

1987

## Jane Doe v. Shirlene Hafen : Reply Brief

Utah Court of Appeals

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**BRIEF**

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DOCKET NO. 870514-CA

IN THE UTAH COURT OF APPEALS

"JANE DOE"

Appellant,

vs.

SHIRLENE HAFEN, as personal  
representative ad litem of  
the Estate of MELVIN REEVES,

Respondent.

Case No. 870514-CA

Category No. 11(D)

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MAY 20 1986

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ARGUMENT

POINT I

REEVES HAS MADE NO GOOD FAITH ARGUMENT  
REGARDING VOIR DIRE OF GENERAL BACKGROUND

The trial court refused to ask the following voir dire questions:

- Question 1: How long have you lived in Washington County?
- Question 2: If you have lived here less than 10 years, where did you come from?
- Question 3: What is your age?
- Question 5: What is the highest level of [your] education?
- Question 6: What degrees have you received?

Jane Doe's brief relies on the landmark Utah case of State v. Ball, 685 P.2d 1055 (Utah 1984) as well as three recent federal cases which are squarely in point. (See Appellant's Brief, at p.2 & 3.)

Reeves' brief virtually ignores this important issue. First, Reeves says that the attorneys could guess at the jurors ages by looking at them. (Brief of Respondent, at p.10.) That is perhaps so; but Reeves offers no authority

for the proposition that guesswork is an excuse for voir dire.

With respect to questions 1, 2, 5 and 6 above, Reeves' only comment is as follows:

The requested voir dire questions . . . were properly denied by the court as not being probative of matters that would shed light on the bias, prejudice, or impartiality of the jurors . . .

Brief of Respondent, at p. 9 and 10. Reeves has offered no argument, no analysis, and no authority to support the trial court's ruling. Indeed, Reeve's suggestion that the voir dire must be "probative" is directly contradicted by State v. Ball, Id. at p.1058-59. State v. Ball teaches that one purpose of voir dire is to permit counsel to intelligently exercise peremptory challenges. Suppose, for example, that counsel does not like Greek jurors. Counsel may ask whether members of the jury panel were born in Greece. Of course, that question is not relevant to anything. Nevertheless, counsel may ask irrelevant questions in order to get rid of Greek jurors. Thus, questions that relate solely to peremptory challenges are by their very nature irrelevant.

Voir dire is not a trivial issue. Failure to ask simple questions, such as educational background, deprives a litigant of an important historical right. (See Art Press

Ltd. v. Western Printing Machinery, 791 F.2d 616 (7th Cir. 1986.) (Copy attached as Exhibit A.)

POINT II

REEVES HAS MADE NO GOOD FAITH ARGUMENT  
REGARDING ISSUES OF ALCOHOL, TOBACCO  
AND PRE-MARITAL SEX

During the trial, Reeves offered verbal or documentary evidence that Jane Doe:

1. Smokes;
2. Drinks alcohol;
3. Had an abortion or miscarriage;
4. Submitted to a voluntary sterilization;
5. Engaged in pre-marital sex;
6. Used marijuana.

Only item No. 6 (marijuana) was excluded. All of the other items were received into evidence.

Jane Doe's brief argued that all of the foregoing items were irrelevant and amounted to intentional character assassination. (Brief of Appellant, at pp.12-19.)

Reeves' brief argues that the evidence on smoking, alcohol and pre-marital sex was all harmless because the evidence was only in documents (viz. hospital records which were received into evidence) while nothing was said verbally.

(See Brief of Respondent, at p.24,25.) That argument is frivolous because it assumes that the jury never looks at exhibits. Defense counsel must have believed that the jury would look at the exhibits or he wouldn't have offered them. Reeves has offered no authority for this novel argument.

After Jane Doe's opening brief was filed, this court decided the case of Belden v. Dalbo, 80 Utah Adv.Rpt. 20 (April 14, 1988). Belden involved an auto accident. At the time of the accident, the plaintiff was allegedly involved in an extra-marital affair. The defense attorney asked a series of questions which focused on the extra-marital relationship. This court stated:

Dalbo and Peel's attorney argued that Lingwall's extra-marital affair with Belden may have had some relevance to his state of mind at the time of the accident. However, the evidence conceivably could have affected the juries opinion of Lingwall, provoked its instinct to punish and improperly entered into the juries deliberations. In weighing the probative value of the evidence versus its prejudicial effect, we find that the danger of unfair prejudice is significantly greater than the relevance of the evidence. . . We hold, therefore, that the trial court abused its discretion in admitting the evidence of Lingwall's purported extra-marital affair with Belden.

80 Utah Adv.Rpt. at p. 23.

In Belden, the court found that the error was not prejudicial. According to Belden, the test for prejudice is whether ". . .there is a reasonable likelihood that a different result would have been reached absent the tainted evidence." 80 Utah Adv.Rpt. at p. 23. Jane Doe respectfully submits that Belden misstates the test. (See cases collected at Brief of Appellant, p. 46 and 47.) Nevertheless, in the case at bar, there was "a reasonable likelihood that a different result would have been reached absent the tainted evidence." (See Brief of Appellant, at p. 49.) Thus, Jane Doe was prejudiced under any test.

### POINT III

#### REEVES HAS MADE NO GOOD FAITH ARGUMENT REGARDING THE MISCARRIAGE AND VOLUNTARY STERILIZATION

Over Jane Doe's vigorous objection, the court received evidence on miscarriage and voluntary sterilization (or spontaneous abortion). Jane Doe's brief challenged the testimony on grounds of relevance (Rule 402 U.R.E.) and prejudice (Rule 403 U.R.E.). Jane Doe's argument was supported by ten significant citations of authority. (See Brief of Appellant at pp.26-30.) The core of Jane Doe's argument was that:

[M]atters concerning the etiology of a medical condition may generally only be proved by expert testimony.

Egede-Nissen v. Crystal Mtn., Inc., 584 P.2d 432, 441 (Wash. App. 1984).

In response, Reeves cites two cases: Thompson v. LeGrande Johnson Construction Co., 688 P.2d 489 (Utah 1984); and Dixon v. Stewart, 658 P.2d 591 (Utah 1982). However, those cases are not in point. The issue in Dixon v. Stewart, supra, was whether or not an expert may testify. In other words, was the expert testimony admissible. The issue in the case at bar is whether an expert must testify to establish a causal relationship. Thompson v. LeGrande, supra, is actually the opposite of the case at bar. Thompson holds that a jury is not required to believe expert testimony. However, Thompson certainly does not hold that a causal relationship can be established without expert testimony.

In this case, Jane Doe suffered from depression. Jane Doe's theory at trial was that the depression (or brain injury) was caused by the car accident. On the other hand, defendant's theory was that the depression was caused by the miscarriage/sterilization. Thus, the precise legal issue is whether expert testimony is required to establish the cause (or etiology) of mental depression; or can a jury decide the cause of depression based on lay testimony.

Indeed, defendant's expert has testified that the cause of depression is a complex medical issue:

Q. [To the defense expert] What things can cause depression?

A. Oh, there are a host of things. Complications in a person's life; threats to their future; various kinds of changes in stability of the biochemical system, which may not necessarily mean brain damage, but it may mean biochemical changes. Death of a loved one; grief of any sort; grieving the loss of a job; grieving the loss of a loved one. Virtually anything that one can grieve over can precipitate a depression organic brain damage can precipitate a depression. A host of causes.

\* \* \*

(April 9 Tr. at p. 265.) Reeves has offered no authority that a jury can decide such a complex medical issue (etiology of depression) without expert testimony! For example, in the absence of expert testimony, how could the jury know if Jane Doe's depression was from miscarriage or a change in brain chemistry?

Reeves' remaining argument is a characterization of the record. Reeves' brief states:

Dr. Weight further testified that if he had been aware of the miscarriage or the sterilization, he would have gone into those matters very deeply to determine whether or



not those two factors were the cause of her depression.

(Brief of Respondent, at p.27.)

The actual testimony was a bit different:

Q. Had you been aware of the sterilization at the time that you were interviewing and testing her, would-- what would it have done, if anything, to have changed the way you did all of your tests or the way that you discussed it with her?

A. Well, I would specifically want to know about it. I would want to know anything that might contribute to the depression . . .

Q. And would sterilization be one of the potentially real serious causes of depression?

A. It could be. It would be something I would want her opinion on. I would want to know, you know, whether that's something she was having a hard time living with, a decision like that.

(April 9 Tr. at p. 265-268.) (Emphasis added.)

In short, the defense expert was given every opportunity to connect the depression with the miscarriage/sterilization. He was not able to form an opinion. At most, he could only say: "It could be." Or in other words, the defense expert was merely speculating. Without expert testimony, the jury was also permitted to speculate.

Finally, Reeves argued that Jane Doe failed to reveal the miscarriage/sterilization during the independent medical examination. (Brief of Respondent, at p.27.) However, that is not because Jane Doe was trying to hide anything. Rather, no one bothered to ask her<sup>1</sup>:

Q. [To defense expert by defense counsel] Is it one that you would have expected her to talk about with you [the decision to have a sterilization], now that you are aware of it?

A. Only since she commented when I asked if there were children, that they had delayed their family and so I had no idea that that was a choice, so I would--I don't know that it would have spontaneously come up other than my pursuing, you know, "What's troubling you?"

(April 9 Tr. at p. 268-69.)

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<sup>1</sup>It seems that the flaw is not because Jane Doe was trying to hide something; rather, the defendant attorney failed to prepare his own expert to delve into those areas. After all, defense counsel had all of Jane Doe's prior hospital records including the sterilization and miscarriage. (See Brief of Respondent, at p. 31-32.) Presumably, defense counsel could have given those records to his own expert in preparation for the independent medical exam. Certainly, Jane Doe has no duty to unilaterally haul all of her old medical records in to the independent medical exam. That is especially so where Jane Doe doesn't even regard those prior records as being relevant. In summary, it is defense counsel's fault that his own expert did not know about the miscarriage/sterilization.

Jane Doe's expert did not regard the issue to be of any significance.

Q. [To plaintiff's expert by defense counsel]--and from Dr. Weight's report, was it ever divulged to you by [Jane Doe] or any other sources that on March 3 of 1980 that she had a miscarriage?

A. No, she did not, and it wouldn't have been significant to me.

\* \* \* \*

Q. You didn't think that if she had anxiety about having a family, that it would be of any problem for her?

A. Not if she didn't identify it and not after six years. That's a long time.

(April 9 Tr., at p. 158-159.)

Finally, there is simply no evidence that questions on miscarriage or sterilization are part of a standard psychological exam. Thus, there was nothing sinister about Jane Doe failing to reveal the miscarriage/sterilization to the doctors. Indeed, neither doctor regarded the subject as significant enough to even ask the question.<sup>2</sup>

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<sup>2</sup>The defense expert apparently conducted his standard interview. (April 9 Tr. at p. 221-222.) There is absolutely no evidence that Jane Doe lied in her interview. Rather, the doctor didn't ask the question.

POINT IV

REEVES HAS MADE NO GOOD FAITH ARGUMENT  
REGARDING THE SURPRISE TESTIMONY

Jane Doe argued that the testimony regarding miscarriage/sterilization was introduced as a surprise at trial. (Brief of Appellant, at p.20.) Jane Doe's opening brief argued that the miscarriage/sterilization testimony was not revealed in answers to interrogatories. Jane Doe's opening brief further argued that the miscarriage/sterilization testimony was not revealed in the extensive pre-trial order. (Brief of Appellant, at p.22.) On these issues, Reeves is silent. Apparently, Reeves concedes both points!

Reeves sole response to the issue of surprise issue was that:

Thus, at least one year prior to trial, plaintiff's counsel was obtaining and examining all medical records on the plaintiff. If the information pertaining to miscarriage and the voluntary sterilization came as a surprise to plaintiff's counsel, it is only because of his failure to examine medical records to which he had access long before defendant counsel did.

In addition to that, the so-called "surprise" testimony pertaining to the miscarriage/sterilization was information within the knowledge and understanding of the plaintiff herself. If she failed to inform her counsel of facts germane to the issues in this case, it does not lie in counsel to try to shift responsibility

away from plaintiff and attempt to place it on defense counsel. There was no surprise that could not readily have been examined, and for which plaintiff's counsel had access long before defense counsel.

Brief of Respondent, at p. 32.

Reeves has offered no authority for this novel argument.

Jane Doe concedes that she and her counsel were both aware of the history of the miscarriage/sterilization. However, Jane Doe was not aware of the defense theory that the miscarriage/sterilization caused the depression (rather than the car accident causing the depression).

An example may be helpful. Suppose that Jane Doe had eggs and bacon for breakfast. Suppose, at trial, Reeves suddenly offered evidence that Jane Doe had eaten eggs and bacon. Jane Doe might first object on the grounds of relevance. However, Reeves might respond that eggs and bacon are relevant on the theory that Jane Doe's brain damage was caused by an allergic reaction to the eggs and bacon. Next, Jane Doe might object on the grounds of surprise because the eggs and bacon theory had not been revealed in pretrial discovery. Suppose Reeves then argues (as here) that there can be no surprise because Jane Doe obviously knows what she had for breakfast. The argument is absurd. Of course, Jane

Doe knows what she had for breakfast, but she would have no way of knowing that her breakfast menu would be injected into the trial. Nor, could Jane Doe have any way of knowing the defense theory that bacon and eggs caused the brain damage.

This was not a minor technical error. This was an egregious error. The issue goes far beyond mere surprise. Here there was a detailed, formal pre-trial order. There was no good faith basis for a violation of that pre-trial order.

#### POINT V

#### REEVES' BRIEF HAS TOTALLY IGNORED THREE CRUCIAL EVIDENTIARY ISSUES

A crucial point in the trial was the admission of hospital records regarding miscarriage and sterilization. Jane Doe challenged those documents on multiple grounds. (See Brief of Appellant, at p. 20-34.) Reeves' brief responded to some--but not all of the issues. Specifically, Reeves failed to even respond to the following issues:

1. Jane Doe claims that the trial court carelessly admitted exhibits into evidence because ". . . they [the jury] don't read them anyway." (See Brief of Appellant at p.33.) Jane Doe contends that act was an abuse of discretion.

2. Jane Doe claims that receiving the voluminous hospital records violated Rule 403 U.R.E. (confusion). (See Brief of Appellant, at p.30.)

3. Jane Doe claims that some portions of the hospital records violated Rule 805 U.R.E. (hearsay within hearsay). (See Brief of Appellant, at p.31-32.)

It is clear from the record that the trial judge refused to even consider these objections. (See Brief of Appellant, at pp.28-34.)

These are crucial issues based squarely on the Utah Rules of Evidence and respectable authority. The issues deserve more than mere silence!

#### POINT VI

##### REEVES HAS MADE NO GOOD FAITH ARGUMENT ON THE LAY TESTIMONY ISSUE

Jane Doe's brief argued that the trial court erroneously excluded the lay opinion evidence of Dennis Parker. (Brief of Appellant, at pp.35-40.) Reeves' brief responded that no proper foundation was laid. Specifically, Reeves says:

No issue was ever raised that (sic) opinion was to be given by a lay witness, as permitted by Rule 701. It never got to that point, because the witness did give conclusionary opinions without the necessary laying of the foundation.

(Brief of Respondent, at p. 44.)(Emphasis added.)

Reeves has simply misread the record. It is true that there were some preliminary skirmishes on foundational questions. However, the foundational hurdles had been crossed. The ultimate question was as follows:

Q. Based on what you have observed, please answer the question based on what you observed.

A. What I observed is that they have-- they were very close with their family and they are now, I mean, they stay at home.

MR. JEFFS: Objection, he's giving a conclusion.

THE COURT: The objection is sustained.

(April 9 Tr. at p. 33.) (Emphasis added.)

Thus, the specific objection before the court was that the witness was giving a conclusion (or lay opinion). That specific issue was briefed by Jane Doe and ignored by Reeves.



## POINT VII

### THEY JURY CAN BE MISLED BY PLAY-ACTING

Jane Doe argued that the jury was misled by permitting a frail widow (and non-party) to sit at counsel table. (Brief of Appellant, at pp.7-12.)

Reeves responded that:

Nowhere in the oral argument nor in any presentation was there any reference whatsoever to Florence Reeves except for the utilization of her help in the selection of jurors during voir dire . . .

(Brief of Respondent, at p. 22.)

Reeves' argument seems to be that play-acting is okay as long as no words are used on the record. However, everyone knows that a lawyer can send messages to the jury without using words. See e.g. Brons v. Bischoff, 277 N.W.2d 854 (Wis. 1979). (Plaintiff claimed she could not sit at counsel table because of pain; however, the court refused permission to let plaintiff stand in the courtroom because the jury would be misled.)

Reeves claims that the widow was only permitted to sit at counsel table for the sole purpose of assisting with

voir dire.<sup>3</sup> However, the jury was not told of that limited purpose! All the jury knew is that the frail widow was at counsel table for part of the trial, and then that she got sick and went home.

Reeves has cited absolutely no authority which would permit a non-party to sit at counsel table. For an additional case which precluded a widow from sitting at counsel table, see Livingston v. Bias, 640 P.2d 362 (Kan. 1982).

#### POINT VIII

##### THE TRIAL COURT'S REFUSAL TO VOIR DIRE CONCERNING JUROR ATTITUDES TOWARD PERSONAL INJURY CASES ALLOWED JURORS TO SIT WITHOUT DETERMINING BIAS OR PARTIALITY

1. There Was No Voir Dire to Bring Out Any Connection Jurors May Have Had With Insurance Companies.

Jane Doe tried to ask the jury panel whether, ". . .any of you own stock in any liability insurance company?" It is "the almost universal view that . . . a plaintiff may, in good faith, interrogate the jury on voir

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<sup>3</sup>Jane Doe does not concede that the widow "assisted" voir dire in any way. Rather she sat silently as a "prop."

dire as to their, or their relatives', possible connection with, or interest in, liability insurance companies . . . " 95 A.L.R. 404, Annot. "Informing Jury of Liability Insurance."

The question proposed by Jane Doe complied with Balle v. Smith, 81 Utah 179, 17 P.2d 224 (1932). Reeves tries to distinguish Balle because that case involved a local company. But the possibility of a juror's financial stake in a case is not limited to local companies as Reeves suggests. A juror with stock in a major national firm (e.g. Allstate) has the same financial risk as a juror with stock in a local insurance company.

The Utah Supreme Court has stated that "counsel for plaintiff is entitled to learn of any juror's interest in or connection with any insurance or casualty company . . . " Kilpack v. Wignall, 604 P.2d 462, 463 fn.2 (1979). (Emphasis added.) If Kilpack is inconsistent with Tjas v. Proctor, 591 P.2d 438 (Utah 1979), this court must follow the more recent opinion, Kilpack. Other cases cited by Reeves, Young v. Barney, 20 Ut.2d 108, 433 P.2d 846 (1967); Ellis v. Gilbert, 19 Ut.2d 261, 429 P.2d 39 (1967) and Robinson v. Hreinson, 17 Ut.2d 261, 409 P.2d 121 (1961) all deal with admitting insurance as evidence. On the other hand, the case at Bar deals with the introduction of insurance during voir dire.

Furthermore, those cases are superseded by Rule 411, Utah Rules of Evidence.

The recent case of King v. Fereday, 739 P.2d 618 (Utah 1987) held that the court might ask if jurors owned stock in a business instead of asking if jurors owned stock in an insurance company. However, in this case, the lower court failed to ask either question.

2. There Was No Voir Dire Sufficient to Uncover Bias Related to Tort Reform Publicity.

Jane Doe submitted evidence of a recent advertising campaign (by insurance companies) designed to scare the public about jury awards. Jane Doe should have been allowed to use voir dire to determine juror attitudes to this advertising campaign. State v. Nichols, 734 P.2d 170 (Mont. 1987) at 173:

Voir dire must be used to determine which jurors have been so affected by pretrial publicity, [that] they would be unable to render a fair verdict.

U.S. v. Whitt, 718 F.2d 1494 (10th Cir. 1983) at 1497:

Where there is the possibility or likelihood that potential jurors have been exposed to prejudicial publicity, they must be questioned with special care so as to insure that such publicity did not result in bias.

State v. Greenawalt, 624 P.2d 828 (Ariz. 1981) at 841:

An examination of the jurors, through voir dire process, is an effective means

by which to determine the effects or influence of pretrial publicity on the jurors.

Without an effective voir dire regarding the insurance industry's media blitz, there was no way to determine whether jurors should have been excused for cause; nor was counsel able to intelligently exercise peremptory challenges on that issue. Borkoski v. Yost, 594 P.2d 688 (Mont 1979); King v. Westlake 572 S.W.2d 841 (Ark. 1978).

Reeves asserts that "questions 23, 24, 39 and 40 were calculated to circumvent the prohibitions of Rule 411 of the Rules of Evidence."<sup>4</sup> (Brief of Respondent, at p.10.) However, the opposite is true. Rule 411 allows evidence of insurance, inter alia, to show "bias or prejudice of a witness." If insurance is admissible to test the bias of a witness, it should be admissible to test the bias of a juror.

Furthermore, the voir dire questions only probed juror bias toward insurance generally, and made no implication that Reeves was in fact insured.

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<sup>4</sup>Rule 411. Liability Insurance: "Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." (Emphasis added.)

Reeves further claims that "Jane Doe" failed to lay a proper Borkoski foundation because no juror had said there was anything in their background that would affect their ability to be impartial. Reeves misleads the court by leaving out the alternative Borkoski foundation: a showing that a juror has read magazines or periodicals which have contained insurance propaganda. Borkoski v. Yost, supra, at 695. In order to lay this foundation, Jane Doe tried to ask which magazines jurors subscribed to (Question 6). However, Reeves objected. The objection was sustained. Having prevented Jane Doe from laying the foundation, Reeves cannot now complain about the lack of foundation.

#### POINT IX

#### JANE DOE WAS IMPROPERLY REQUIRED TO PROVE FUTURE DAMAGE TO A REASONABLE CERTAINTY

1. The Adequacy of Plaintiff's Objection to the Instructions 21 and 23.

Instructions 21 and 23 limited Jane Doe's recovery to future damages that were reasonably certain to occur. Plaintiff objected as follows,

Instruction 21 refers to reasonable certainty, "reasonably certain to suffer in the future." And in fact it should read "reasonably probable to suffer in the future."

As to Instruction 23, again it speaks in terms of "reasonable medical certainty" instead of "reasonable medical probability."

(April 10 Tr., p. 112-113.)

Objections must "state distinctly the matter to which [plaintiff] objects, and the ground for [her] objection." Rule 51, Utah Rules of Civil Procedure. Jane Doe's objection stated distinctly the matter objected to, i.e. the word "certain." The ground was also stated, i.e. that the proper word is "probable." A lengthy argument was not necessary.<sup>5</sup> Reeves complains that "No citation was given to Court[sic] upon which it could predicate any evaluation of the claimed

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<sup>5</sup>A lengthy argument had, in fact, occurred in chambers:

The court has been reviewing with counsel the instructions to be given to the jury as well as the special verdict form. The court has advised them that they may now make their exceptions and objections to the Court's instructions.

\* \* \* \*

MR. DEBRY: Your Honor, may I add for the record, if the Court please, that in addition to that, the Court has, for well over an hour, consulted with counsel in some detail on each jury instruction, so that the record--the Court has heard comments from counsel on the--

THE COURT: Yes, I have.

MR. DEBRY: --on the instructions.

objection." (Brief of Respondent, p.49.) But the fact that counsel did not have controlling Utah authority at his fingertips does not affect the adequacy of the objection:

We know of no ruling that requires a lawyer to cite specific cases on objection to evidence admitted at trial so long as the grounds relied upon are a correct interpretation of the law. Indeed, in many instances, the objections arise in unforeseen situations, and to adopt the requirement that appellees suggest would be to put upon a trial lawyer an unduly burdensome duty.

First Nat. Bank v. Penn-Harris-Madison Sch. Corp., 237 N.E.2d 108, 111 (Ind. 1968). Few trials are recessed, so that counsel can search for controlling precedents to support an objection.

The objection "was sufficient to bring to the trial court's attention the principle relied on . . . " Fromen v. Perrin, 213 N.W.2d 684, 690 (Iowa 1973) (objection to four specific words in instruction with statement of correct language sufficient to preserve error). Compare Jane Doe's objection with Godesky v. Provo City Corp., 690 P.2d 541, 547 (Utah 1984) (objection that instruction was "not a correct statement of the law" and which referred to wrong paragraph was insufficient). Jane Doe's objection was distinct, specific and accurate. Taken in conjunction with a lengthy



(well over one hour) conference off the record, the judge was adequately advised of Jane Doe's position.

2. Jane Doe Was Held to an Improperly Strict Burden of Proof.

A plaintiff such as Jane Doe may recover for damages probably caused by the accident. Moore v. D.R.G.W. Ry. Co., 4 Ut.2d 255; 292 P.2d 849 (1956); Kirchgastner v. D.R.G.W. Ry. Co., 218 P.2d 685 (Utah 1950); Picino v. Utah-Apex Mining Co., 52 Utah 338; 173 P. 900 (1918). This rule was recently reaffirmed by the Utah Supreme Court:

The evidence must do more than merely give rise to speculation that damages in fact occurred; it must give rise to a reasonable probability that the plaintiff suffered damage . . .

Atkin, Wright & Miller v. Mtn. States Telegraph and Telephone Co., 709 P.2d 330, 336 (Utah 1985). This is in accord with the general rule that a plaintiff must prove her case by a preponderance of the evidence.

The difference between probability and certainty is not idle semantics (as defendant suggests). Instructions are "given meaning in accordance with the ordinary and usual import of the language as it would be understood by lay jurors." Biswell v. Duncan, 742 P.2d 80,88 (Utah 1987).

"Certain" means "free from doubt." Black's Law Dict., 3d Ed., p.204. "Probable" means: "having more evidence for than against, supported by evidence which inclines the mind to believe, but leaves some room for doubt." Id. at p. 1081. (Emphasis added.)

In Whatcott v. Continental Cas. Co., 85 Utah 406; 39 P.2d 733, 735 (Utah 1935) the Utah Supreme Court found reversible error in an instruction that said "if you are in doubt . . . your verdict should be for the defendant." The reason was that:

Plaintiff was entitled to a verdict at the hands of the jury if, to their minds, she established the material allegations of her complaint by a preponderance or greater weight of the evidence. Obviously there may be a clear preponderance of the evidence in favor of the existence of an alleged fact and yet the jury may entertain some doubt about it being the fact.

Accord, Miller v. Watkins, 355 S.W.2d 1, 3 (Mo. 1962):

To require proof to a reasonable degree of certainty is to require proof beyond a reasonable doubt, which is a higher burden of proof than that required in civil actions.

In summary, the difference between "probability" and "certainty" is the difference between proof by preponderance of the evidence, and proof beyond a reasonable doubt.

The only applicable case cited by defendant is over twenty-five years old. Robinson v. Hreinson, 17 Ut.2d 261, 409 P.2d 121 (Utah 1961).<sup>6</sup> Robinson uncritically followed a standard jury instruction that itself failed to follow prior Utah precedent. This court should not make that same error, but should follow the rule affirmed in the recent case of Atkin, Wright & Miller, supra, and followed by the weight of Utah authority.

3. Instructing the Jury to Apply the Wrong Burden of Proof Was Prejudicial Error.

The burden of proof is a crucial issue. Cases are won and lost by the jury's application of the burden of proof. Error in instructing the jury on the appropriate burden of proof is reversible error. Whatcott v. Continental Cas. Co., supra, 39 P.2d at 735. Accord, Miller v. Watkins, supra, 355 S.W.2d at 3; Parker v. Williams, 268 So.2d 746, 750 (Ala. 1972); Colbert v. Borland, 306 P.2d 53, 58 (Cal. App. 1967); Bolta v. Brunner, 138 A.2d 713, 716 (N.J. 1958).

Furthermore, Jane Doe's evidence was consistently phrased in terms of "probability," not "certainty." (April 9 Tr. at pp. 62, 69 and 93.) The jury may well have concluded that Jane Doe failed to meet her burden of proof because the

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<sup>6</sup>Alverado v. Tuckett, 2 Ut.2d 16, 268 P.2d 986 (1954) merely affirms the preponderance of the evidence standard urged by Jane Doe.

testimony did not rise to a level of certainty, as opposed to probability.

POINT X

THE ISSUE OF  
DR. CAPEL'S TESTIMONY IS MOOT

Jane Doe asked her treating orthopedic doctor (Dr. Capel) whether her injuries would make her barbering "more difficult or impossible." Reeves objected that the question was "leading and suggestive." The objection was sustained. Jane Doe argued that the trial court erred by sustaining the objection. Brief of Appellant, at p. 44. Reeves' response was that the answer received was in evidence before the court sustained the objection. Brief of Respondent, at p. 51. Although that is a curious position, Jane Doe will accept the concession. This issue is, therefore, moot.

POINT XI

THE COST OF POSSIBLE FUTURE SURGERY WAS RELEVANT  
TO ASSESSING THE FUTURE MEDICAL RISKS TO JANE DOE

Jane Doe's treating orthopedic doctor testified that she faces a risk of traumatic arthritis in her shoulder as a result of the accident. (April 8 Tr. p.93.) Reeves

apparently concedes that the risk of future arthritis was properly brought before the jury. Brown v. Johnson, 24 Ut.2d 388; 472 P.2d 942 (1970).<sup>7</sup> Reeves' objection goes only to Dr. Capel's estimate of future costs of possible surgery.

Jane Doe does not argue that the cost of surgery would be recoverable, in full, as an item of special damages. Reeves concedes that to recover the full cost of future surgery, Jane Doe must show that future surgery was "more probable than not." (Brief of Respondent, p.48). (See generally, Appellant's Brief at Point IX, p.43-44--proof that future damages are probable.)

However, the amount of expense associated with the 50 percent (or less) chance of surgery is relevant to assist the jury in awarding general damages for the risk of future disability.

Reeves makes a blurry factual argument that Dr. Capel said the future surgery was only "possible." Reeves picks these words out of context to apparently suggest that the risk of future surgery was too remote or speculative. However, Dr. Capel's exact testimony was that:

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<sup>7</sup>Reeves does not cite or discuss this controlling Utah precedent.

It [future surgery] is only possible, and I wouldn't say that it was any more possible than 50 percent.

The fact that Dr. Capel uses guarded medical terminology does not mean that the jury is unable to evaluate the evidence. The jury was entitled to evaluate that risk whether it was 1 percent or 99 percent. Without medical testimony, the jury was unable to properly evaluate and award general damages for that risk.

Reeves argues that the future harm (surgery) "must be more probable than not . . . ". (Brief of Respondent, p.48.) However, Reeves' legal argument was rejected by Brown v. Johnson, supra:

This does not mean that the chances of sustaining the harm must be over 50 percent. It means that the jury must be convinced by a preponderance of the evidence that there is a definite risk of harm, and when so convinced, the jury will evaluate that risk. 24 Ut.2d at 392.

## POINT XII

### THE CAUSE SHOULD BE REMANDED WITH DIRECTIONS TO ALLOW PREJUDGMENT INTEREST ON SPECIAL DAMAGES

Jane Doe sought prejudgment interest on her special damages. (Brief of Appellant, at p. 50.) Reeves states "the trial court did not fail to provide for prejudgment interest." (Brief of Respondent, at 57.) While the judgment

seems ambiguous, Jane Doe accepts Reeves' concession. Therefore, this court's opinion should confirm that Jane Doe is entitled to prejudgment interest on her special damages, pursuant to the concession of Reeves.

#### POINT XIII

##### JANE DOE SHOULD BE ENTITLED TO COSTS AND ATTORNEY FEES FOR THE APPEAL

Some of the issues in this case are genuinely contested. It is reasonable to have a vigorous debate over such bona fide issues.

However, other issues are not seriously contested. The following issues merit sanctions:

1. Reeves has made no response of any substance to Jane Doe's claims regarding voir dire of general background. (Supra, at Point I.)

2. Reeves' excuse for introducing evidence on smoking, drinking, and premarital sex is frivolous. (Supra, at Point II.) To the extent that this was an intentional character assassination, counsel should personally be sanctioned.

3. Reeves has offered no good faith argument for introducing surprise medical records in violation of the

formal pretrial order and contrary to the pretrial discovery.  
(Supra, at Point IV.)

4. Reeves has totally ignored three important evidentiary issues. (Supra., at Point V.)

5. Reeves has ignored, or misstated, the record with respect to lay testimony. (Supra., at Point VI.)

6. Placing a non-party, sick, old widow and her oxygen tank at counsel table was (at a minimum) "fishy."  
(Supra., at Point VII.)

The real issues (Points III, VIII, IX, and XI above) should be hard fought. However, enormous time has been wasted on the frivolous issues. Costs and attorney fees are appropriate. (Rule 33, Rules of the Utah Court of Appeals.)

Respectfully submitted this 18 day of  
May, 1988.

ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiff

By: [Signature]  
ROBERT J. DEBRY

By: [Signature]  
DANIEL F. BERTCH



CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT (Jane Doe v. Hafen, et al.) was mailed, U.S. Mail, postage prepaid, this 18th day of May, 1988, to the following:

M. Dayle Jeffs  
JEFFS & JEFFS  
90 North 100 East  
Provo, UT 84603

/ek

Linda Kora

EXHIBIT "A"

[5,6] In any event, even assuming *arguendo* that the *Walker* rule is correct, we find that the district court erred in deciding Ferguson's motion to dismiss for want of personal jurisdiction before determining whether there was complete diversity. We note first that the district court stated in its order that the subject-matter jurisdiction question was as easy to resolve as the in personam jurisdiction question. Thus, according to the trial court's own assessment, neither motion was more "convenient" in terms of difficulty. Second, federalism concerns tip the scales in favor of initially ruling on the motion to remand. In passing on Ferguson's motion, the district court was required to delve into difficult questions of Illinois law concerning the fraudulent-enticement doctrine and the scope of that state's long-arm statute.<sup>8</sup> It should not have considered these issues when it was presented with a federal question of at least equal, if not less, difficulty relating to complete diversity among the parties.

Because the action has been sent back to state court, we can only reverse the district court's decision on Ferguson's motion to dismiss. As indicated above, the remand must remain undisturbed. We express no opinion on the merits of the motions filed below for either remand or dismissal. Because the dismissal is now a nullity, Ferguson remains a defendant in the action remanded to the Illinois state court. *See Waco*, 293 U.S. at 143-44, 55 S.Ct. at 7.

### III

For the reasons stated above, we DENY Ferguson's motion to dismiss this appeal and REVERSE that portion of the judgment of the district court dismissing defendant Ferguson for lack of personal jurisdiction.

zens of the state in which the suit was brought. *See* 28 U.S.C. § 1441(a), (b); *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 776-77 (7th Cir.1986). When this action was removed, Stride, a citizen of Illinois, was listed as a defendant. This would be another reason for the district court to consider first the realignment of the parties.

**ART PRESS, LTD., a Canadian corporation, Plaintiff-Appellee,**

**v.**

**WESTERN PRINTING MACHINERY COMPANY, an Illinois corporation, Defendant-Appellant.**

**No. 85-2192.**

United States Court of Appeals,  
Seventh Circuit.

Argued Jan. 23, 1986.

Decided May 30, 1986.

Rehearing and Rehearing En Banc  
Denied June 27, 1986.

Purchaser brought warranty action for damages resulting from purchase of paper cutting machine built by manufacturer. The United States District Court for the Northern District of Illinois, Richard A. Posner, Circuit Judge, sitting by designation, entered judgment on a jury verdict in favor of purchaser, and manufacturer appealed. The Court of Appeals, Bauer, Circuit Judge, held that trial judge, who permitted only rudimentary inquiries establishing identity of venirepersons and asking whether each potential juror believed he could be impartial, and did not inquire as to level of venirepersons' education or permit inquiry as to their attitudes toward general nature or particular facts of the case, unduly restricted voir dire.

Vacated and remanded.

#### 1. Jury ⇄ 131(2)

Trial judge has broad discretion in limiting voir dire of potential jurors, but that discretion is subject to parties' right to an impartial jury.

8. In determining the validity of service prior to removal, a federal court must apply the law of the state under which the service was made, and the question of amenability to suit in diversity actions continues to be governed by state law even after removal. *See* 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1082 at 329-31 (1969).

**2. Jury**  $\Rightarrow$  131(4)

To protect right of parties to an impartial jury, trial court should permit reasonably extensive examination of prospective jurors so that parties have basis for intelligent exercise of right to challenge, whether for cause or peremptorily.

**3. Jury**  $\Rightarrow$  131(2)

Trial judge's desire not to make voir dire a "big deal" in a case which is estimated to last only a few days is clearly subsidiary to trial judge's duty to impanel an impartial jury.

**4. Jury**  $\Rightarrow$  131(4)

Trial judge, who permitted only rudimentary inquiries establishing identity of venirepersons and asking whether each potential juror believed he could be impartial, and did not inquire as to level of venirepersons' education or permit inquiry as to their attitudes toward general nature or particular facts of the case, unduly restricted voir dire.

**5. Jury**  $\Rightarrow$  131(3)

Purpose of voir dire is to elicit information which shows biases of venireperson or provides counsel with basis for exercising peremptory challenges.

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Robert E. Kehoe, Jr., Wildman, Harrold, Allen & Dixon, Chicago, Ill., for defendant-appellant.

Richard J. Gray, Jenner & Block, Chicago, for plaintiff-appellee.

Before BAUER, COFFEY and RIPPLE,  
Circuit Judges.

BAUER, Circuit Judge.

A jury awarded plaintiff, Art Press, Ltd., \$94,709.10 in a warranty action for damages resulting from plaintiff's purchase of a paper cutting machine built by the defendant, Western Printing Machinery Company. We vacate the jury's verdict and the award and remand for a new trial because the district court unduly restricted the voir dire of the venirepersons.

**I.**

We will discuss the facts underlying this action only insofar as they are important to the trial court's voir dire of the potential jurors. At the final pre-trial conference, plaintiff's attorney requested that the trial judge ask each venireperson his occupation and level of formal education, and whether he had any family or friends in the printing or printing equipment business. Defendant's attorney joined in this request and further asked the court to question the potential jurors as to their mechanical aptitude, their hobbies and interests, and other background information.

The trial court suggested that the parties stipulate to a minimum educational level requirement for the jurors, but plaintiff's counsel declined. The trial court then asked counsel why he was interested in voir dire concerning the level of formal education, to which plaintiff's counsel responded:

[I]t helps me when I'm addressing the juror if I have some idea of who that juror is. It's just a question—and perhaps [defendant's counsel] will share my view here—of my understanding of what I need to do as a lawyer to relate to that particular juror, and if I have some idea of the educational background or the occupation of that juror, it allows me, I think, to do a better job of lawyering.

Defendant's counsel then added:

I guess there are a number of things to look for in trying to decide what is a good juror for this case or any case, although you want to tailor it to the ability to hear and understand the kinds of issues that are presented in this particular case. Certainly, we want to try to ferret out any bias that a witness may have, but on top of that, I think we also want to try to familiarize ourselves with the chemical background of the jurors, because each of these jurors is asked to bring to bear their background, experience and common judgments, common experiences, in deciding these issues, and in connection with trying to make a decision whether or not to exercise a peremp-

tory challenge, I know myself, and I suspect [plaintiff's counsel], too, would like to know as much as we possibly can about each of these potential jurors. I agree with [plaintiff's counsel] that I don't think we can set any qualifications for eligibility here.

The trial judge stated that he had "grave doubts" about asking questions concerning education because he had once observed a case in which

one of the lawyers used his peremptory challenges to get rid of the only jurors who seemed by their background to be equipped to understand the case. That's why if you want to stipulate that you were looking for some minimum education, that would be fine, but I don't want you using—one of you using your peremptory challenges to get rid of a person who has some business background or some education and end up with a jury of people who don't know what's going on.

The trial judge took the parties' requests under advisement, but stated that he did not "want to make the voir dire a big deal in a case that's only going to last a couple of days."

When the jury venire was assembled, the trial judge first determined whether any of the venirepersons were not qualified under 28 U.S.C. 1865, which sets forth citizenship, minimum age, and other basic requirements for jury service. The trial judge then asked the prospective jurors only the following questions:

- (1) the venireperson's name, address, and prior jury service;
- (2) the venireperson's employer or occupation;
- (3) the venireperson's familiarity with either party or their counsel;
- (4) if the venireperson (or immediate family or friends) had been employed in the printing or machinery business;
- (5) if the venireperson felt he could be impartial in the case.

The trial judge specifically rejected any voir dire as to the prospective jurors' edu-

cation, stating that he did not want to "drag out in public the deficiencies of their education" and that if one of the attorneys exercised "a peremptory challenge against someone who had a deficient education, it might be a little embarrassing." The trial judge further stated that the attorneys could "infer from their occupation and their accent what kind of education [the venirepersons] have."

On appeal, the defendant argues that the trial judge so limited the voir dire of the potential jurors that it was prevented from intelligently exercising its peremptory challenges and from eliciting information which could have led to challenges for cause. Plaintiff argues that the voir dire, though restricted, was sufficient to obtain an impartial jury.

## II.

[1, 2] A trial judge has broad discretion in limiting the voir dire of potential jurors, but this discretion is subject to the parties' right to an impartial jury. *Fietzer v. Ford Motor Co.*, 622 F.2d 281, 284 (7th Cir.1980). To protect this right, a trial court "should permit a reasonably extensive examination of prospective jurors so that the parties have a basis for an intelligent exercise of the right to challenge," *Fietzer*, 622 F.2d at 284, whether for cause or peremptorily. *Id.* at 285. See *United States v. Dellinger*, 472 F.2d 340, 368 (7th Cir.1972) (trial court must permit "sufficient inquiry into the background and attitudes of the jurors to enable [the parties] to exercise intelligently their peremptory challenges"). This court "has been zealous in its protection of probing voir dire," *Fietzer*, 622 F.2d at 284 (quoting *Beard v. Mitchell*, 604 F.2d 485, 501 (7th Cir.1979)), and will reverse a trial court for abuse of its discretion "when limitations placed on the parameters of voir dire threaten to undermine the purpose for conducting an examination of prospective jurors." *Fietzer*, 622 F.2d at 285.

[3-5] We believe that the voir dire conducted in this case was so limited as to

preclude the parties from adequately discovering whether the jurors were biased or prejudiced and did not permit sufficient inquiry to allow the parties to intelligently exercise their peremptory challenges. We first note that it is not necessary, as plaintiff seems to assert, to show that a member of the jury was in fact prejudiced; it is enough to show that the voir dire did not reasonably assure that bias or prejudice would be discovered, if present. *Dellinger*, 472 F.2d at 367. We do not believe that the voir dire in this case provided that reasonable assurance because it failed to go beyond asking the venirepersons only a few of what this court in *Fietzer* termed "stock questions:" the rudimentary inquiries that establish the identity of the venireperson. The trial judge did not even inquire as to the level of the potential jurors' education, which *Fietzer* also stated was a "stock question."<sup>1</sup> The only inquiry permitted beyond the basic questions about the venirepersons' identity was whether each potential juror believed he could be impartial. In *United States v. Lewin*, 467 F.2d 1132, 1138 (7th Cir.1972), this court held that such "a general question is inadequate to call to the attention of the veniremen those important matters that might lead them to recognize or display their disqualifying attributes." The trial judge permitted no inquiry designed to elicit the venirepersons' attitudes toward the general nature or particular facts of the case. See *Fietzer*, 622 F.2d at 286. This severe limitation undermined voir dire's purpose of eliciting information that shows the biases of a venireperson or provides counsel with a basis for exercising peremptory challenges. See *Fietzer*, 622 F.2d at 284 (quoting *Kiernan v. Van Schaik*, 347 F.2d 775, 779 (3rd Cir.1965)); *Lewin*, 467 F.2d at 1138. We therefore vacate the jury's verdict and award and remand for a new trial.

## VACATED AND REMANDED

1. Although this court is sympathetic with trial judges who wish to avoid lengthy voir dire, a trial judge's desire not "to make the voir dire a big deal in a case that's only going to last a

NATIONAL LABOR RELATIONS  
BOARD, Petitioner,

v.

AUBURN FOUNDRY, INC., Respondent.

No. 85-2527.

United States Court of Appeals,  
Seventh Circuit.

Argued Feb. 14, 1986.

Decided May 30, 1986.

Rehearing Denied June 25, 1986.

Administrative law judge determined that employer had committed unfair labor practice by discriminatorily discharging employees for activities during strike and recommended that employees be reinstated and awarded back pay. Almost three years after National Labor Relations Board's first hearing in matter, Board affirmed and ordered reinstatement and back pay for all aggrieved employees. Petition for enforcement was brought. The Court of Appeals, Flaum, Circuit Judge, held that Court of Appeals would not refrain from enforcing Board's order mandating reinstatement, despite employer's claim of newly discovered evidence.

Order enforced.

## 1. Labor Relations ⇐688

Appellate court has authority to order National Labor Relations Board to review new facts that impact on whether remedy ordered by Board should be enforced. National Labor Relations Act, § 10(e), as amended, 29 U.S.C.A. § 160(e).

## 2. Labor Relations ⇐688

Appellate court cannot declare "material" factual matters which under National

couple of days" is clearly subsidiary to his duty to impanel an impartial jury. *Dellinger*, 472 F.2d at 370 n. 42.