers of automobile and truck under theories of strict product liability and negligence); *Whitehead v. Am. Motors Sales Corp.*, 801 P.2d 920 (Utah 1990) (passenger who was injured when a Jeep Commando rolled over brought products liability action against manufacturer); *Clayton v. Ford Motor Co.*, 2009 UT App 154, 214 P.3d 865 (passenger brought suit against truck manufacturer, alleging strict liability for fourteen product defects).

II. The Jury Should Consider Various Factors When Determining Whether a Boat Manufacturer Has Breached Its Duty to Warn Boat Passengers.

A. The Scope of the Boat Manufacturer's Duty to Warn Is Influenced by Certain Factors.

Having established that the Defendants do have a duty to warn passengers, the question then turns to the scope of that duty. The Court here in posing the second question asked about "the proper nature and extent of a duty, if any to warn a passenger, and how such duty, if any, could be satisfied by an owner or operator."

At its core, the manufacturer of a recreational boat has a duty to provide reasonable warnings to passengers concerning those dangers of which it knows or should know but that are not obvious to users. To properly consider this question requires looking at two issues. First, what factors are considered in determining whether the warning itself is reasonable? Second, must the boat manufacturer communicate those warnings directly to the passengers, or is a warning to the boat owner sufficient?

1. The Recreational Boat Manufacturer Must Disclose All Risks and the Extent of Those Risks.

The Utah Court of Appeals in *House v. Armour of America, Inc.*, 886 P.2d 542, 551 (Utah Ct. App. 1994), *aff'd*, 929 P.2d 340 (Utah 1996), stated a warning "must completely disclose all the risks involved, as well as the extent of those risks." The court then listed various factors which should be considered by the fact finder in assessing whether the warning is reasonable:

> A warning must (1) be designed so it can reasonably be expected to catch the attention of the consumer; (2) be comprehensible and give a fair indication of the specific risks involved with the product; and (3) be of an intensity justified by the magnitude of the risk.

Id. (citation omitted). *See also* *House*, 929 P.2d at 343 (agreeing with the court of appeals that a "manufacturer may be held strictly liable for any physical harm caused by its failure to provide adequate warnings regarding the use of its product").

In *Alder v. Bayer Corp.*, 2002 UT 115, 61 P.3d 1068, this Court recognized the need for a manufacturer to disclose not only the precautions to guard against a risk, but the danger if the precautions are not followed. In *Alder*, the installer of an x-ray processing machine informed the hospital of the need to maintain certain air circulation requirements in the room where the x-ray processing machine was placed. The installer, however, failed to explain why the failure to maintain the air circulation was dangerous. The Court recognized that under these circumstances a jury could find that the installer had breached its duty to warn.

> Therefore, a jury could find that AGFA breached its duty by failing to take reasonable measures to prevent the exposure. Even in the absence of that finding, there is a triable issue as to adequate warnings. The dissent is accurate in its observation that AGFA communicated to the hospital the requirement for ten complete air exchanges per hour. However, that warning arguably falls short of informing the user Technicians of the facts which made the Curix machine "likely to be dangerous." These facts could be found to include the disclosure of the specific, serious, long-term effects of chemical exposure, since that was the real danger and the one giving rise to the alleged injuries.

Id. ¶ 38.

This need to explain the consequences of failing to follow precautions is particularly needed when the consequences are life-threatening and not obvious.

2. The Boat Manufacturer May Be Required to Provide Warnings Directly to the Boat Passengers.

In certain circumstances, the boat manufacturer may be required to communicate the warnings directly to the passengers, such as by placing a warning in the passenger area of the boat.

In *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739 (3rd Cir. 1990), a case cited by the Defendants, the court outlined the factors used when considering whether the seller can rely on communicating the dangers to an intermediary or whether the seller needs to communicate directly to the user:

> These factors include (1) the dangerous condition of the product; (2) the purpose for which the product is used; (3) the form of any warnings given; (4) the reliability of the third party as a conduit of necessary information about the product; (5) the magnitude of the risk involved; and (6) the burdens imposed on the supplier by requiring that he directly warn all users.

See also *Grier v. Cochran W. Corp.*, 705 A.2d 1262, 1266 (N.J. Super. Ct. App. Div. 1998) (among factors to be considered in whether a seller supplying a product through an intermediary has a duty to warn the ultimate product user depends on "the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user") (quoting Restatement (Third) of Torts: Products Liability § 2, comment *i* (Proposed Final Draft, Apr. 1997)).

The Third Restatement of Torts: Products Liability also recognizes that under certain circumstances a seller may be required to convey warnings to persons beyond purchasers such as, in this case, passengers:

> Depending on the circumstances, Subsection (c) [which recognizes inadequate warnings as a product defect] may require that instructions and

> warnings be given not only to purchasers, users, and consumers, but also to others who a reasonable seller should know will be in a position to reduce or avoid the risk of harm. There is no general rule as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay the warnings. **The standard is one of reasonableness in the circumstances. Among the factors to be considered are the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.**

Restatement (Third) of Torts: Products Liability § 2, comment *i* (emphasis added).

Comment *n* to Section 388 of the Second Restatement of Torts also recognizes that "[g]iving to the third person through whom the chattel is supplied all the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability." Restatement (Second) of Torts, § 388, comment *n*. Comment *n* also recognizes that a manufacturer may be required to give direct warnings to certain users like passengers:

> Here, as in every case which involves the determination of the precautions which must be taken to satisfy the requirements of reasonable care**, the magnitude of the risk involved must be compared with the burden which would be imposed by requiring them, . . . and the magnitude of the risk is determined not only by the chance that some harm may result but also the serious or trivial character of the harm which is likely to result.** . . . Since the care which must be taken always increases with the danger involved, it may be reasonable to require those who supply through others chattels which if ignorantly used involve grave risk of serious harm to those who use them and those in the vicinity of their use, to take precautions to bring the information home to the users of such chattels which it would be unreasonable to demand were the chattels of a less dangerous character.

Id. , comment *n* (emphasis added).

Accordingly, the factors the fact finder should consider when determining whether a manufacturer must give a warning directly to someone like a boat passenger are the following:

1. The defendants' knowledge concerning the severity and likelihood of the danger;

2. The likelihood a warning will be conveyed by an owner/operator; and

3. The feasibility and ease of providing a direct warning to the user or, in this case, the boat passenger.[4]

For example, in this case, placing a warning in the passenger area to warn passengers about the kill-switch lanyard and the consequences of not wearing the lanyard (the "circle of death) is appropriate because of (1) the grave danger to passengers from that risk, (2) the likelihood the boat operator will not convey the warning and (3) the ease of providing such a warning.

B. The Jury Should Decide Whether the Manufacturers' Warnings Are Both Reasonable and Reasonably Displayed.

This Court in *Harris v. Utah Transit Authority*, 671 P.2d 217, 220 (Utah 1983), stated that "the right to trial by jury is a basic principle of our system that cannot be allowed to be eroded by improper intrusions on the jury's prerogative." Utah courts have recognized that the adequacy of a warning "presents a question of fact, to be resolved by the trier of fact." *House*, 886 P.2d at 55. *See also Grier v. Cochron W. Corp.*, 705 A.2d

[4] Defendants in their brief recognize that these factors should be considered in determining whether the manufacturer must provide a warning directly to the boat passengers. Defendants' Brief at 43-48. Whether the facts require the manufacturer to provide a warning directly to the boat passengers is a fact question for the jury to decide, not a question of law for the court.

1262, 1266 (N.J. Super. Ct. App. Div. 1998) ("Questions of reasonableness in determining the adequacy of warnings are ordinarily for the jury to resolve.").

The California appellate court's decision in *Colombo v. BRP US Inc.*, 179 Cal. Rptr. 3d 580, 230 Cal. App 4th 1442 (2014), illustrates that juries should decide whether the warnings are adequate, including whether they are placed properly. In *Colombo*, the defendants, Bombardier Recreational Products, Inc., and BRP US Inc. (collectively "BRP"), manufactured the watercraft in question. BRP knew the watercraft water propulsion system could cause severe orifice injuries to passengers who did not wear wet suits and fell off the back of the watercraft. 179 Cal. Rptr. 3d at 587. BNP provided a warning on the operator console under the handlebars that warned that all riders needed to wear wetsuits and explained the danger from failure to wear a wetsuit. BNP did not place this same warning on the back of the watercraft. *Id.* The plaintiffs fell off the back of a BNP watercraft and suffered severe injuries from the water propulsion system. *Id.* at 587-88. The plaintiffs and their experts argued BNP's warning was inadequate because there was no warning posted on the rear or back of the watercraft and this failure substantially contributed to plaintiffs' injuries. *Id.* at 593. The case went to the jury, and the jury agreed with plaintiff and awarded damages. On appeal, the court recognized that the jury's finding that the failure to include a warning on the back of the watercraft was a substantial factor in causing the injuries was supported by the evidence.

> In any event, we conclude this evidence was properly admitted, as it is of reasonable, credible and solid value and supports the finding of a reasonable jury [citations omitted] that BRP's conduct in failing to give plaintiffs a warning [on the back of the watercraft] similar to the one given to the operator was a substantial factor in causing their harm.

Id.

Therefore, the failure-to-warn claim in this case should only be taken from the jury if, after considering the evidence in the light most favorable to the Plaintiff, the Court concludes that no reasonable jury could find the Defendants' warnings and placement of warnings unreasonable.

CONCLUSION

AAJ and UAJ request that the Court recognize that boat manufacturers do owe a duty to warn boat passengers. The AAJ and UAJ also request that this Court recognize that the adequacy and placement of warnings for passengers is generally a decision for the finder of fact consistent with the factors discussed in this brief. As a result, AAJ and UAJ believe that this case should be returned to the trial court for a jury to determine whether the warnings provided by the Defendants were adequate.

DATED this 30th day of November 2020.

UTAH ASSOCIATION FOR JUSTICE

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Certificate of Compliance with Rule Utah Rule of Appellate Procedure 24(a)(11)

Certificate of Compliance with Page or Word Limitation, Typeface Requirements, and Addendum Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(1) because:

   [X] this brief contains 17 [number of] pages, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2), or

   [X] this brief contains 4,777 [number of] words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2). This brief has been prepared using _____ [name and version of word processing program].

2. This brief complies with the addendum requirements of Utah R. App. P. 24(a)(12) because the addendum contains a copy of:

   [ ] any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

   [ ] the order, judgment, opinion, or decision under review and any related minute entries, findings of fact, and conclusions of law; and

   [ ] materials in the record that are the subject of the dispute and that are of central importance to the determination of the issues presented for review, such as challenged jury instructions, transcript pages, insurance policies, leases, search warrants, or real estate purchase contracts.

3. This brief complies with rule 21(g).

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/s/ Douglas B. Cannon
Attorney's or Party's Name

November 30, 2020
Date

CERTIFICATE OF SERVICE

I certify that on November 30, 2020, a copy of the foregoing was sent via electronic mail to the following parties:

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