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Reid E. Jensen v. Connie Gail Thomas : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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REID E. JENSEN,

Plaintiff and
Appellant,

vs.

CONNIE GAIL THOMAS,

Defendant and
Respondent.

CASE NO. 14838

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BRIEF OF RESPONDENT

Appeal from the Judgment of the District Court for Salt Lake County, Utah,

The Honorable G. Hal Taylor, Judge.

STEFAN
PAUL
RAY
1000
Salt
Att
Res

ROBERT J. DEBRY

2040 East 4800 South #203

Salt Lake City, Utah

Attorney for Plaintiff-Appellant

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Plaintiff and)	
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Respondent.)	
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BRIEF OF RESPONDENT

Appeal from the Judgment of the Third Judicial
District Court for Salt Lake County, Utah
The Honorable G. Hal Taylor, Judge

STEPHEN B. NEBEKER
PAUL S. FELT
RAY, QUINNEY & NEBEKER
400 Deseret Building
Salt Lake City, Utah
Attorneys for Defendant-
Respondent.

ROBERT J. DEBRY
2040 East 4800 South #203
Salt Lake City, Utah
Attorney for Plaintiff-Appellant

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NATURE OF THE CASE

This is a negligence action brought by plaintiff-driver against the driver of the other automobile to recover damages for an unusual medical condition allegedly caused by the collision.

DISPOSITION IN THE LOWER COURT

The case was submitted to the jury on the issue of whether the accident caused the medical condition of which plaintiff complained. The jury returned a verdict of "no cause of action". Plaintiff moved for a new trial pursuant to Rule 59(a)(3) on the ground that he was surprised by the testimony of Defendant's expert medical witness. The Third Judicial District Court for Salt Lake County, Utah, Judge G. Hal Taylor presiding, denied plaintiff's motion.

RELIEF SOUGHT ON APPEAL

The respondent seeks affirmation of the trial judge's Order denying plaintiff's Motion for a New Trial.

STATEMENT OF FACTS

On June 16, 1974, a Cadillac driven by the plaintiff, Reid E. Jensen, was struck from the rear by a vehicle driven by defendant Connie Gail Thomas. Although the facts show that there was no visible damage to plaintiff's automobile and only very minor damage to defendant's Volkswagen, plaintiff claimed that he suffered severe injuries arising out of this

accident. Whether or not plaintiff's medical condition was caused by this accident became the chief issue at trial.

Plaintiff had a history of medical problems. He was wounded and knocked unconscious during World War II. [R. 302] His service related injuries caused him to receive a thirty per cent (30%) disability rating from the government. [R. 313] In August, 1966, he suffered a severe heart attack. [R. 313] Since 1966, plaintiff has been undergoing treatment for the condition of hardening of the arteries (arteriosclerosis). [R. 336] In 1970 he was involved in the first of three rear-end automobile collisions when his vehicle was struck by another car. [R. 313] From this first accident, plaintiff suffered a cervical sprain, [R. 313] followed by numbness in his extremities and headaches. [R. 314] In 1970, plaintiff also became aware that he was suffering from Raynaud's Phenomena. [R. 315] This condition affects the circulation to his extremities. [R. 386] On June 19, 1971, plaintiff had his second severe heart attack [R. 317, 339], resulting from a condition of blockage of the coronary arteries. [R. 339] This heart attack combined with the Raynaud's Phenomena caused him to retire. [R. 317] In 1972 plaintiff had an open-heart coronary by-pass surgery. [R. 318, 389] Plaintiff underwent more surgery in 1973 when a lower rib and two sections of nerve ganglia were removed in order to alleviate problems in

his lower extremities stemming from his Raynaud's Phenomena. [R. 318] Then in June 1974, plaintiff and defendant were involved in the accident which is the subject of this law suit. Subsequently on July 29, 1976, plaintiff was involved in yet another rear-end collision. [R. 318]

Prior to trial plaintiff claimed that the accident with defendant had aggravated his Raynaud's Phenomena and also caused him to suffer from a condition known as Transient Ischemia Attack (hereinafter "TIA"). TIA is a "mini-stroke" which is caused by the blood flow to the brain being temporarily interrupted. [R. 365] This results in a brief loss of brain function including vision. [R. 365-366]

Through discovery, plaintiff found that defendant intended to call Dr. Edward J. Hershgold as an expert medical witness. [R. 85] Dr. Hershgold had examined the plaintiff at defendant's request. Dr. Hershgold stated in his letter dated May 14, 1976, that he could not "trace a direct connection between his [plaintiff's] history of so-called whiplash injury and the Raynaud's." [R. -- two unnumbered pages between R. 226 and R. 227].

On June 1, 1976, plaintiff deposed Dr. Hershgold. After the deposition, plaintiff's attorney informed defendant's attorney that he did not intend to claim that the accident of June, 1974, had aggravated the plaintiff's Raynaud's Phenomena.

Prior to the trial, defendant's attorney advised plaintiff's attorney that he still intended to call Dr. Hershgold as a witness.

At trial plaintiff called Dr. Van Dyke (through videotape deposition) as one of his expert medical witnesses. On cross-examination Dr. Van Dyke testified that it would be very difficult for him to know whether the neck injury from the 1970 accident or the 1974 accident was primarily responsible for plaintiff's TIA [R. 383]; and that plaintiff's heart problems had a bearing on his TIA condition since "a defective heart would not put out proper amounts of blood" and "a defective heart can also be the source of little clots which break off and shoot out, you know, into arteries." [R. 387] Dr. Van Dyke also testified that the single most important cause of TIA is hardening of the arteries, [R. 408, 412] and that in every one of the 25 to 30 TIA patients he has treated within the last two years, the TIA was related to disease of the vascular system and not to injury to the neck. [R. 414-415] The following answer from plaintiff's own medical expert is most revealing:

DEFENDANTS ATTORNEY: Would it be a fair statement to say that in all probability the cause of his particular problem would be hardening of the arteries?

DR. VAN DYKE: Yes. [R. 415]

During the presentation of her case, defendant

called Dr. Hershgold as an expert medical witness. [R. 232]
Defendant's attorney questioned Dr. Hershgold in two areas:

(1) Dr. Hershgold was questioned concerning his findings from his examination relating to plaintiff's arteriosclerotic condition; and

(2) Dr. Hershgold was questioned concerning the fact that at no time during the medical exam of plaintiff in May 1976 did plaintiff complain of any visual disturbances which are the main symptoms of TIA.

During his direct examination, defendant's attorney did not ask Dr. Hershgold to state an opinion regarding whether or not the accident of 1974 caused plaintiff's TIA. His testimony on direct examination went to his findings and observations during his examination of the plaintiff. His diagnosis of arteriosclerosis corroborated testimony that had already been received into evidence from Dr. Van Dyke, plaintiff's own medical witness. However, on cross-examination, plaintiff's attorney opened this area up by asking if Dr. Hershgold had an opinion on causation:

PLAINTIFF'S ATTORNEY: As a matter of fact you have no opinion on whether or not his -- one way or other whether his transient ischemic attacks were caused by the arteriosclerosis or something else?

DR. HERSHGOLD: I have an opinion on that.

PLAINTIFF'S ATTORNEY: You have an opinion?

DR. HERSHGOLD: Oh, yes. [R. 246]

Plaintiff's attorney did not ask Dr. Hershgold to state his opinion, so on redirect examination defendant's attorney asked the Doctor what his opinion was. [R. 251] Plaintiff's [REDACTED] objection was overruled by the court. [R. 251] Dr. Hershgold stated that in his opinion, plaintiff's TIA is due to his blood-vessel disease. [R. 251-252]

At the close of all the evidence the court directed a verdict against the defendant on negligence. [R. 176] The case was submitted to the jury on the issue of whether or not the negligence of the defendant was a proximate cause of plaintiff's medical problems. [R. 176]

The jury returned a verdict in favor of defendant -- no cause of action [R. 188] Plaintiff thereupon moved for a new trial pursuant to rule 59(a)(3) Utah Rules of Civil Procedure on the ground that he was surprised by Dr. Hershgold's testimony. [R. 227] Plaintiff's Motion for New Trial was denied by the court. [R. 263] Plaintiff filed a Notice of Appeal. [R. 264]

I. COUNSEL FOR PLAINTIFF CANNOT CLAIM THAT HE WAS SURPRISED BY AN EXPERT WITNESS'S RESPONSE TO AN OPINION QUESTION WHICH HE ASKED.

Plaintiff initially intended to present two theories of injury at trial. The first theory was that the accident

caused plaintiffs TIA. The second theory was that the collision caused plaintiff's problems with Raynaud's Phenomena. Defendant retained Dr. Hershgold, a hematologist and circulatory specialist, to conduct an independent medical examination of the plaintiff. Subsequent to the exam, plaintiff took Dr. Hershgold's deposition. After the deposition plaintiff's attorney informed defendant's attorney that plaintiff would not claim any causal relationship between the automobile collision and the Raynaud's Phenomena, and that plaintiff would proceed on the sole theory that the accident caused plaintiff's TIA. [R. 257] Such a change in strategy by the plaintiff did not affect the defendant's list of witnesses, and prior to trial plaintiff's attorney specifically told defendant's attorney that Dr. Hershgold would still be called as one of defendant's expert witnesses.

At trial plaintiff called Dr. Van Dyke as an expert medical witness. On cross-examination, Dr. Van Dyke testified concerning the causal relationship between the arteriosclerosis and TIA. [supra pg. 4] Since this testimony had been taken by videotape deposition before trial, plaintiff's attorney obviously knew what the testimony of his own witness would be. He also knew or should have known that plaintiff's arteriosclerosis would be an issue at trial.

In her case in chief defendant called Dr. Hershgold primarily for the purpose of corroborating Dr. Van Dyke's

testimony regarding arteriosclerosis. Dr. Hershgold simply testified to his findings regarding plaintiff's arteriosclerosis condition made during the independent medical examination. This testimony came in without objection by plaintiff's attorney [R.234-238] Then defendant's attorney started to question Dr. Hershgold regarding complaints plaintiff voiced during the examination. [R.238] At that point plaintiff objected and the following colloquy was held outside the presence of the jury.

MR. DeBRY: You indicated that Dr. Hershgold would be a witness, and therefore at our expense, our time, we took Dr. Hershgold's deposition and we asked by Interrogatory who you intended to call. And you indicated by Answer to Interrogatory that you intended to call Dr. Hershgold on the issue of Raynaud's. And therefore we went to the time -- we went to the expense to interrogate him on that issue. Now, that issue has never been brought up in this case. And we are completely got by surprise and completely prejudiced. And there is no way that I can properly protect my client, represent my client when we haven't had a chance to interview or take a deposition of this witness beyond the scope of the Raynaud's problem.

And if the interrogation goes beyond the scope of the Raynaud's problem, it is no issue in this case.

THE COURT: Well, at this point the only question was part of laying a foundation as to his medical history. That can't surprise you.

MR. DeBRY: Well, I presume that he is leading up to -- I don't know what he is leading up to. That's the point. I have never taken his deposition.

THE COURT: Why object at this stage?

MR. NEBEKER: Let me just state, Your Honor, what Dr. Hershgold will testify to is basically what

he has said. And that is whenever you have had a hardening of the arteries condition that you have these little platelets in the blood which break off and that is what causes normally this particular problem that we have here. Now, that's the extent of his testimony basically.

MR. DeBRY: Let me indicate that's completely immaterial unless you want this witness to give his expert opinion that in this case he has examined him and in his expert opinion that caused it to a reasonable medical probability. If you want him to give a text book answer in some ethereal abstract sense, sometimes arteriosclerosis causes it and sometimes that causes Raynaud's, that permits the Jury to speculate.

MR. NEBEKER: I think where Dr. Van Dyke has testified to these same facts, he has already testified to this condition that this man has arteriosclerosis, that it can cause this particular problem. In fact he said it would have to be taken into account. Dr. Hershgold is merely buttressing that opinion given by Dr. Van Dyke this is what happens.

Mr. DeBRY: So I am not prejudiced and I didn't have a chance to interrogate him. Where is your testimony going to go?

MR. NEBEKER: It's going to go to support the statement from Van Dyke.

MR. DeBRY: That what?

MR. NEBEKER: That arteriosclerosis --

MR. DeBRY: Sometimes causes --

MR. NEBEKER: -- that some -- Dr. Van Dyke said it has to be taken into account as a factor. And I think Dr. Hershgold can testify it's the same thing. He is just testifying to the same facts basically that Dr. Van Dyke is.

MR. DeBRY: Well then, I will object on the basis that there is no foundation and that this is permitting the witness and the Jury to speculate unless he wants to give his opinion as to whether or

not the accident caused this man's TIA or whether the arteriosclerosis caused it, but this abstract question is dangerous for the Jury.

THE COURT: Proximate cause is for the Jury.

MR. NEBEKER: That's right, Your Honor. We have a Supreme Court case where the Supreme Court said that even in the case where there was testimony in something like thirty percent of the cases in some kind of an injury, that this was for the Jury to determine whether or not that testimony --

THE COURT: Once you have laid the foundation -- what is your ultimate question that you are going to ask the Doctor?

MR. NEBEKER: I am merely going to ask him if --

THE COURT: Are you going to pose a hypothetical?

MR. NEBEKER: No. I am merely asking him to testify to the fact that when he saw Mr. Jensen he had this condition of arteriosclerosis, that that condition is something that gives rise to this problem of having these platelets break off. They can travel to the brain and cause these mini strokes.

THE COURT: He has already testified to that.

MR. NEBEKER: He has already testified to that. I just wanted to ask him whether or not when Mr. Jensen came in in May of 1976, whether or not he complained of any visual disturbances. And he said he didn't.

MR. DeBRY: I move all the testimony be stricken on that basis. That's an abstract question.

MR. NEBEKER: It is not abstract.

MR. DeBRY: You have got to ask about this man.

MR. NEBEKER: I am asking whether or not he actually complained of any kind of visual disturbances.

THE COURT: Apparently I don't understand your objection. He is asking a question to which you objected in the abstract, came up to the Bench, and

I have taken a proffer of proof in effect. If he said anything to him in taking his medical history about complaining of this eye problem?

MR. NEBEKER: That's right.

THE COURT: You still haven't answered my question. What is the ultimate opinion.

MR. DeBRY: That's the danger. There is no ultimate question, I think, Your Honor.

THE COURT: Well now, if you'd let me interrogate him, please.

MR. NEBEKER: That would be the ultimate. That's the final question I am going to ask him.

THE COURT: All right, what --

MR. NEBEKER: Because he will testify that --

THE COURT: You are only going to ask one more question, the one the objection is made to?

MR. NEBEKER: That's about it.

THE COURT: Well, you certainly can't have any objection to that.

MR. DEBRY: Well, I move that it all be stricken insofar as he has stated no expert opinion. He has not said that arteriosclerosis probably caused this man's condition or even may have caused it. All he has testified to in the abstract is that sometimes in some people arteriosclerosis causes TIA and this man may have arteriosclerosis.

And if anything permits the Jury to speculate, that's it. We can get a textbook up here to say arteriosclerosis sometimes causes TIA's.

THE COURT: The Jury is at liberty to reject the testimony if they want to. Is that the only question you have left?

MR. NEBEKER: I think that's about it.

THE COURT: All right. We could have got over that easier. And the Jury will be back at ten after. Court will be in recess until that time. If you have any other problems come into Chambers. [R. 239-243]

Thereupon the jury returned and defendant's attorney proceeded to ask exactly what he said he would.

THE COURT: The objection is overruled. You may answer the last question. Do you want her to read it or do you want to reframe it?

MR. NEBEKER: I will reframe it, Your Honor.

Q. (By Mr. Nebeker) Dr. Hershgould, do you recall examining Mr. Jensen on May 3, 1976, at my request?

A. Yes.

Q. And at that time did you take a history from Mr. Jensen and talk to him about his physical complaints?

A. I did.

Q. And at that time do you recall him making any mention of any kind of visual disturbances when you talked to him?

A. No, I don't.

MR. NEBEKER: That's all, Your Honor. [R. 243-244]

Obviously there was nothing inadmissible in Dr. Hershgould's direct testimony. He merely testified to his medical findings regarding plaintiff's arteriosclerosis and to the fact that plaintiff had not complained of any visual disturbances during the examination. Plaintiff's attorney's objection to Dr. Hershgould's testimony seemed to anticipate a question seeking the Doctor's opinion on causation. But no such question was forthcoming by defendant's attorney. Instead plaintiff's attorney then proceeded to delve into the area of opinion which he had thought objectionable:

BY MR. DeBRY:

Q As a matter of fact you have no opinion on whether or not his -- one way or other whether or not his transient ischemic attacks were caused by the arteriosclerosis or something else?

A I have an opinion on that.

Q You have an opinion?

A Oh, yes. [R. 246]

Obviously plaintiff's attorney was hoping to elicit from defendant's medical witness an admission that he didn't have an opinion concerning whether or not plaintiff's arteriosclerosis caused the TIA. Plaintiff's attorney took a calculated chance in opening up this area. This question backfired on him, and he didn't get the answer for which he had hoped. Consequently after opening the door into this causation area, plaintiff's attorney never did ask what the Doctor's opinion was. So on redirect examination defendant's attorney asked the natural question:

BY MR. NEBEKER:

Q I am not sure whether you were given the opportunity to state your opinion, Doctor. Did you feel that you had that opportunity to give your opinion?

MR. DeBRY: Well, I object to that unless a proper foundation is made if he gives his opinion by hypothetical questions or assumes this fact.

MR. NEBEKER: I am merely completing what was started by Mr. DeBry.

MR. DeBRY: It shouldn't be an abstract opinion. It should be a concrete opinion.

THE COURT: You asked him whether or not he had a chance to form his opinion. And he said, "Yes." And you didn't ask him what it was. I suppose to redirect it is proper. The objection is overruled.

Q (By Mr. Nebeker) What I want to ask you is if you do have an opinion and what it is. I want to phrase my question properly.

A I don't know precisely exactly what is the cause of Mr. Jensen's blurred vision; that is or of the so-called transient ischemic attacks that he's had. If he came to me with the story that I have heard now, my opinion would be preponderantly that his transient ischemic attacks are due to his blood vessel disease.

MR. NEBEKER: That's all, thank you. [R. 251-252]

Thus, plaintiff's Point One is not an accurate characterization of the trial. Defendant's counsel did not inject surprise testimony into the trial through Dr. Hershgold. Defendant's attorney only asked Dr. Hershgold for his findings and observations which he made during the examination of the plaintiff. If plaintiff's attorney was surprised by any testimony, this surprise came in response to a question which plaintiff's attorney himself asked. This is not the kind of surprise testimony which entitles the plaintiff to a new trial under Rule 59(a)(3) Utah Rules of Civil Procedure.

Rule 59(a)(3) deals with the subject of New Trials and states that:

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the

parties and on all or part of the issues, for any of the following causes; . . .

* * * *

(3) Accident or surprise, which ordinary prudence could not have guarded against.

As the court said in In Re Nash, 227 P.2d 270, 272, (Cal. 1951), "the surprise for which the courts have power to grant a new trial must be some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence on his own . . . which ordinary prudence could not have guarded against." The court in State v. Anderson 290 NE.2d 510 (Ind. 1972) stated that the party claiming he is entitled to a new trial on the basis of surprise has a "heavy burden" of showing that ordinary prudence could not have guarded against the surprise. In this case plaintiff knew Dr. Hershgold was going to be called as an expert witness for the defendant, and he took Dr. Hershgold's deposition without inquiring into his opinion regarding causation of the TIA. Yet, when he cross-examined Dr. Hershgold, plaintiff's attorney proceeded to ask this witness questions regarding his opinion on this subject. With all the discovery tools available to plaintiff, he could easily have found out that Dr. Hershgold had an opinion on causation which was contrary to plaintiff's experts testimony. Forewarned, plaintiff's attorney could have refrained from asking opinion questions and this area

would never have been opened up. But since plaintiff's attorney did choose to open it up, he cannot now claim that he was surprised by the response to his questions.

In Pacht v. Morris, 489 P.2d 29 (Ariz. 1971) defendants lost at trial and appealed claiming that they were surprised when plaintiff's doctor expressed an opinion as to the permanency of the injury. The Supreme Court of Arizona affirmed the trial court's denial of a new trial and found that defendants knew from the allegations of the complaint that plaintiff claimed permanent injuries and also knew that plaintiff would call the doctor as a witness. Defendants could have inquired into his opinion through deposition, but didn't. The court ruled that there was no surprise from testimony which went to support the allegation of permanent injury which was maintained by the plaintiff throughout the action.

Similarly the Idaho Supreme Court stated in Papineau v. Idaho First National Bank, 258 P.2d 755, 758, (Id. 1953) that "a party cannot claim surprise from the admission of testimony competent, relevant, and material to the issues framed by the pleadings." This should be especially true in the case at bar where the subject of Dr. Hershgold's opinion was first raised by the same party who is now claiming surprise.

II. THERE WAS NO ABUSE OF DISCRETION WHEN THE TRIAL COURT REFUSED TO GRANT A NEW TRIAL ON THE GROUND THAT COUNSEL FOR PLAINTIFF WAS SURPRISED BY THE ANSWER TO A QUESTION WHICH HE ASKED

Utah law is clear that the trial court has discretion over whether or not a new trial should be granted when surprise is claimed by the losing party. In Mecham v. Allen 1 Utah 2d 79 262 P.2d 285 (1953) defendant claimed that he was surprised by the testimony of a witness produced on rebuttal regarding the facts of the accident. In affirming the trial court's refusal to grant a new trial, the Utah Supreme Court stated:

"Whether a new trial should have been granted was a matter within the discretion of the trial court who was in a better position than we are to evaluate this evidence, determine its effect and whether it was a planned surprise. (262 P.2d at 293)

Courts have always looked with suspicion upon surprise as a ground for a new trial. See Fletcher v. Pierceall 304 P.2d 770 (Cal. 1956). In Bott v. Wender, 453 P.2d 100 (Kan. 1969), the Supreme Court of Kansas affirmed the trial court's denial of a new trial motion on the ground of surprise, and reiterated the overriding rule that the granting of a new trial on the grounds of surprise is discretionary on the part of the trial court, and will not be reversed unless a clear abuse of discretion is shown.

Appellant cites the cases of Whitfield v. Dubricat, 64 P.2d 960 (Cal. 1937) and Walker v. Distler, 296 P.2d 452 (Id. 1956). In both of these cases, the trial judges exercised

their discretion, granted a new trial on the ground of surprise and the appellate courts refused to rule that they had abused their discretion. Therefore these cases really support respondent's position that the trial judge's discretion will not be overturned on appeal unless a clear abuse of discretion is shown.

The Honorable G. Hal Taylor, trial judge, heard the claimed surprise testimony in the context in which it arose. After the trial was over, he heard plaintiff's Motion for New Trial, for which plaintiff submitted a Memorandum which is very similar to his appellate brief. [R. 194-199] After considering the matter, Judge Taylor exercised his discretion and denied the motion. Defendant respectfully submits that under the facts and circumstances in this case, the action of the trial judge does not represent an abuse of discretion entitling plaintiff to a new trial.

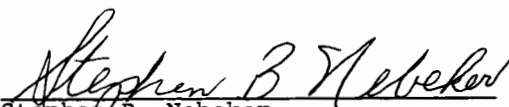
CONCLUSION


No surprise testimony was introduced into this case by defendant through Dr. Hershgold. Defendant's examination of Dr. Hershgold concerned only his findings during the independent medical examination, and plaintiff's complaints to him during said examination. If plaintiff was surprised by any testimony given by Dr. Hershgold, it was opinion testimony opened up by plaintiff's attorney during his cross-examination. Plaintiff should not be heard to claim surprise when he gets the answer to his own question which he does not like.

The trial judge exercised his discretion and denied plaintiff's Motion for a New Trial. Plaintiff has produced no evidence or law showing that the trial judge abused his discretion. Absence such a showing the trial judge's Order denying a new trial should be affirmed.

Respectfully submitted,

RAY, QUINNEY & NEBEKER


Stephen B. Nebeker


Paul S. Felt

Attorneys for Defendant-Respondent