

1987

Jane Doe v. Shirlene Hafen : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 870514-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH



JANE DOE,)	
)	
Appellant,)	Case No. 870514-CA
)	
vs.)	
)	
SHIRLENE HAFEN, as personal)	Category No. 14(b)
representative ad litem of)	
the Estate of MELVIN REEVES,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

Appeal from Jury Verdict and Judgment of the
Fifth Judicial District Court of Washington County
Honorable Ray M. Harding, District Judge Pro Tempore

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 MAR 16 1988 

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STATEMENT OF JURISDICTION

This is an appeal from a Special Verdict rendered by a civil jury on the 10th day of April, 1987, and a judgment entered therein on the 7th day of May, 1987.

RELIEF SOUGHT ON APPEAL

Respondent asks that the judgment of the District Court be affirmed.

DISPOSITION IN THE LOWER COURT

Following the entry of judgment, the appellant filed a Notice of Appeal on June 2, 1987 (Record, Vol. 6, pp. 269-270). On May 4, 1987, appellant filed a Motion for a New Trial (Record, Vol. 6, pp. 144-145). On May 19, 1987, the Court denied plaintiff's Motion for a New Trial (Record, Vol. 6, page 225). On June 2, 1987, appellant filed a Motion to Amend Judgment (Record, Vol. 6, page 249). On August 4, 1987, the trial court denied the Motion to Amend (Record, Vol. 6, page 278). On August 24, 1987, appellant filed a second Notice of Appeal (Record, Vol. 6, page 281).

Appellant has filed a Motion to Consolidate the two appeals for purposes of briefing. Pursuant to the provisions of Rule 4(b), Rules of the Utah Court of Appeals, the Notice of Appeal filed prior to the disposition of the Motion for a New Trial and the Motion to Amend the Judgment has no effect.

and the new Notice of Appeal is the only one that presently confers jurisdiction upon this Court, and is the only one to be considered in this appeal.

ISSUES PRESENTED FOR APPEAL

Respondent does not elect to restate the issues, since appellant is bound by its own statement of issues.

STATEMENT OF THE CASE

"Jane Doe" was a passenger on a motorcycle drive her husband. The motorcycle was involved in an accident an automobile driven by Melvin Reeves. Melvin Reeves subsequently died for reasons unrelated to this case, and the defendant herein, Shirlene Hafen, was substituted as personal representative ad litem for the Estate of Melvin Reeves.

The case was tried to a jury in the Fifth Judicial District Court, in Washington County, at St. George, on April 8, 9, and 10, 1987. The jury returned a verdict in favor of "Jane Doe", and assessed damages in the amount of \$10,000 special damages and \$20,000 general damages.

STATEMENT OF THE FACTS

Respondent accepts the Statement of Facts of the appellant.

SUMMARY OF ARGUMENT

Point I

Prior to voir dire examination of prospective jurors, plaintiff submitted a series of requested voir dire questions. The Court examined each of those and discussed them with counsel, and declined to ask questions pertaining to matters of privacy of the jury, or questions that would not shed light on the bias, prejudice or impartiality of the jurors, but which were covered substantively in the interrogation of the jurors conducted by the trial judge.

The Court refused to ask improper questions pertaining to insurance matters as being inviolation of Rule 411 of the Rules of Evidence and the prior decisions of the Utah Supreme Court. The Court further refused to ask questions pertaining to an alleged "insurance crisis" or "liability crisis."

The questions declined by the Court were in conformity with prior case law, Rule 411 of the Rules of Evidence, and the responsibility of the Court to avoid the injection of prejudicial questioning or statements being given to the jury.

Point II

The refusal of the Court to ask prospective jurors questions concerning alleged "tort reform propaganda" and the "insurance crisis" were in conformity to the case law of the State of Utah, and in accordance with the broad discretion of the trial court in the conduct of voir dire requests. Such

requests were unsupported by any case or statutory authority applicable to this trial court, nor were they persuasive in exposing potential prejudice.

Point III

The claim that defendant tried to mislead the jury into thinking that a "sick old widow" would be responsible to pay the judgment is spurious and not borne out by the record. The record shows that the widow of Melvin Reeves was allowed by the trial court to sit at counsel table only during the voir dire examination of the prospective jurors, to assist counsel in selection of jury, and the jury was specifically informed that she was not a party to the action but was the widow of Melvin Reeves.

Point IV

The accusations of character assassination are not borne out by the record. The only indication of the smoking and alcohol drinking by the plaintiff were contained in hospital records filled out and signed by the plaintiff, and were not called to the attention of the jury.

The Court declined to allow the admission of the evidence of possession of marijuana by the plaintiff.

The Court specifically prohibited counsel from making reference to any premarital sex shown by the records and exhibits admitted into evidence.

The admission into evidence of the records showing that the plaintiff had had a miscarriage prior to the accident and a voluntary sterilization after the accident and before being examined by psychologists was admitted into evidence as being relevant and material to the claim of the plaintiff to neuropsychological injury, and was in no respect a character assassination.

Point V

The claim of surprise testimony is invalid, in view of the fact that the records submitted were the medical records of the plaintiff herself, subpoenaed from the Dixie Medical Center one year prior to trial, and that plaintiff had access to those records and had failed to disclose the fact of the miscarriage and the voluntary sterilization to counsel and to her psychologists. Said records were available to plaintiff's counsel through normal discovery methods, and were available to plaintiff without the necessity of discovery methods. They cannot be considered as surprise testimony under the case law cited in the brief.

Point VI

The introduction of the medical records is only corroborative of plaintiff's own testimony admitting, under oath, that prior to the accident she had had a miscarriage and that after the accident but before examination by the psychologist she had had a voluntary sterilization conducted at the Dixie

Medical Center. The medical records corroborate that and were not objected to except on the basis of surprise, and with limited objections as to deletion of the words "alcohol" and "smoking" from the records. As such, the medical records are not prejudicial, but are factual circumstances germane to the defense of the claim of neuropsychological injury, and were properly admitted.

Point VII

Testimony of the lay witness Dennis Parker was conclusory and was without foundation. When objected to by defense counsel, plaintiff's counsel failed to establish the foundational basis of personal observation or other basis for giving the conclusory remarks. Nevertheless, the evidence was admitted into the record, and was not an error committed by the trial court.

Point VIII

The alleged claim of exclusion of future medical expenses is without merit. The doctor's testimony was to the effect that in "the most adverse expression" of the development of her injuries, there might need to be another operation. He could not say that there was more than a possibility. As such, the exclusions and rulings by the Court were appropriate.

Point IX

Appellant raises an objection to Instruction No. 22 given by the Court for the first time on appeal; such objection cannot now be considered.

Appellant further objects to Instruction No. 23, but the objections voiced at trial were not supported by any basis for the objection, and thus there was no opportunity for the trial Court to correct the instruction. Instruction No. 23 was a fair statement of the law and did not effect any prejudice to the plaintiff's case.

Point X

The objection to the testimony of the treating doctor was due to the leading and suggestive nature of the question, and was sustained by the Court. Plaintiff's counsel did not restate the question in an acceptable manner, nor lay a foundation that the doctor was qualified to testify as to the matters sought to be elicited from him. Thus, there was no error. In addition to that, the doctor was permitted to testify to the substance of the same material following the objections; thus, no error was committed and no prejudice was effected against the plaintiff.

Point XI

The verdict of the jury was fully supported by the evidence. The testimony of the plaintiff herself contradicted the testimony of the economist as to lost earnings. The tes-

timony of plaintiff's neuropsychologist refuted the same witness' own testimony of the necessity for future medical treatment. There were no prejudicial errors committed by the trial court. The plaintiff had a full, fair, and complete trial in this matter.

Point XII

The Court entered a valid judgment in the case, which provided for interest as provided by law, which would encompass the award of prejudgment interest on special damages for past medical expenses. The Court did not err by failing to grant prejudgment interest.

ARGUMENT

POINT I

"JANE DOE" WAS NOT DENIED A FAIR TRIAL
BECAUSE THE TRIAL COURT REFUSED TO ASK
SOME OF PLAINTIFF'S REQUESTED QUESTIONS
TO PROSPECTIVE JURORS.

Prior to the commencement of the examination of the prospective jurors, plaintiff had submitted to the Court voir dire requests (Record, Vol. 5, pp. 238-243).

In a conference in chambers prior to the commencement of the interrogation of jurors, the Court specifically examined and then addressed the Court's intent with regard to that

requested voir dire examination. As part of that in chambers conference, the Court specifically advised plaintiff's counsel: "If I don't ask the question in general or specifically or close enough, you can request me that I ask those questions." (April 8 Tr., 7:22-25) The Court then went through each of the plaintiff's requests and indicated which would be given and which would be denied.

Thereafter, when convened in open court, the trial judge went through a thorough and probing interrogation of all of the jurors as to numerous questions bearing on the qualifications of the jurors to sit as unbiased and impartial (April 8 Tr., pp. 13-46).

The Court then inquired of counsel if they had additional questions to be presented to the jury (April 8 Tr., 43:7-8). Upon such request by counsel, the Court again queried the jury as to additional matters and again asked counsel if there was anything else to be offered (April 8 Tr., 43:23). After all questions had been asked, except those specifically declined in the conference in chambers (supra), counsel for plaintiff passed the jury for cause (April 8 Tr., 46:10-11).

Thereafter in chambers, plaintiff's counsel made a motion for a mistrial on the failure of the Court to give the voir dire questions previously ruled upon by the Court (April 8 Tr., 51:23-25, 52:1-17).

The requested voir dire questions 1, 2, 3, 4, 5, 6, 9 and 11 were properly denied by the Court as not being proba-

tive of matters that would shed light on the bias, prejudice, or impartiality of the jurors, or were covered substantively in the interrogation of the jurors conducted by the trial judge (April 8 Tr., pp. 13-46).

As to Question 3 regarding age, obviously plaintiff's counsel could view the jurors and could approximate their ages without a specific disclosure, nor would such specific disclosure lend any clarification of the suitability of such juror to sit on the jury.

Question 11 is not a question pertaining to bias or prejudice or impartiality, but is an attempt by plaintiff's counsel to bracket in the minds of the jury a high value to the case, and was properly refused.

Questions 23, 24, 39 and 40 were calculated to circumvent the prohibition of Rule 411 of the Rules of Evidence, which prohibits the introduction of evidence as to insurance. The impropriety of such voir dire questions is supported by numerous decisions of the Utah Supreme Court. In Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121 (1961), the Court said:

We do not depart from our former position: that the question of insurance is immaterial and should not be injected into the trial; and that it is the duty of both counsel and the court to guard against it.

In Ellis v. Gilbert, 19 Utah 2d 189, 429 P.2d 39 (1967), the Court said:

We here observe that neither in the order of the trial court nor in this decision, is it postulated that information concerning insurance should be disclosed to the jury. (Footnote at 3)

Footnote 3: That introduction of the question of insurance into the trial is held to be prejudicial error. [citations omitted]

In Young v. Barney, 20 Utah 2d 108, 433 P.2d 846

(1967), the Court said:

The safeguarding against disclosure to a jury of insurance coverage in personal injury trials is a very touchy subject which lawyers and judges have always been obliged to handle with such caution as to justify use of the metaphor "walking on eggs". The understanding has always been that it was prejudicial error to deliberately inject insurance into such a trial.

Whether that injection comes in the trial during the course of admission of evidence in violation of Rule 411 of the Rules of Evidence, or through voir dire examination of the jury, the prejudicial effect of injecting the insurance factor into the trial is just as damaging.

That the prohibitions against such disclosure applies to voir dire examination of the jury is illustrated in Tjas v. Proctor, 591 P.2d 438 (Utah, 1979), where the Court said:

Additionally, as part of the claim for failure to provide a fair trial, appellants contend that the trial court during voir dire failed to ask the jurors questions which he requested. These questions particularly as they raised the issue of insurance, are and were properly refused as this Court has previously indicated:

That the question of insurance is immaterial and should not be injected into the trial; and it is the duty of both counsel and the court to guard against it.

Id at page 440.

Questions 25 and 26 as to contingent fees have no probative value as to impartiality of the jury.

Questions 28, 29, 30, 31, 32, 33, 34, 36, 37, 38 and 41 have to do with the so-called "insurance crisis" and are more specifically dealt with under Point II of this brief.

In State v. Balle, 685 P.2d 1055 (Utah, 1984), the only Utah case cited by appellant, allegedly supportive of his claim of error, in fact is damaging to plaintiff's appeal in this case. It reiterates the basis for which a trial judge should conduct voir dire examination of prospective jurors. At page 1060, the Court said:

The gathering of sufficient relevant information must, of course, be pursued with a sensitivity to the privacy of the potential juror.

Judge Harding in this case did exactly that, when he said

The Court: I am afraid you have met a judge who believes in the privacy of the jury and I believe they have a right of privacy. I believe you have a fair right of inquiry.

(April 8 Tr., 8:6-9)

The Court in State v. Balle went on to say at page 60:

The trial judge, in his broad discretionary power to conduct voir dire [citations omitted], has a duty to protect juror privacy.

Tjas v. Proctor, supra, and State v. Balle, supra, both confirm that the inquiry conducted by Judge Harding over 33 pages of transcript into the qualifications of prospective jurors was conscientiously and properly conducted in compliance with the case law and the discretion afforded the trial

judge in such matters. There was no error in the refusal to ask the questions complained of by appellant.

POINT II

THE COURT'S DENIAL OF VOIR DIRE QUESTIONING OF THE PROSPECTIVE JURORS CONCERNING "TORT REFORM PROPAGANDA" WAS IN CONFORMITY WITH THE DECISIONS OF THE UTAH COURTS, AND DID NOT DENY "JANE DOE" A FAIR TRIAL.

Plaintiff cites as authority for appellant's contention that the Court should have allowed the voir dire of the jurors as to whether or not they were a shareholder in an insurance company the case of Kilpack v. Wignall, 604 P.2d 462, 643 (Utah, 1979).

In that case, the Utah Supreme Court made reference to the fact that the first trial of the matter had ended in a mistrial when counsel for defendants objected to the voir dire by plaintiff's counsel as to whether the jurors had connections with the Casualty Insurance Company.

After the second trial and on appeal, the Court reversed the case on the basis that reasonable minds could not differ, and that the actions of the defendants in the case constituted negligence and the seven-year-old child was not guilty of contributory negligence as a matter of law.

The issue of voir dire examination of the jury as to connections with the casualty insurance was never ruled upon by the Court in the case, and only incidentally mentioned in a footnote citing Balle v. Smith, 81 Utah 179, 17 P.2d 224

(1932) for the proposition that a plaintiff would be entitled to know a juror's interest in an insurance or casualty company. In the Balle case, the Supreme Court said at page 230:

The company was a local one, and it was entirely possible that some of the jurors might have been interested or connected either as a stockholder or an agent or debtor or creditor of this company. The plaintiff was entitled to learn whether such relationship existed.

Such voir dire examination of the jurors was dicta in the case, for at page 229 the Court said:

Counsel for plaintiffs insisted he had a right to pursue that line of questioning, and stated he would confine himself strictly to determining if any juror was interested as a stockholder or officer, employee, debtor or creditor of Intermountain Lloyds...

The Court went on to say, however, that

The plaintiff, however, is not the appellant,...so that that particular ruling of the Court in refusing counsel permission to ask the question is not directly involved on this appeal.

In the Balle case, because it was a local company and there was a considerable possibility that prospective jurors might be stockholders, agents, employees, debtors or creditors of that insurance company, it may have been permissible to have asked the question about such connection. However, in the case at bar there is no evidence that such local company status prevailed, and there was no basis for requesting that question.

When Kilpack and Balle are examined in the light of Tjas v. Proctor, supra, which specifically reaffirmed its ruling in Robinson v. Hreinson, supra, that such voir dire

questioning of the jurors is immaterial and not permitted, clarification is provided to the the citation in State v. Balle, supra, to the fact that

The trial judge, in his broad discretionary power to conduct voir dire,...[citations omitted] has a duty to protect juror privacy.

The trial judge in the case at bar examined the voir dire requests of plaintiff and correctly denied such requests.

The questions requested by plaintiff's counsel Nos. 28 - 34, and 36 - 41 are clearly objectionable. They are clearly intended to place before the jury the spector of an insurance crisis.

To determine if they have been "tainted" by the articles attached to plaintiff's brief on appeal as Exhibit A; the trial court would have had to inquire of the jurors as to their reading of said articles.

If you ask the jurors to examine or to consider the materials set forth in the alleged advertising or "propaganda", once they have been asked to read or examine the allegedly offensive articles, that juror has then been tainted by having read such articles and would be subject to challenge for cause.

Appellant cites no Utah authorities approving of such voir dire interrogation of prospective jurors. Borkoski v. Yost, 594 P.2d 688 (Mont., 1979) cited by plaintiff cites the jurisdictions of California, Kentucky, Missouri, North Carolina, Texas and the Court of Appeals of the Third Circuit as holding such inquiries to be reversible error. The case then

cites Arkansas, New York, Kansas and Connecticut for presumably holding contrary.

In Johnson v. Hansen, 389 P.2d 330 (Or., 1964), the Court declined to reverse for failure to provide such voir dire examinations and said:

In the ordinary case, the presence or absence of insurance is not only irrelevant but the unnecessary injection of the subject into the trial is prejudicial.

The Court in that case held that the requested voir dire inquiry was improper.

The Barton v. Owen, 139 Cal.Rptr. 494, 71 Cal. App. 3rd 484 (1977) cited by plaintiff in support of such questions as to the malpractice insurance crisis being improper, wherein the Court said:

We find, however, that the trial judge properly used his discretion to limit the voir dire in this case. The proposed voir dire question would have injected into the present case unnecessary emphasis on the subject of malpractice insurance...for it is likely that the panel would have surmised that the plaintiff was discussing the overall medical insurance crisis only because the defendant was similarly insured. (emphasis added)

The footnote to that case shows that the requested voir dire examination question substantially encompasses the requests submitted by plaintiff, which was properly denied by the trial judge in the case at bar.

Of note, the Borkoski court said at page 695:

Therefore, we further hold that, as a prelude to any questions concerning whether a potential juror has read or heard anything to indicate that jury verdicts for plaintiffs in personal injury cases result in higher insur-

ance premiums for everyone, an attorney must ask certain general introductory questions. These initial questions may be approached from two directions: (1) Whether the prospective juror has heard of or read anything (not necessarily related to insurance) which might affect his ability to sit as an impartial juror (as was done by the trial judge in this case) or ... (emphasis added)

If, however, no positive response was received to these introductory inquiries, there is no reason to pursue further the line of inquiry we have approved above.

The foregoing are all subject to a showing that counsel is acting in good faith and is not merely attempting to impress on the jury the fact that defendant may be covered by insurance.

In the particular case at bar, the trial judge, Judge Harding, in his questioning of the prospective jurors said, at April 8 Tr., page 42:24

Is there anything in any of your backgrounds, any experience or anything you have heard or read or seen that would cause you to be affected, or would affect you in the amount of compensation that you might award in a case? Anything in your background that you feel would affect you in a determination of the amount of compensation you might award in a case? OK, the record may reflect that there is no indication.

Thus, in a preliminary question submitted to the jury, almost exactly parroting the recommended procedure of the Montana court in Borkoski, the trial court received no affirmative responses, and as stated by the Borkoski court, no positive response having been received to these introductory inquiries, there was no reason to pursue further that line of inquiry.

As pointed out in State v. Balle, supra, the trial court has a broad discretion with regard to voir dire examination of the jury. Examination of plaintiff's proposed voir dire questions as to the issue of the alleged "lawsuit or liability crisis" and the effect of advertising on the insurance rates has been consistently rejected by the Utah courts. Certainly a more searching inquiry into the reading habits and articles alleged to be offensive and affecting the bias of the jury would have clearly created a prejudicial bias against the defendant in the case, and would have led the jury to surmise, as stated in Barton v. Owen, supra, that the plaintiff was discussing the insurance crisis only because the defendant was insured.

The denial of the voir dire requests were not only within the discretion afforded the trial court, but were required to prevent prejudice from being injected into the trial.

POINT III

THE RECORD IS DEVOID OF EVIDENCE THAT DEFENDANT TRIED TO MISLEAD THE JURY INTO THINKING THAT A "SICK OLD WIDOW" WOULD BE RESPONSIBLE TO PAY THE JUDGMENT.

In his Point III, the appellant first creates a straw man and then attempts to blow him down. Appellant contends that there was insurance coverage of \$100,000. While that is not a part of the record of the proceeding and is not relevant

to this inquiry, such is the fact. Appellant contends that the insurance carrier had \$100,000 at risk but the estate had no financial risk at all.

The record shows that in his closing argument, plaintiff's counsel asked the jury to enter in the special damage question \$124,927 (April 10 Tr., pp. 125, 132).

In addition to these special damages, counsel asked the jury to make a further award for general damages, suggesting, improperly, a per diem argument for the depression of \$1.00, \$10.00, or \$25.00 per day for the previous five years and for the future.

Whether the estate was substantial or not is immaterial. The estate was at risk.

Prior to the commencement of the trial, plaintiff's counsel filed a motion to exclude Florence Reeves from sitting at counsel table. The Court considered that motion and denied it (April 8 Tr., page 2):

As far as her coming and sitting at counsel table, I will permit her to be present during the voir dire of the jury for purposes of permitting her to assist counsel in the selection of the jury, in view of the fact that she is the only heir of the estate of Melvin Reeves and is therefore in the best position to assist counsel in making that determination. (emphasis added)

Prior to first examination of prospective jurors, plaintiff's counsel then requested an admonition to the jury to explain the presence of Florence Reeves during the voir dire examination (April 8 Tr., page 6):

I think if the Court feels obligated to introduce her to the jury, that the court should advise the jury at that point, so there is no misunderstanding, that she is not a party to this case and that there is no showing -- there is no reason for the jury to suppose or guess or speculate that she is going to have to pay any money.

The Court agreed to that request, and gave the clarification to the jury (April 8 Tr., page 46):

Ladies and gentlemen, one last matter here initially. Seated, as indicated, immediately to the left of Mr. Jeffs is Florence Reeves. She is not a party to this action. She is, however, the widow of Melvin Reeves, and this suit involves Mr. Melvin Reeves, who died not related to this accident, but he died after the accident, and she is present here. (emphasis added)

Immediately after the voir dire questioning by the Court, and after she had been identified to the jurors and they had been identified to her, in compliance with the Court's initial ruling that she could assist with the selection of the jury, she was excused and left the courtroom. (April 8 Tr., 47:2-4)

Although she had been deposed some two years earlier as a courtesy to counsel and without notice, she was intended to be a witness at the trial as the only witness available to the defense who saw the accident. Her health prevented such happening. As an officer of the Court, defense counsel gave as his reasons for not producing Florence Reeves as a witness her fragile health. (April 9 Tr., pp. 204-205, attached hereto as Exhibit A).

This writer has found no Utah decisions discussing the matter. Appellant has cited but one case, and that from the Supreme Court of Michigan from 1965. In that case, the issue was not the allowance of the widow at counsel table for assistance in selecting the jury in a locality unfamiliar to counsel, as in the case now at bar, but was maintained at the counsel table, was introduced by defense counsel as the widow of the deceased, and the matter of her presence there or the fact of her not being a party to the suit was never explained to the jury. Despite several objections during the course of the trial, she remained at counsel table throughout the trial. That case is not applicable to the case now at bar.

Parenthetically, it should be noted that in the introduction of the parties, the plaintiff was not present in court, but her husband, who was no longer a party in the proceeding, was introduced by plaintiff's counsel. "Jane Doe's" husband sat at counsel table not only during voir dire examination, but during various stages of the trial. (April 8 Tr., page 13).

In appellant's argument on this point, appellant makes assertions that there was an attempt by defense counsel to mislead the jury into thinking that the widow was responsible to pay the judgment. That is not supported by the record, but only by assertions made out of the presence of the jury by plaintiff's counsel (April 8 Tr., page 6) and was fully explained by the Court to the jury before the completion of voir dire examination.

In plaintiff's argument asking the Court to exclude Florence Reeves from the courtroom and from the counsel table, plaintiff's counsel makes accusations that her presence was an attempt to influence the jury into believing that she was to pay any judgment. No where in the briefs nor in the oral argument of defense counsel, 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, as specifically permitted by the Court. She was then taken from the courtroom and never returned to the presence of the jury.

Plaintiff's argument that "Why should defense counsel be able to convey the same message by a charade or play-acting?" is creating a paranoid characterization that defense counsel might have argued that judgment would come from this widow's pocket, when in fact no such argument or discussion was ever held or suggested to the jury. That is, the effort by appellant is to set up a straw man of a potential, supposed, implication from Mrs. Reeves' presence at the counsel table during voir dire. and is an inference that was not present in the courtroom, nor was it made in any respect during the presentation of the case.

The Court's attention is also drawn to Instruction No. 2 given by the trial court (copy attached as Exhibit B) wherein the trial court specifically pointed out that Shirlene Hafen was made the defendant in the action because she was the representative of the estate of Melvin Reeves, and if plain-

tiff should be awarded judgment it would be awarded against the estate of Melvin Reeves (Record, Vol. 6, page 95).

The Special Verdict submitted to the jury does not even propose that the judgment would be against the estate. The Special Verdict sought only the finding of the questions of whether Melvin Reeves had been negligent, and whether that was a proximate cause of the plaintiff's injuries, and the amount of those injuries. Such presentation could not be construed by the jury to mislead them as asserted in plaintiff's Point III.

POINT IV

THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS ADMISSIBLE AND WITHIN THE DISCRETION OF THE TRIAL COURT TO BE RECEIVED IN EVIDENCE, AND DID NOT CONSTITUTE CHARACTER ASSASSINATION.

Plaintiff claimed that she had symptoms of depression and other symptoms, demonstrating a neuropsychological injury to the brain, attributable to the accident.

The plaintiff had the burden of proving by a preponderance of the evidence that the claimed neuropsychological injuries were caused by the accident which was the subject matter of the lawsuit. The defense is entitled to present evidence to refute such claims, or evidence which would have the tendency to cast doubt on whether the plaintiff had sustained her burden of proof of showing causal relation of the claimed neuropsychological injury to the accident.

The issue of whether the plaintiff smokes or does not smoke was never presented in testimony to the jury. The only involvement of the question was that on page 10 of a 12-page document of the medical records of the plaintiff (Exhibit 7), a preoperative information sheet filled out by the plaintiff herself, by a series of circled answers to 25 questions, the plaintiff circled "yes" to the question "Do you smoke?" No mention was made in oral testimony to such fact, nor was any oral argument ever presented or raised with the jury as to such fact.

With regard to the drinking of alcohol, in the same medical records on the same information sheet, the plaintiff answered the question "Do you drink alcohol?" with a circled "yes." On other medical records, on page 12 of a 22-page document introduced as Exhibit 6, the similar preoperative information filled out by the plaintiff to the question "Do you drink alcohol?" was again answered "yes."

No mention was made in oral testimony or in argument or presentation to the jury with regard to the drinking of alcohol. The trial court required excising of the handwritten word "alcohol" in the margin of the record, but allowed the questions and answers on smoking and the use of alcohol to remain on the preoperative information sheets as a part of the medical records. (April 10 Tr., pp 15-16).

The Court further allowed plaintiff's counsel to substitute for the hospital records a photocopy with the hand-

written notation of "alcohol" blanked out so that it could not be read by the jury.

After hearing in camera both from plaintiff's expert Dr. Gummow, and from the plaintiff herself as to her use of marijuana, the Court prohibited submission to the jury of her prior use of marijuana, holding that the prejudicial effect outweighed the probative value despite the prior marijuana use and its potential effect on the plaintiff's depression.

No questioning was undertaken in the presence of the jury as to the plaintiff's prior use of marijuana, or as to the expert's opinion of the effect of marijuana on plaintiff's depression. As such, the issue was never presented to the jury (April 10 Tr., page 13). Such issues were never submitted to the jury in oral argument or in presentation of evidence.

With regard to premarital sex, the hospital record exhibits show that on March 3, 1980 plaintiff had a spontaneous abortion, which occurred at two months of gestation. Although the testimony of the plaintiff showed that she had been married just one month prior to the spontaneous abortion, the trial court correctly permitted the introduction of the medical records showing the spontaneous abortion, but prohibited counsel from questioning the plaintiff regarding premarital sex (April 10 Tr., 53:19-23). No reference was made in any of the questioning of the witnesses, nor in oral arguments, nor was anything presented to the jury pertaining to premarital sex.

With regard to the spontaneous abortion, reference to which appeared in the records of the Dixie Medical Center (Exhibit 6), plaintiff's counsel urged the Court to prohibit the use of the words "spontaneous abortion", but to refer to it as a "miscarriage." The Court required defense counsel to so refer to the abortion as a miscarriage (April 9 Tr., 137:3-12). All references in the interrogation of witnesses and in the argument of counsel referred to the spontaneous abortion as a miscarriage, at the request of plaintiff's counsel.

Plaintiff's expert, Dr. Gummow, on crossexamination admitted that she had not been informed of the miscarriage or sterilization until the night before her trial testimony. The doctor further admitted that with some women, a miscarriage can produce depression, and further admitted that a voluntary sterilization can produce depression in some women. Dr. Gummow further testified that at no time during her testing in 1986, nor in the testing by her colleague Dr. Nielsen, did the plaintiff ever disclose to them the miscarriage or the voluntary sterilization, which occurred post-accident.

Dr. David Weight, defendant's expert, testified that the depressions which plaintiff was suffering could be caused by anything which would cause a person to grieve. He further testified that some of the factors that the plaintiff had provided to him to indicate a possible source of the depression she was suffering were the lack of stability of her marriage (April 9 Tr., page 265), continued litigation problems,

concern that she was not working at her previous level, that she was not happy in her present circumstances.

At no time during Dr. Weight's examination did the plaintiff ever disclose the miscarriage or the voluntary sterilization that occurred after the accident (April 9 Tr., page 266).

Dr. Weight further testified that the decision on a voluntary sterilization is very important in a person's life, and that sometimes people make the decision and then have second thoughts or regrets thereafter. 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 (April 9 Tr., page 267).

The issue of the miscarriage prior to the accident, and the voluntary sterilization thus become material issues to the causes related by the plaintiff in her depression, which was the fundamental symptom evaluated by plaintiff's expert, Dr. Gummow, in determining that plaintiff had suffered a brain deficit.

The Court thus concluded that the issue of the miscarriage and the issue of the voluntary sterilization became relevant and material to the issues of the plaintiff's claims of depression being the fundamental symptom of the alleged brain injury, and whether it was causally connected to the accident or emanated from causes extraneous to the accident.

Upon crossexamination, plaintiff was asked about whether she had had a miscarriage in March, 1980. She admitted that she had (April 10 tr., page 60). When asked whether it was upsetting to her, she admitted that it was very upsetting.

When asked whether she was frustrated for not being able to carry the baby full term, her answer was: "I wasn't frustrated; I was devastated." (April 10 Tr., 60:11-25, 61:1-3). She still admitted feelings from that miscarriage.

She further admitted on crossexamination that in July, 1983, she had had a sterilization (April 10 Tr., 62:13-21, 63:7-12). She admitted that she did not remember telling Dr. Neilsen or Dr. Gummow about the sterilization or the miscarriage (April 10 Tr., page 64). Part of Exhibit 7 was a sterilization permit dated August 25, 1983, signed by the plaintiff, by which she granted permission for the sterilization. The permission reads:

It has been explained to me that I will probably be sterile as a result of this operation, but no such result has been warranted. I understand that the word "sterility" means that I may be unable to inseminate or conceive or bear children if said operation is successful. I also understand that this procedure is generally irreversible. I voluntarily request the operation. (emphasis added) [page 4, Exhibit 7]

Plaintiff's alleged character assassination is not that at all. No reference was made in testimony or oral argument that the plaintiff smoked, drank alcohol, engaged in premarital sex, or used marijuana. The only reference to

smoking and alcohol was contained in the plaintiff's own information sheet filed with the Dixie Medical Center at the time of admission to the hospital, as referenced above. The medical records and testimony pertaining to the miscarriage and voluntary sterilization directly relate to the primary symptoms, and are the medical records of the plaintiff.

When plaintiff appears before the Court and claims that she suffers from depression, and through the use of her experts alleges that this occurs as a result of the accident, defendant is entitled to submit to the court medical records and other evidence to demonstrate that there are primary and direct causes of depression unrelated to the accident which may be an explanation for the claimed symptoms. In addition, the inferences drawn from such information could well and did presumably lead the jury to conclude that she did not suffer a neuropsychological injury in the accident, but that this related, or could relate, to the instability of her marriage, the prior miscarriage, and the voluntary sterilization.

The claim that the limited information submitted to the jury produced prejudicial effects in view of the "ultra-conservative Mormon community" of St. George is purely conjectural on the part of counsel. This writer's experience in St. George would lead him to conclude that it is a retirement community that attracts people from all over the United States because of its weather. There is no evidence before the Court, in fact or in truth, that St. George is an "ultraconservative Mormon community."

There is no indication to think that the jury which was empaneled was prejudiced by the information on the hospital records that plaintiff smokes or drinks. Such presumed prejudice is merely conjectural at best. The trial court amply demonstrated that the facts about the plaintiff are admissible in evidence because they are relevant and material to the inquiries to be submitted to the jury. Plaintiff's own testimony that she was "devastated" by the miscarriage, and the impact of the voluntary sterilization are subject matters required to be submitted to the jury, in view of the plaintiff's claims of depression.

Plaintiff's argument suggests that the jury could have drawn its own conclusions, and that is the very function of the jury. The accusation of character assassination is not borne out by the record. The record reflects that the trial court limited the introduction of evidence to the medical records as they existed, and the interrogations pertaining to the effect of the miscarriage and the voluntary sterilization. The presentation of such evidence was a matter-of-fact presentation to explain the depression. It can in no way be characterized as character assassination.

In this case, plaintiff brought suit claiming a neuropsychological injury, and asked for an award of hundreds of thousands of dollars. The medical records of the plaintiff herself, and her own testimony, amply demonstrate that the two events are unrelated to the accident. It would have been reversible error for the trial judge to have denied such rele-

vant and probative evidence from being admitted to explain the depression to which she was laying claim.

POINT V

"JANE DOE" WAS NOT DENIED A FAIR TRIAL BY ANY SURPRISE TESTIMONY.

In appellant's Point V, appellant asserts that the defense submitted surprise testimony of a miscarriage prior to the accident, and a voluntary sterilization approximately one year after the accident and a year before her first examination by plaintiff's psychologist. Appellant characterizes this as "surprise" testimony.

As stated by appellant, "Jane Doe's" expert testified that the most severe symptom of the alleged brain damage was depression. Plaintiff, by alleging the neuropsychological injury, has placed her medical records, pre-accident and post-accident conditions as relevant to the inquiry.

The complaint in this case was filed July 1, 1983 (Record, Vol. 1, pp. 1-3). At least by that point, and probably prior thereto, plaintiff's counsel had access through the plaintiff to all of the medical records of the plaintiff.

On April 22, 1986, just under one year prior to the trial of this matter, defendant took the records deposition of the Dixie Medical Center (Record, Vol. 3, pp. 145-146; Vol. 6, pp. 219-220).

Coincident with that, defendant issued a subpoena

duces tecum for the records of the Dixie Medical Center (Record, Vol 6, page 221).

A letter was sent to Dixie Medical Center requesting such medical records, with a copy to plaintiff's counsel (Record, Vol. 6, page 222). A copy of the subpoena and the Notice of Records Deposition were also submitted to plaintiff's counsel.

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

In addition to that, the so-called "surprise" testimony pertaining to the miscarriage and voluntary 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.

The objections of plaintiff's counsel that the medical records were a surprise to counsel are not valid objections to the admissibility, since such information was

readily available to plaintiff's counsel. It was probably already within the confines of their medical file at the time it was subpoenaed by defense.

The issue in this case from the very inception has been whether the neuropsychological injury was caused by the accident. That was an issue framed in the amended complaint and in the pretrial order. The evidence of the miscarriage prior to the accident, and the evidence of the voluntary sterilization subsequent to the accident bear upon that issue. The issue of causation was always before the Court, and is not a new theory, as purported by appellant.

Anderson v. Bradley, 590 P.2d 339 (1979) frames the issue and the applicable law. The allegation therein was that the officer's testimony that the plaintiff told him at the hospital that he saw the car but could not get out of its way. The Court held that that statement was not necessarily inconsistent with the officer's testimony that the plaintiff had sprinted across the road. The Court held that that was a jury prerogative to weigh that evidence. The Court held that that was not surprise, and said:

In any event, surprise as a grounds for a new trial is only that which ordinary prudence could not have guarded against. The surprise claimed here may not be so categorized, since it could have been easily guarded against by utilization of available discovery procedures. (emphasis added)

In the instant case, not only did plaintiff's counsel have the available discovery procedures, but had the cooperation of the plaintiff in providing consent to obtain

any medical records that plaintiff's counsel desired to obtain. Plaintiff's counsel had notice virtually one year prior to trial that defendant's counsel had subpoenaed and obtained the medical records of the Dixie Medical Center. As such, the claim of surprise is not appropriate.

In the case at bar, there was no attempt to conceal the acquisition of the records one year prior to trial, nor to prevent access by plaintiff's counsel, which could not have been accomplished in any event.

Plaintiff cites Eagle v. American Tel. & Tel. Co., 769 F.2d 541 (9th Cir. 1985) for the proposition of surprise. In that case, at a summary judgment hearing an attempt was made by the plaintiff to advance a new theory of damages. In the instant case, the dispute as to causation of the alleged neuropsychological injury was always present from the time of the filing of the answer denying the brain injury having been caused by the accident. Such case is inapplicable to the issue here.

The further case cited by the plaintiff of Conway v. Chemical Leaman Tanklines, Inc., 687 F.2d 108 (5th Cir. 1982) points out that "The surprise, however, must be inconsistent with substantial justice" in order to justify a grant of new trial.

That ruling is consistent with our Rule 59(a)(3) Utah Rules of Civil Procedure: "Action or surprise, which ordinary prudence could not have guarded against."

The claim of surprise in this matter is an attempt by appellant to shift from the plaintiff the responsibility to inform her counsel of all material matters relative to the presentation of her case, and from plaintiff's counsel the responsibility to undertake ordinary discovery process or to be alerted by the discovery initiated by the defense and to examine the medical records obtained thereby, which had always been available to plaintiff's counsel.

Plaintiff cites the case of Sacawa v. Polikoff, 375 A.2d 279 (N.J. Super. 1977), for the proposition that the doctor defending a medical malpractice case failed to reveal that he had taken x-rays of the plaintiff. As such, the facts are distinguishable, because here the medical records are not those taken by the defendant at defendant's request, but are the medical records of the plaintiff herself, within her own knowledge and availability. The citation is not applicable.

The citation to Walker v. Distler, 296 P.2d 452, again a medical malpractice case, the doctor failed to answer that the patient had pre-eclampsia. This information was peculiar to the doctor who was being sued in the malpractice case, and would not be necessarily within the knowledge of the plaintiff herself. However, and as such, it is not applicable to the situation here, where it is the plaintiff's medical records available to her which were utilized to show the probable cause of the depression which she claimed.

The claim of surprise is unsupported by the record, and not a basis for reversal by this Court.

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The claim of surprise is unsupported by the record, and not a basis for reversal by this Court.

POINT VI

"JANE DOE" WAS NOT DENIED A FAIR TRIAL BY THE INTRODUCTION OF THE MEDICAL RECORDS INTO EVIDENCE.

Without reiterating the argument set forth in Point V as to the surprise matter, it is readily apparent by examination of the crossexamination of Dr. Linda Gummow, and the direct examination of Dr. Weight, cited in Point V, that the failure of the plaintiff to disclose to either psychologist the devastating effect of the miscarriage in her life prior to the accident, and the obviously more devastating effect of voluntary sterilization was a concealing from both experts by the plaintiff of significant factors impacting upon her symptomatic depression. Both psychologists testified that some women suffering a miscarriage may suffer depression from such fact, and that the recognition by a woman that the voluntary sterilization is irreversible and that she will never bear children and thus not be a whole woman, constitutes the required and supportive expert testimony, casting doubt on whether the plaintiff has established by a preponderance of evidence that the neuropsychological injury was caused by the accident.

The plaintiff's own testimony as to the devastating effect of the miscarriage and her admission of the voluntary sterilization, coupled with the signed document executed by her at the time of the sterilization acknowledging the steri-

lization to be irreversible and a permanent prevention of child bearing, provide ample support for the medical testimony and the inferences to be drawn thereby by the jury (Exhibit 7, attached as Exhibit C).

The failure of the plaintiff to disclose to any of the examining psychologists the prior miscarriage and the sterilization could be construed as indicative of an attempt to prevent the trier of the fact from discovering the truth of the matter as to those devastating occurrences unrelated to the accident.

Because of that failure to disclose, Dr. Weight, called by the defense, correctly indicated that he could not rule out the possibility that the depression came from the accident, but that if he had known of the miscarriage and voluntary sterilization he would certainly have explored in depth to find out if that was the cause of the depression, and not the accident. Such failure to disclose, and the testimony of the plaintiff, raise substantial serious doubts in the minds of the jury, and could cause the jury to conclude that the neuropsychological injury did not emanate from the accident, and that plaintiff had not met her burden of proof.

In this case, the jury entered a verdict of \$30,000 in favor of the plaintiff. It may well be that the jury concluded all issues as to neuropsychological injury and the shoulder injury favorable to the plaintiff, but did not believe the plaintiff's testimony as to the amounts she claimed for damages, and awarded what, in the jury's mind, was a rea-

sonable amount to be awarded for such injuries. Appellant cannot contend that they were prevented from receiving a just verdict by the jury, when she received a \$30,000 verdict.

As pointed out by appellant's brief, "Jane Doe's" own expert testified that she could form no opinion as to whether the sterilization or miscarriage caused the depression or guilt in "Jane Doe" (April 9 Tr., pp. 122-123).

In Kimes v. Herrin, 705 P.2d 108 (Mont. 1985), cited by plaintiff, the issue submitted to the jury was whether the father's drinking and associated family fighting were relevant injuries claimed by the plaintiff. The case is totally dissimilar to the facts before the Court in this case.

Appellant contends that the lack of medical testimony linking "Jane Doe's" miscarriage and sterilization to the depression for which she suffered is asking this Court to countenance the concealing of vital information from the experts, and to submit an unfounded claim of neuropsychological injury.

The citation of appellant to Pearce v. Wisteszen, 701 P.2d 489 (Utah, 1985) is inapplicable. There, the evidence sought to be introduced concerned the effect of alcohol ingested remotely in time and beyond the realm of physical effect on the body. In the case now before the Court, the issue is the depression occasioned a potential multitude of causes (instability of the marriage, miscarriage, voluntary sterilization, and perhaps even the auto accident). In view of "Jane Doe's" own testimony as to the effect of the

miscarriage and sterilization, it can hardly be said that such evidence was not relevant to the inquiry as to the cause of the depression symptoms.

Appellant cites McCormick, Sec. 313, 3rd ed., 1984, on the issue of whether an opinion offered by a hospital record without the possibility of cross-examination is permissible. In this case, the hospital records were merely confirmatory of testimony of the plaintiff herself, admitting that she had had a miscarriage prior to the accident and a voluntary sterilization subsequent to the accident and before her first examination by a psychologist. As such, no opinions were asked or produced by the hospital records. They were factual records received as business records. Such records were not objected to on the basis of their being an opinion, as cited in appellant's brief, nor on any foundational basis, but only on the basis of surprise and relevance.

The Court correctly ruled that they were relevant to the inquiry and that they were admissible.

The Court's attention is called to the Pearce case, *supra*, wherein the Court said:

This Court has followed the general rule that the trial court's decision to admit or exclude evidence will not be reversed unless it abused its discretionary powers. [citations omitted]

The Court went on to say, at page 492:

If evidence has some probative value but has a tendency to unduly prejudice or confuse the issues or to mislead the jury, the trial court must balance the probative value against those countervailing factors to determine whether the evidence should be admitted. "Precedent,"

concluded the Court in Carlson, is of little value in reviewing such cases.... We simply determine whether on the facts of the particular case, the trial court's ruling was within the reasonable or permissible range [citations omitted]

It is the contention of the defendant in this case that the Court judiciously and carefully weighed those considerations and admitted the evidence now claimed to be error. It was within the discretionary authority of the court to admit such evidence, having concluded that it was relevant to the inquiries and claims of the plaintiff, in view of the crossexamination of plaintiff's own expert prior to the introduction of such evidence.

As stated by the Court in Hill v. Bache Halsey Stuart Shields, Inc., 790 F.2 817 (10th Cir. 1986) at page 826 relevant evidence must be "substantially outweighed" by the danger of confusion or delay to justify exclusion. In this case, the trial court concluded that the evidence was material and relevant and should not be excluded.

The Court is cited also to Thompson v. LeGrand Johnson Construction Co., 688 P.2d 489 (1984), wherein the Court said:

The issue of causation in this case is not a matter of such technical sophistication as to be solely within the realm of expert opinion. Instead, it is a fact question of whether plaintiff's disabilities were attributable to the condition or to some preexisting condition. Expert testimony can be helpful in such a situation, but it is not, as the plaintiff suggests, conclusive. [citations omitted]

Also, the Court is cited to Dixon v. Stewart, 658 P.2d 591 (Utah, 1982) wherein the Court said:

In general, expert testimony is admissible when (1) it appears that the matter before the jury is not within the knowledge of the average layman or concerns a subject not within average experience, and (2) the testimony is such that it will be an aid to the jurors regarding the issue before them. Whether or not these two criteria are met is a matter to be determined by the trial court, which is given considerable discretion.

Both the testimony of the plaintiff herself and the testimony of the experts corroborate the relevance and materiality of the testimony as to the miscarriage and the sterilization, and refute the claim of error in admitting such evidence.

POINT VII

THE TRIAL COURT DID NOT ERR IN EXCLUDING LAY OPINION TESTIMONY. THE TRIAL COURT ONLY REQUIRED A PROPER FOUNDATION FOR THE TESTIMONY OF THE LAY WITNESS.

In regard to the testimony of Dennis Parker, the Court's attention is called to the Transcript of April 9, page 28, where the Court said:

I am going to allow you to have the witness testify as to contact he has observed, and he is limited to that ability, Counsel, so if you want to ask him those kinds of questions.

Then counsel asked whether he knew of any difficulty "Jane Doe" had had in her family relationships before and after the accident. It was objected to on the basis of no foundation, inasmuch as counsel had not laid a foundation

showing any personal observation. The Court then ruled (April 9 Tr., 29:23-25):

Well, I think we need to have some time frame foundation information, Counsel.

In response thereto, counsel said the time frame was two or three years, and he wanted to compare before and after the accident. He did not set a time when the witness made any observations, who was present, where it occurred, or anything of the normal and necessary foundational basis. The additional objection was made (April 9 Tr., 30:10-15). The Court again reiterated that counsel needed to narrow it down as to who was present. Then Mr. DeBry, in a leading question (April 9 Tr., 30:24), said:

Have you noticed any difficulty, based on your observation comparing the time period before and after the accident that ["Jane Doe"] has had in family relationships with father, mother, sisters, brothers, aunts, uncles, nephews, husband, any of the above?

A: Yes.

An objection was made to that by defense counsel, and overruled by the Court. The question was allowed to remain. Thus, appellant's contention that the witness was not allowed to testify is not borne out by the record (April 9 Tr., 32:1-8). The witness then testified:

To answer the question, they, ["Jane Doe's"] younger sister is my age, so -- and so I did know ["Jane Doe"] and her family years previously which -- they don't associate with very much. I have only seen her probably twice in the last five or six years, actually with ["Jane Doe"].

To come off with the other side of the family, they were very outspoken with Justin's side of the family. They would go up there every weekend or twice a week.

An objection was made by defense counsel:

Mr. Jeffs: Your Honor, he has testified while she was there, he has not identified whether he was present at all.

Court: The objection is sustained. Let's have him answer more direct questions.

It was very obvious to the Court and defense counsel that plaintiff's counsel was not asking when the observations took place, where he was, who was present, what he observed, but only conclusory statements as to whether she was having family difficulties or depression or other problems. As such, no adequate foundation was laid, and the sustaining by the Court of the objections was fundamental and proper.

The plaintiff's counsel was never precluded from laying a foundation to ask the questions and to establish whether or not the witness had the ability to observe that which his conclusory statements suggested.

The Court in this case did explain the basis that there had not been sufficient foundation. On several occasions, the Court pointed out that plaintiff needed to establish time, place and circumstance, which were never asked by plaintiff's counsel. Thus, no foundation was laid.

No issue was ever raised that 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 conclusory opinions without the necessary laying of the foundation. An examina-

tion of the record (April 9 Tr., pp. 29-33) amply illustrates that the foundational basis for the alleged observations was never laid, and thus the predicate to the opinions was not laid. Nevertheless, the conclusory statements were admitted in part, even without adequate foundation.

The Court gave reasons for the sustaining of the objections that the testimony was without foundation, and gave suggestions as above set forth; nevertheless, plaintiff's counsel did not lay the foundation.

The Court is cited to Utah Department of Transportation v. Jones, 694 P.2d 1031 (Utah, 1984), wherein at page 1036, the Court said:

Admission of any type of testimony requires the laying of proper foundation to qualify the witness to give the particular testimony sought to be elicited. No foundation was laid or sought to be laid regarding Jones' qualification to testify regarding the highest and best use of the subject property.

That exact circumstance prevails here: plaintiff did not lay the foundation to show that the witness had the necessary competence to render whatever opinion was intended to be elicited.

The Court is also cited to Ewell & Son, Inc. v. Salt Lake City Corporation, 27 U.2d 198, 493 P.2d 1283, wherein the Court said:

Whether the allowance of such testimony, which we will have characterized as borderline, is unfair and harmful depends on the particular circumstances and must necessarily be left largely within the discretion of the trial court.

The claimed conclusory statement that the witness had observed the relationships of the plaintiff to her family were not predicated by a foundational base showing how such conclusions were arrived at. As stated in Hansen v. Hansen, 110 U.2d 222, 171 P.2d 392 (1946):

Certain answers to questions involve surmise, hearsay and conclusions. The Court did not err in not receiving them into evidence. Indeed, the Court could not base any finding upon such answers without indulging in speculation.

Such was the case in this situation. Without laying a foundation, any questions precluded were properly precluded. The plaintiff was not prejudiced thereby.

POINT VIII

THE TRIAL COURT DID NOT IMPROPERLY EXCLUDE EVIDENCE OF FUTURE MEDICAL EXPENSES.

Appellant opines that the Court sustained an objection to the treating doctor's testifying as to the surgical fees for a future operation, because the probability of the future surgery was not greater than 50%. That is not the basis of the court's action when examined in the light of the testimony. The Transcript of April 8, p. 93 reads:

Doctor, to a reasonable medical probability, what is ["Jane Doe's"] prognosis or prospect for the future with respect to her shoulder and her collarbone injury?

A: Well, I expect that over the next few years, it will be pretty stable and continue pretty much like it is. There is the potential for progression of traumatic arthritis, which is wear and tear arthritis at that joint where the collarbone and shoulderblade meet. It doesn't necessarily have to develop, but it wouldn't be unusual if it did. At this most

extenuating and adverse expression, she might need another operation which would be removal of the outside half inch of the clavicle to prevent contact rubbing and irritation. That is only possible, and I wouldn't say that it was any more possible than 50%. (emphasis added)

On that answer, plaintiff's counsel asked for the surgical fees for such an operation. In view of the doctor's characterization that the shoulder would be "pretty stable and continue much like it is," that there was a "potential for traumatic arthritis, but it doesn't necessarily have to develop," and that "at its most extenuating and adverse expression" she might need another operation, the testimony was not that such future operation was with reasonable medical probability, but only a possibility at the "most extenuating and adverse expression." On that basis, it was not within the realm of permissible evidence to testify as to the cost of such surgery.

The Court then allowed counsel to go on and develop the potential for future arthritis set forth in the questions and the doctor's answers were admitted (April 8 Tr., 94:7-25). Thus, the claim of the appellant that they were prevented from submitting to the jury an opinion on future medicals is not valid. Their claim that they were prejudiced by not being allowed to present such claim is not valid.

As pointed out in Robinson v. Hreinson, supra,

Of course, no award for damage should be based on mere speculation or conjecture. There must be a firm foundation for any award by proof that at least more probable than not that the damage will be suffered. For this reason the jury should not be allowed to assess future damages on probability, but only such damages

as it believes from the preponderance of the evidence the plaintiff will, with reasonable certainty, incur in the future.

The Court is also cited to Jamison v. Utah Home Fire Insurance Co., 559 P.2d 958 (1977), wherein at page 961 the Court said:

In this connection, it is also pertinent to observe that the general rule is that an award of damages cannot properly be made on mere possibility or conjecture, there must be a firmer foundation. That is, any such award, must be supported by proof upon which reasonable minds acting fairly thereon could believe that it is more probable than not, that damage was actually suffered.

The doctor testified that at the "most extenuating and adverse expression" she might need an operation, and that that was only possible. That does not comport with the requirement in Jamison that it must be more probable than not that the damage was actually suffered.

See also Alverado v. Tuckett 2 Ut.2d 16, 268 P.2d 986 (1954), wherein the court said:

The burden was upon the plaintiff to prove the charge of speeding, such a finding could not be based on mere speculation or conjecture but only on a preponderance of the evidence. This means the greater weight of the evidence, or as sometimes stated, such degree of proof that the greater probability of truth lies therein. A choice of probabilities does not meet this requirement. It creates only a basis for conjecture on which a verdict of the jury cannot stand. (emphasis added)

The objections sustained by the Court were within the guidelines and discretion of the Court, and were properly ruled upon by the Court. No error was committed by such ruling. See also Robinson v. Hreinson, supra.

POINT IX

THE INSTRUCTIONS GIVEN BY THE COURT ON DAMAGES
WERE NOT IMPROPER.

Appellant contends that Instructions No. 22 and 23 given by the Court (Record, Vol. 6, pp. 116-117) were incorrect statements of the law. With regard to Instruction No. 22, the record shows that plaintiff did not object and cannot therefore raise the issue for the first time on appeal. The objections voiced by the plaintiff are set forth in Transcript of April 10, pp. 112-113.

As to Instruction No. 23, the total objection was as follows:

As to Instruction No. 23, again it speaks in terms of reasonable medical certainty instead of reasonable medical probability.

No additional objection was given as a basis for objecting to Instruction No. 23, merely that statement. No citation was given to Court upon which it could predicate any evaluation of the claimed objection.

The Instruction apparently was drawn by the Court not from requests submitted by either of the parties but from the Court's own reservoir of jury instructions. The Instruction appears to have been drawn from 90.3, Jury Instruction Forms for Utah, which has parenthetically stated:

You may consider whether any of the above will, with reasonable certainty, continue in the future, and if you so find award such damages as will fairly and justly compensate the plaintiff therefor.

The footnote to that Instruction in Jury Instruction Forms for Utah reads:

Note: In regard to future damages, we use the phrase, "with reasonable certainty". However the phrase "will probably suffer in the future" has been approved by our Courts. [citing Picino v. Utah Apex Mining, 52 Utah 338, 173 P.2d 900]

While the jury instruction made use of the term "reasonable medical certainty", the play on semantics between "reasonable medical certainty" and "reasonable medical probability" is more apparent than real. As cited in the very case given by appellant, Picino, supra, there the distinction was between what may happen and what will probably happen. The Court said that the determination should be on the basis of probability.

That plaintiff did receive an award for medical expenses is demonstrated by the fact that on a stipulation of medical expenses of \$6,700.00, the jury awarded \$10,000 in special damages and \$20,000 in general damages. Thus, appellant's claim that the instruction was misleading and required an undue burden upon the plaintiff to sustain their showing of damages is refuted.

The court is cited to Robinson v. Hreinson, supra, where the court said:

For this reason the jury should not be allowed to assess future damages on probability, but only such damages as it believes from the preponderance of the evidence the plaintiff will with reasonable certainty incur in the future.

The appellant did not provide to the trial court any basis upon which the trial court could make an evaluation as to the propriety of the instructions complained of. Accordingly, this Court should reject any appeal on such basis.

POINT X

THE JURY WAS NOT PREVENTED FROM HEARING THE TREATING DOCTOR'S OPINION AS TO "JANE DOE'S" ABILITY TO WORK AS A BARBER.

Appellant claims that the treating doctor was asked a hypothetical question that assumed that "Jane Doe" was trained as a barber and that a barber spends a majority of her time with her arms outstretched and raised above her waist. Appellant claims that that hypothetical question was not permitted.

In fact, the question was not hypothetical at all, and was answered. An examination of the April 8 Transcript, page 92, shows that the question that was asked was:

Assuming that that's true and assuming that a barber or beautician would have their hands in somewhat this position (indicating)(sic) throughout the course of their work, could ["Jane Doe's"] current condition make barbering more difficult or impossible?

A: Yes.

The objection was made as follows:

I don't think it's a hypothetical at all. I think it's asking him a specific question in a leading or suggestive manner, and I object to the question on that basis.

There isn't any foundation laid for if any knowledge he might have that what barbering requires or doesn't require.

The Court sustained the objection, which was made on the basis that the question was leading and suggestive. Counsel did not return to the hypothetical question, but then specifically asked the doctor:

Doctor, does ["Jane Doe"] appear to have any disability based on the history that was given you?

A: Yes.

Q: Would you briefly describe what that disability is?

A: She told me she could not barber and hairdress because of discomfort in her left arm. And she changed her job and occupation in response to this and now works in a situation where she doesn't have to use her arm in an upstretched and elevated manner all day.

Thus, the objection to the leading and suggestive question was made, the question was reframed to be more specific to "Jane Doe" and her disability, and the question was specifically answered as to her inability to function as a barber with her arms in an outstretched and elevated manner.

In the case of Highland Const. Co. v. Union Pacific RR Co., 683 P.2d 1042 (Utah, 1984), cited by the plaintiff, at page 1051, the Court stated:

The Utah Rules of Evidence in force at the time of this trial permitted testimony by an expert in the form of an opinion if those opinions were (a) based on facts or data perceived by or personally known or made known to the witness at the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness. Rule 56(2) Utah Rules of Evidence... The expertise of the witness, his degree of familiarity with the necessary facts, and the logi-

cal nexus between his opinion and the facts
duced must be established. (emphasis added)

In this case, no effort was made to establish that the proffered opinion was "within the scope of the special knowledge, skill, experience or training possessed by the witness."

No effort was made to lay a foundation that he had any special expertise to know whether or not she could do barbering or not. Despite that fact, the witness did testify to her inability to function as a barber, and that was presented to the jury. Certainly no error was committed.

Plaintiff also cites the Court to Budd v. Salt Lake City, 23 Utah 515, 65 P. 486 (Utah, 1901). The attention of the Court is called to that portion of the Budd case beginning at the bottom of page 19, which reads as follows:

As to whether or not a witness is competent to testify as an expert is a question ... within the sound discretion of the trial judge, and his determination will not be reviewed or disturbed, unless a palpable abuse of discretion is disclosed.

Certainly the sustaining of the objection for the question being leading and suggestive was within the sound discretion of the trial judge, and should not be disturbed on appeal.

The Court is also cited to Robinson v. Hreinson, supra, which reiterates that the trial judge should have the discretion in his rulings during the trial, and that there must be a clear abuse of discretion before disturbing his ruling.

In view of the testimony quoted above, which was permitted by the Court to be presented to the jury, and the failure of plaintiff's counsel to rephrase the question as other than as a leading question, it cannot be said that there was any abuse of such discretion.

POINT XI

THERE WERE NO PREJUDICIAL ERRORS COMMITTED BY THE TRIAL COURT.

Without reiterating the arguments set forth in the prior points, suffice it state that the plaintiff received a substantial verdict of \$10,000 special damages and \$20,000 general damages.

The jury disbelieved "Jane Doe's" expert economist, who testified that the lost future earnings were predicated upon average earnings of \$14,000 per year projected with inflation. On crossexamination (April 9 Tr., 181:12-14), the economist assumed a full time employment but did not take into account that the plaintiff had not had full time employment.

He had not checked her actual earnings, either (April 9 Tr., 183:5-8). He had no knowledge that she was only working 30 hours per week prior to the accident, and not a 40 hour week (April 9 Tr., 184:19-22). He did not compare the projected earnings of \$14,000 against her actual earnings, but projected those lost earnings at an 8% discount rate and came up

with \$58,000 of projected lost future earnings (April 9 Tr., 189:8-14).

He used a 6.22 inflationary factor to project future earnings, whereas her former employer, Tom Hershey, testified (April 10 Tr., 72:16-19) that when she worked as a barber for him that her earnings were in the vicinity of \$400 or \$500 per month, at the most.

His projections also ignored the plaintiff's own testimony on crossexamination that her haircuts at Tom's Barber Shop were charged at \$7.00, and that she got 60% of that and paid 40% for the chair furnished.

She also testified that she quit barbering at Guys and Dolls because she wasn't getting enough time in there to make a good income, and left there to work for The Rickshaw for 30-35 hours at minimum wage (April 10 Tr., 48:18-24).

The economist also ignored the fact that she worked at Tom's Barber Shop for about four months after the accident, and then she terminated with him because she went to work elsewhere, because she could work more hours and earn more money (April 10 Tr., 71:3-8), and that she did not inform him that there was anything about the barbering job that she was not able to handle (April 10 Tr., 71:9-12).

Under the actual circumstances where she had never earned more than minimum wage and rarely got more than 30-35 hours per week, the testimony of plainiff's economist was not believable that she had lost earnings of \$14,000 per year.

Plaintiff's novel but questionable theory that plain-

tiff had suffered a neuropsychological brain injury at the accident, when coupled with the fact of the preaccident miscarriage and the postaccident sterilization, and the instability in her married life, was not believable testimony to the jury. The claim that a treatment program would cost between \$60,000 to \$90,000 as testified to by Dr. Gummow becomes highly suspect in view of Dr. Gummow's own testimony on direct examination, where she said:

Now, do you have an opinion based upon reasonable neuropsychological certainty as to whether or not ["Jane Doe"] will improve or get better with respect to the brain damage?

A: Yes, I have an opinion.

Q: What is your opinion?

A: My opinion is that she has recovered as much as she will or can be expected to do so due to the amount of time that has elapsed between the accident. Most brain injury recovery occurs in the first year and a half after an insult. (emphasis added)

Based upon that information and the testimony of the plaintiff herself that despite doctor's recommendations testified to by Dr. Gummow that she have psychotherapy, and that approximately five years had elapsed since the accident, no treatment had been undertaken. Those circumstances and the testimony that she should be given a treatment program costing sixty to ninety thousand dollars was just speculative, and not believed by the jury.

With regard to the alleged prejudice, no prejudiced has been demonstrated by appellant's contentions in this brief. The facts of the matter are that the plaintiff's claim

of \$124,927.00 in special damages was just not believed by the jury, and was certainly not referable to the accident. The jury's award of \$10,000 related to the actual past medical expenses of \$6,747.67 is a reasonable and appropriate recovery herein.

POINT XII

THE TRIAL COURT DID NOT FAIL TO PROVIDE FOR PREJUDGMENT INTEREST.

The judgment signed by the Court provided for judgment as provided by law. The defendant stipulated that the past medical expenses incurred to the date of entry of the judgment were \$6,747.67. The plaintiff claimed special damages for loss of future earnings and future medical treatment, for which she would not be entitled to interest.

In the judgment entered by the Court, since it is provided by §78-27-44 that interest be awarded at 8% per annum from the date of occurrence on the actual damages assessed to the date of the judgment, plaintiff would be entitled to interest at 8% on the \$6,747.67 from the date of the occurrence until the entry of judgment.

The judgment submitted by plaintiff through counsel did not include a calculation of interest pursuant to §78-27-44 and therefore the judgment entered by the Court is the only one submitted that included within it an appropriate method of awarding interest in accordance with said statute.

54(e). Utah Rules of Civil Procedure, provides that the Clerk must include in the judgment signed by him the interest on the verdict and the costs when taxed, as has been done in this case. That is all that remains to be added to the judgment signed by the trial judge in order to complete the judgment in accordance with the Rules of Civil Procedure

CONCLUSION

The overall analysis of the transcript and exhibits in this case demonstrates that the trial judge judiciously, carefully, and with sensitivity to the protection of the plaintiff's privacy, limited the evidence to those items which are relevant, material, and germane to the issues to be tried.

Appellant makes the common mistake of viewing the matter most favorable to the plaintiff when the rules of appellate review require the matter to be reviewed in a light favorable to sustaining the verdict of the jury.

As has often been stated by the Supreme Court of Utah, the transcript and trial must be looked at in an overall picture to determine whether or not the plaintiff had a fair trial. In this case, the plaintiff not only had a fair trial, but recovered a substantial judgment of \$30,000. The Court should now deny the appellant's request for a reversal and new trial.

Respectfully submitted this 15th day of March, 1988.


M. Davle Jeffs

1 subject with counsel, the parties, or witnesses to this
2 case.

3 And we will see you back at three o'clock,
4 I hope.

5 (The jury was excused.)

6 MR. JEFFS: Your Honor, I met with
7 Mrs. Reeves last night for about 15 minutes, and I have
8 concluded that I will -- as bad as I would like to have
9 her here, I will not call her. I just do not feel that
10 she can handle the strain of it.

11 It's one thing to come in and sit for a few
12 minutes, 20 minutes with us; it's quite a different thing
13 to come out and take the witness stand and be subjected to
14 the stress of cross-examination, even as carefully as I'm
15 sure Mr. DeBry would deal with that.

16 It still is too dangerous and I will not
17 bring her.

18 THE COURT: All right. I don't think you
19 have any argument from Mr. DeBry on that, and the Court
20 will find that she is not available for -- in accordance
21 with the rules. And that permits her deposition to be
22 published and used in examination here by Mr. DeBry.

23 What about Mrs. Hafen? Why do you want her
24 here other than to see if she really exists and to see
25 what she looks like, Counsel?

1 MR. DeBRY: Well, your Honor, I would like
2 to see if she exists. I would like to see what she looks
3 like, and I think the jury is entitled to see that.

4 It's true that the scope of questions would
5 be very, very narrow. I would ask her who she is; if
6 she -- and if she's the personal representative of the
7 estate; and --

8 MR. JEFFS: That's on file and of record.
9 He doesn't need to ask her that.

10 MR. DeBRY: Well, I need to ask her in the
11 sense that -- the other day, as I recall, the Court ruled
12 that Mrs. Reeves could come in the courtroom but not sit
13 at counsel table. That was my recollection. I may be
14 wrong.

15 But Mrs. Reeves did come in the counsel room,
16 and because we don't have photographs --

17 MR. JEFFS: Your Honor --

18 MR. DeBRY: Let me make a record, a verbal
19 record.

20 She came in with an attendant. She was
21 terribly frail. She had an oxygen tube in her nose that
22 she was grasping for and she sat next to Mr. Jeffs at
23 counsel table, which, for the record, she would have been
24 no more than four or five feet from the jury box. And for
25 all the world that jury might be wondering or speculating

1 and by the trappings could very well infer that she was
2 his client and she hired him and he was protecting her
3 last penny.

4 And I think I'm entitled to call the true
5 client, and if for nothing else, say, "Are you the party
6 in interest and the client in this case?" and let the jury
7 look that person in the eye.

8 MR. JEFFS: If we named Walker Bank as the
9 PR ad litem for this proceeding, who would he call? I
10 think that the argument is specious. It -- the Court did
11 not say she could not sit at counsel table. She can. She
12 considers me as her attorney; she has from the very
13 inception.

14 That's why we got in the big fight over them
15 going to her home the Sunday before the original trial
16 setting. And I think if he's trying to carry out some
17 idea of -- that there is some assets or not some assets,
18 it is not going to be -- it is not a question he could
19 ask.

20 MR. DeBRY: I would not ask that.

21 MR. JEFFS: So I don't know that there is any
22 reason to have her here.

23 THE COURT: I really don't either, Counsel.
24 If you had a legitimate purpose, I certainly would -- I
25 would certainly have her here, but simply to establish

INSTRUCTION NO. 2

This is a civil case in which plaintiff, Heidi Neighbor, seeks a money judgment against defendant, Shirlene Hafen, as Personal Representative ad litem of the Estate of Melvin Reeves, on account of bodily injuries which plaintiff alleges were sustained by her in an automobile/motorcycle collision occurring in St. George, Washington County on August 15, 1982.

Plaintiff alleges that the collision was caused by negligence of Melvin Reeves. Defendant denies Melvin Reeves was negligent, and claims that the collision was caused by plaintiff's own negligence or the negligence of Justin Neighbor.

The foregoing is not to be taken by you as facts proved in the case, but it is simply a brief and condensed statement of the contentions of the parties as appears from their written pleadings in the case.

Shirlene Hafen has been made the defendant in this action because she is the Representative of the Estate of Melvin Reeves. If plaintiff should be awarded a judgment, it would be against the Estate of Melvin Reeves.

DIXIE MEDICAL CENTER

STERILIZATION PERMIT

8/25/83
Date: 7/19/83

Hour: 12:10 14:20

I hereby authorize and direct Dr. Grant Carter
and assistants of his choice to perform the following operation upon me at the
Dixie Medical Center: Tubal ligation

and to do any other procedure that his judgment may dictate during the above
operation. It has been explained to me that I will probably be sterile as a
result of this operation, but no such result has been warranted. I understand
that the word "sterility" means that I may be unable to inseminate or conceive
or bear children if said operation is successful. I also understand that this
procedure is generally irreversible.

I voluntarily request the operation.

Signed: Ludi Nefflon

Signature Witnessed:

BY: J. Williams LPA

BY: D. S. ... RN

I joint authorizing the performance upon my wife (husband) of the surgery con-
sented to above. It has been explained to me that as a result of the operation
my wife (husband) may be sterile.

Signed: Justa R. Nefflon

Signature Witnessed:

By: J. Williams LPA

By: D. S. ... RN