

1987

Martin I. Broberg v. Tim Hess and Karen Hess : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Dale F. Gardner, Robert J. Debry; Attorneys for Appellant.

harold L. Petersen; Strong & Hanni; Attorneys for Respondent.

Recommended Citation

Brief of Respondent, *Broberg v. Hess*, No. 870547 (Utah Court of Appeals, 1987).

https://digitalcommons.law.byu.edu/byu_ca1/747

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCC
KFU
58

.A 2

DOCKET NO. 870547

IN THE SUPREME COURT OF THE STATE OF UTAH

MARTIN I. BROBERG,)
)
Plaintiff-Appellant,)
)
vs.)
)
TIM HESS AND KAREN HESS,)
)
Defendants-Respondents.)

Case No. *870547-CA*
~~87-0329~~

BRIEF OF RESPONDENTS

Appeal from the Judgment of the
First Judicial District Court of Cache County
Honorable Omar J. Call

HAROLD L. PETERSEN
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Attorneys for Defendants-Respondents

Dale F. Gardner
Robert J. DeBry
ROBERT J. DEBRY & ASSOCIATES
4001 South 700 East, Fifth Floor
Salt Lake City, Utah 84107
Attorneys for Plaintiff-Appellant

RECEIVED
DEC 4 1987

COURT OF APPEALS

IN THE SUPREME COURT OF THE STATE OF UTAH

MARTIN I. BROBERG,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	Case No. 87-0329
)	
TIM HESS AND KAREN HESS,)	
)	
Defendants-Respondents.)	

BRIEF OF RESPONDENTS

Appeal from the Judgment of the
First Judicial District Court of Cache County
Honorable Omar J. Call

HAROLD L. PETERSEN
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Attorneys for Defendants-Respondents

Dale F. Gardner
Robert J. DeBry
ROBERT J. DEBRY & ASSOCIATES
4001 South 700 East, Fifth Floor
Salt Lake City, Utah 84107
Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PARTIES TO THIS PROCEEDING	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
POINT I. PLAINTIFF'S VOIR DIRE OBJECTION IS WAIVED FOR FAILURE TO OBJECT AT TRIAL.....	3
POINT II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AS TO JURY VOIR DIRE	7
POINT III. UTAH LAW FORBIDS THE INJECTION OF INSURANCE INTO A NEGLIGENCE CASE SUCH AS THIS	12
CONCLUSION	17

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Balle v. Smith,</u> 17 P.2d 224 (Utah 1932)	3,12,13,14,18
<u>Condas v. Condas,</u> 618 P.2d 491 (Utah 1980)	4
<u>Cruz v. Union Pacific R.R. Co.,</u> 707 P.2d 360 (Colo. App. 1985)	6
<u>Gittens v. Lundberg,</u> 3 Ut.2d 392, 284 P.2d 1115 (1955)	17
<u>Higgins v. Hermes,</u> 89 N.M. 379, 552 P.2d 1227 (1976)	6
<u>Hill v. Cloward,</u> 14 Ut.2d 55, 377 P.2d 186 (1962)	14
<u>Ivie v. Richardson,</u> 9 Ut.2d 5, 336 P.2d 781 (1959)	15
<u>Jahnke v. State,</u> 682 P.2d 991 (Wyo. 1984)	4,5,10
<u>King v. Fereday,</u> 739 P.2d 618 (Utah 1987)	3,7,8,17
<u>Lopez v. Schwendiman,</u> 720 P.2d 778 (Utah 1986)	4
<u>Maltby v. Cox Constr. Co. Inc.,</u> 598 P.2d 336 (Utah 1979)	7,8
<u>Robinson v. Hreinson,</u> 17 Ut.2d 261, 409 P.2d 121 (Utah 1965)	14
<u>Saltas v. Affleck,</u> 105 P.2d 176 (Utah 1940)	3,13,14,18
<u>State v. Leslie,</u> 672 P.2d 79 (Utah 1983)	4
<u>Utah State Road Comm'n v. Marriott,</u> 21 Ut.2d 238, 444 P.2d 57 (1968)	7
<u>Young v. Barney,</u> 20 Ut.2d 108, 433 P.2d (1967)	17

PARTIES TO THIS PROCEEDING

The parties to this proceeding are:

Martin I. Broberg	-	Plaintiff, appellant
Tim Hess	-	Defendant, respondent
Karen Hess	-	Defendant, respondent

STATEMENT OF JURISDICTION

Article VIII, Section 3 of the Utah Constitution and Utah Code Ann. §78-2-2(3)(i) (1953) provide the Utah Supreme Court jurisdiction over this appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did plaintiff preserve any issue for appeal?
2. Did the trial court's jury voir dire constitute a clear abuse of discretion?
3. If so, was plaintiff unduly prejudiced thereby?

STATEMENT OF THE CASE

1. Defendants-respondents Hess ("defendants") object to plaintiff-appellant Broberg's ("plaintiff") statement of the facts in that although the trial below arose out of plaintiff's alleged slip and fall at the basement apartment, rented by plaintiff from defendants, the jury did not find as fact how plaintiff actually injured himself and this matter was disputed at trial.

2. The jury specifically found in the special verdict that no act on the part of defendants caused plaintiff's alleged injury. (R. 226)

3. Plaintiff's counsel never objected to the actual jury voir dire conducted by the court. (Transcript, pp. 2-20)

4. Plaintiff's counsel was specifically given the opportunity to submit further questions at the end of the trial court's voir dire but failed to request any further questions once he was made aware of the extent to which the trial court initially intended to voir dire the jury. (Transcript, p. 19)

5. Plaintiffs' counsel passed the jury for cause without any objection. (Transcript, pp. 19-20)

6. During voir dire, the court specifically asked prospective jurors to state their own employment, their prior employment if retired, their spouse's employment or their spouse's prior employment if retired. (Transcript, p. 3)

7. The court asked prospective jurors if they were acquainted with any of the parties. (Transcript, pp. 7-9)

8. The trial court asked prospective jurors if they were acquainted with any counsel or their respective law firms. (Transcript, pp. 10-11)

9. The trial court asked prospective jurors whether or not they were landlords (Transcript, p. 11); whether or not they or their immediate families were tenants or involved in disputes with landlords (Transcript, pp. 13-14); if any prospective juror worked for an attorney (Transcript, p. 15); if any prospective juror had a bias toward either party for having hired an attorney (Transcript, p. 17); if any prospective juror had any problem with applying the law as instructed by the judge (Transcript, p. 19); or if there was any reason whatsoever that any prospective juror could not try the case impartially (Transcript, pp. 14-15).

SUMMARY OF ARGUMENT

It is undisputed that plaintiff did not timely object to any questions given or omitted by the trial court during jury voir dire. He declined to ask the court for further questioning at the close of the court's intended voir dire when the court

asked him specifically for any additional questions. He passed the jury for cause without objection. Having failed to raise such objections at the appropriate time and having failed to put any such objections in the record, such objections were waived and cannot now be raised on appeal. Plaintiff has not shown that the trial court abused its discretion nor that any such alleged abuse resulted in undue prejudice. The Utah Supreme Court's holding in Saltas v. Affleck, 105 P.2d 176 (Utah 1940), rendered subsequent to Balle v. Smith, specifically held that it was reversible error for prospective jurors to be interrogated as to their interest in a specifically named insurance company or even generally so as to indicate that an insurance company was the real party in interest. Injection of insurance into this case would have been reversible error.

ARGUMENT

POINT I.

PLAINTIFF'S VOIR DIRE OBJECTION IS WAIVED FOR FAILURE TO OBJECT AT TRIAL.

As noted on page 6 of Appellant's Brief, it was not until after the jury returned a verdict against plaintiff and in favor of defendant that plaintiff, in a motion for new trial, claimed any error involving jury voir dire.

In King v. Fereday, 739 P.2d 618 (Utah 1987), an appeal was taken alleging error on two grounds. First, appellant therein claimed that the trial court's failure to give particular jury instructions warranted new trial. Second, appellant therein claimed that the trial court abused its discretion in declining to

ask jury voir dire to determine any juror's connection to defendant's insurance company. The court rejected appellant's first argument on the basis that appellant had failed to object at trial. In this regard, the court stated:

The party claiming an error in the proceedings also bears the responsibility of assuring that "the record adequately preserves objection or argument for review in the event of an appeal." Barson, 682 P.2d at 837 (citation omitted). Id. at p. 621.

As the Utah Supreme Court pointed out in Condas v. Condas, 618 P.2d 491 (Utah 1980):

Defects curable at trial cannot be relied upon by a party if the trial court has had no opportunity to rule thereon. See, Drugger v. Cox, Utah, 564 P.2d 303 (1977). Id. at p. 495.

In like manner, the Utah Supreme Court "will not review alleged error when no objection at all is made at the trial level." State v. Leslie, 672 P.2d 79 (Utah 1983); Lopez v. Schwendiman, 720 P.2d 778 (Utah 1986).

Plaintiff made no objection to the voir dire asked by the trial court. The trial court specifically asked counsel for plaintiff if the jury was passed for cause and plaintiff's counsel made no objection. (Transcript, p. 19, line 22 through p. 20, line 7) Particularly instructive on this point is the case of Jahnke v. State, 682 P.2d 991 (Wyo. 1984). In that case, appellants claimed error as to the manner of jury voir dire. The Supreme Court of Wyoming stated:

Furthermore, the appellant has not made any showing by brief or argument with respect to

prejudice arising out of any inhibition of his exercise of preemptory challenges. The record is silent as to whether or in what manner the appellant exercised his preemptory challenges. His argument is not that he was denied his right with respect to the use of preemptory challenges, but simply that he could in some way have better utilized his challenges if the trial court had not exercised its discretion with respect to the conduct of voir dire in the manner in which it did. There is no error to be found in this claim. The appellant was entitled to a fair and impartial jury, not one which he perceived to be sympathetic. In this regard we note that the following matter does appear in the record on appeal:

The Court: Are the parties satisfied that a jury of 12, plus 2 alternates, has been drawn and qualified in this matter? Mr. Carroll?

Mr. Carroll: The state is satisfied, Your Honor.

The Court: And, Mr. Barnett?

Mr. Barnett: Defense is satisfied, Your Honor.

Id. at pp. 1000, 1003.

Just as in Jahnke, plaintiff made no objections to the questions actually asked by the court during voir dire, neither did plaintiff object to the jury actually impaneled.

The requirement that appellants object on the record to preserve an issue for appeal is well founded. The establishment of a record indicates both the objection and sets forth the grounds thereof. It alerts the trial court to the basis for the objection, thus enabling the trial court to consider the merits of the objection at the time it is raised in order to cure, if necessary, any defect, thus allowing the case to proceed in a

judicially efficient manner.

Plaintiff could have submitted to the court his proposed jury voir dire prior to the morning of trial and had the court rule prior to the day of trial. Such procedure would have allowed plaintiff to put any objections on the record at that time. He didn't. Plaintiff had the opportunity to object at the time of jury voir dire to the adequacy of questions actually asked. He didn't. The trial court specifically solicited further questions from plaintiff's counsel. No further questions were requested by plaintiff. Plaintiff's counsel was asked if he passed the jury for cause. This he did. Having failed to object at the time of jury voir dire, plaintiff cannot now raise this point on appeal.

In Higgins v. Hermes, 89 N.M. 379, 552 P.2d 1227 (1976), a defendant appealed a personal injury action claiming that plaintiff's extensive jury voir dire was prejudicial.

The defendant contends that reversible error was committed when the plaintiff's counsel intensively questioned a potential juror on voir dire about her employment with an insurance company and about her investments in insurance companies. The defendant argues that the questioning was overly lengthy and thus prejudicial to the defendant. No objection was made during the course of this testimony and therefore error was not preserved. State v. James, 76 N.M. 376, 415 P.2d 350 (1966); State v. Harris, 41 N.M. 426, 70 P.2d 757 (1937); Candelaria v. Gutierrez, 30 N.M. 195, 230 P. 436 (1924). [Emphasis added.] Id. at p. 1228.

Cruz v. Union Pacific R.R. Co., 707 P.2d 360 (Colo. App. 1985), is also helpful. In Cruz, the court stated:

Plaintiff argues that, had the motion been granted, certain allegedly improper questions

asked prospective jurors on voir dire or directed to plaintiff on cross-examination and some allegedly improper remarks in closing argument would have been prohibited. However, plaintiff's counsel did not object at the time any of these questions were asked or remarks were made. Therefore, errors, if any, were waived. Christensen v. Hoover, 643 P.2d 525 (Colo. 1982); Spears Free Clinic and Hospital for Poor Children v. Maier, 128 Colo. 263, 261 P.2d 489 (1953). [Emphasis added.] Id. at 362.

POINT II.

THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION AS TO JURY VOIR DIRE.

As acknowledged by plaintiff on page 10 of his Appellant's Brief, "matters of possible bias and prejudice on the part of the jury are within the discretion of the trial court." King v. Fereday, 739 P.2d at 622 (Utah 1987). It has long been noted that the trial judge has considerable discretion as to the manner and form in which he will conduct voir dire examination to determine the qualifications of jurors. Utah State Road Comm'n v. Marriott, 21 Ut.2d 238, 444 P.2d 57 (1968). In fact, matters of possible bias on the part of the jury and the trial court's ruling on whether to question prospective jurors with respect to such possible bias "will not be disturbed on appeal unless it is demonstrated that the court abused its discretion." Maltby v. Cox Constr. Co. Inc., 598 P.2d 336 (Utah 1979). Thus, it is clear plaintiff must first show that the trial court abused its discretion. He has not.

Plaintiff's reading of King v. Fereday, supra, on page 11 of his appellant's brief is inaccurate. Plaintiff asserts that:

The lower court's denial [in King v. Fereday] of the requested questions was upheld by this court only because the trial judge agreed to ask if any juror had "stock ownership in a business and, if so, the nature of the business."

Plaintiff neglects to note the questions actually asked in this case by the trial court, including the questions inquiring into the present or past employers of jurors and their spouses.

In King v. Fereday plaintiff therein asserted as error the trial judge's refusal during jury voir dire to inquire about the prospective jurors' connection to defendant's insurance carrier. After quoting Maltby v. Cox Constr. Co., supra, to the effect that such matters were within the sound discretion of the trial court and would not be disturbed on appeal unless demonstrated to be an abuse of discretion, the Utah Supreme Court, affirming, noted that plaintiff had failed to so demonstrate such abuse. The Supreme Court did not say it was upholding the trial court's discretion "only because the trial judge agreed to ask if any juror had stock ownership in a business" In fact, the Court stated:

We also note that trial judges typically ask jurors about their occupations. These questions were sufficient to bring to light any connection a prospective juror might have had with defendant's insurance carrier.

Second, plaintiff failed to include in the record the questions actually asked during the jury voir dire. As a result, a determination that the trial court abused its discretion in its voir dire of the jury would require speculation on our part. Id. at 623.

The trial court in this case asked each prospective juror about their own employment, their past employment if they were retired, their spouse's employment if they were married, and their spouse's prior employment if the spouse was retired. (Transcript at p. 3) In addition, the court asked if any of the jurors were acquainted with any of the parties (Transcript, pp. 7-9); if any of the jurors were acquainted with counsel or their respective law firms (Transcript, pp. 10-11); if any of the prospective jurors were landlords (Transcript, p. 11); if any of the jurors or their immediate families were tenants or involved in disputes with landlords (Transcript, pp. 13-14); if any prospective juror worked for an attorney (Transcript, p. 15); if any juror had a bias toward either party having hired an attorney (Transcript, p. 17); if any prospective juror had any problem with applying the law as instructed by the judge (Transcript, p. 19); if there was any reason whatsoever the prospective jurors could not try the case impartially (Transcript, pp. 14-15); or if any juror had read or heard articles calling for tort reform (Transcript, p. 17).

At the end of voir dire, the court specifically solicited further questions from plaintiff's counsel but no further requests were made. (Transcript p. 19, lines 19-21) In fact, while at the bench and while off the record, plaintiff's counsel fully acquiesced to the trial court's decision regarding the very ques-

tions at issue here. This fact points out the necessity of putting objections on the record.

From a review of the record, it is absolutely clear that the trial court in no way abused its discretion in the course of jury voir dire.

In addition to showing an abuse of discretion, plaintiff, from the record, must also show prejudice arising from the abuse. In Jahnke v. State, 682 P.2d 991 (Wyo. 1984), the court stated:

Furthermore, the party contesting the rulings of the trial court with respect to the scope and content of voir dire examination of jurors is obligated to establish not only an abuse of the trial court's proper discretion, but he must demonstrate the substantial prejudice to his rights as a result of that abuse of discretion. United States v. Robinson, 154 U.S. App. D.C. 265, 475 F.2d 376 (1973). See also, Hopkinson v. State, [632 P.2d 79 (Wyo. 1981)];

* * *

Furthermore, the appellant has not made any showing by brief or argument with respect to prejudice arising out of any inhibition of his exercise of preemptory challenges. The record is silent as to whether or in what manner the appellant exercised his preemptory challenges. His argument is not that he was denied his right with respect to the use of preemptory challenges, but simply that he could in some way have better utilized his challenges if the trial court had not exercised its discretion with respect to the

conduct of voir dire in the manner in which it did. There is no error to be found in this claim. The appellant was entitled to a fair and impartial jury, not one which he perceived to be sympathetic. [Emphasis added.] Id. at p. 1003.

When the record of the trial court's actual voir dire is reviewed, there can be no question: (1) That the court did not abuse its discretion as to what questions it chose to ask; (2) that absolutely no prejudice resulted to plaintiff as a result of the questions actually asked; (3) that plaintiff completely acquiesced in the questions actually asked by the court; and (4) that at the end of jury voir dire, plaintiff declined to request any further questioning of the jury.

Additionally, plaintiff's whole basis on appeal does not stand scrutiny. Plaintiff's position is that he has in some way been prejudiced because he was unable to find out which jury members had worked for an insurance company or owned an interest in State Farm Insurance Company. Neither of these possibilities has been established by plaintiff in the record. In fact, on the record, no impaneled juror worked for an insurance company.

Prior to trial, the trial court granted Hess' Motion in Limine that there would be no mention of insurance during the trial. Plaintiff agreed with this motion. (R. 94)

At the outset then, no jury member was going to hear any evidence or any mention of any insurance company whatsoever, much less State Farm. Therefore, it is absolutely clear that even if one of the jury members had owned an interest in State Farm or had worked for an insurance company some time in the past, such would

never be relevant to his consideration of the case since no jury member would know (1) whether or not either plaintiff or defendant was insured nor (2) that out of thousands of insurance companies, defendant was insured by State Farm. Plaintiff cannot claim any prejudice under these circumstances.

When one considers plaintiff's position in light of the simplest of analysis, it becomes clear that plaintiff's only interest in asking jury members whether or not they had worked for an insurance company or whether or not they had a financial interest in State Farm was to educate the jury that in fact Hess was insured by State Farm. This is clearly contrary to well settled Utah law.

POINT III.

UTAH LAW FORBIDS THE INJECTION OF INSURANCE INTO A NEGLIGENCE CASE SUCH AS THIS.

Plaintiff's brief relies almost entirely for Utah law on Balle v. Smith, 17 P.2d 224 (Utah 1932). That 1932 case was an action for personal injuries arising out of an automobile accident. In that case the court did state that a plaintiff was entitled to learn whether or not a juror was interested in or connected with an insurance company, but the court did not state under what circumstances such disclosure was warranted. The court did state:

The universal rule is that it is irrelevant to the issue of negligence whether the defendant is carrying liability insurance or not, and, subject to some qualifications which need not be here mentioned, such testimony is

wholly inadmissible. Courts have guarded jealously against the introduction of such evidence before the jury, not only because it is irrelevant to the issues, but because jurors are commonly thought to be prejudiced against insurance companies, and, if the fact were known that the defendant is insured, jurors would be less inclined to consider the case on the merits, and more inclined to render a verdict for plaintiff and in a larger amount than if the defendant, especially where the defendant is an individual, had to bear the loss alone. We do not say this suspicion is well founded, but merely that such prejudice is widely believed to exist. For the same reasons arguments and statements of counsel directly stating, or from which it may be inferred, that the defendant is insured, are forbidden. In many cases courts declare a mistrial, or on appeal a reversal, where counsel have abused their privilege by improperly forcing the fact that defendant is protected by indemnity insurance to the attention of the jury. Id. at 229.

Not cited in Broberg's Appellant's Brief is the case of Saltas v. Affleck, 105 P.2d 176 (Utah 1940), where, after discussing at length the prior case of Balle v. Smith, supra, the court held exactly contrary to Balle stating:

Within the rule of the cases it is prejudicial error for counsel to ask each of the jurors if he were an officer or stockholder of the Northwest Casualty Company of Seattle, Washington [the defendants' insurer]. The same ethical standards should be maintained in the questioning of jurors as of witnesses.

The case of Alexiou v. Nockas, 171 Wash. 369, 17 P.2d 911, 914, is direct authority that the examination of each juror, as was done in the instant case as to his insurance connection was prejudicial error. The court said: "The examination of the jurors by respondent's counsel constituted reversible error. We cannot countenance such inappreciation of the ethics as counsel manifested. The purpose of

his questions was, patently, to inform the jury that the loss would fall upon an insurance company instead of the appellant."

We are of the opinion it was reversible error for counsel to interrogate each juror as to whether he were a stockholder in a specifically named insurance company or generally so as to indicate that an insurance company was the probable real party in interest, a matter foreign to the issues in the case, when no preliminary questions had been asked.
Id. at p. 179. [Emphasis added.]

None of the prospective jurors in the instant case indicated any affiliation whatsoever with an insurance company during the jury voir dire. The court asked each juror to identify their own employer, their prior employer if they were retired, their spouse's employer, and their spouse's former employer if retired. The record indicates that such questioning satisfied plaintiff's interests in this regard. If not, counsel should have objected, giving the grounds for the objection. He should have at least requested further questioning such as ownership in a business when asked by the court for any such further questions. This he did not do.

In Robinson v. Hreinson, 17 U.2d 261, 409 P.2d 121 (Utah 1965), the court stated:

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. Id. at p. 123.

In Hill v. Cloward, 14 Ut.2d 55, 377 P.2d 186 (1962), the court, subsequent to Balle and Saltas, noted both the impropriety of injecting insurance into the case and the requirement to object

timely to preserve appeal:

It seems hardly necessary to state that the matter of insurance is quite immaterial to issues as to liability and damages, or the amount thereof. It is also true that inasmuch as the defendant is entitled to have this extraneous matter excluded from the case, the plaintiff is entitled to the same protection if he so desires. . . . In the instant situation candor requires recognition that it was improper for the defendant to inject the matter of insurance into the case.

But there is an insuperable difficulty with the plaintiff's position. His counsel let the incident pass without objection and without a request to rectify any harm he thought had been done. Fair play and good conscience require that he do so at the earliest opportunity. It would be manifestly unjust to permit a party to sit silently by, believing that prejudicial error had been committed, proceed with the trial to its completion, and allow the jury to deliberate and reach a verdict, to see if it wins, then if he loses, come forward with a claim that such an error rendered the verdict a nullity. If this could be done, proceedings after such an occurrence would be in vain and thus an imposition upon the court, the jury and all concerned. The court will not countenance any such mockery of its proceedings. If something occurs which the party thinks is wrong and so prejudicial to him that he thereafter cannot have a fair trial, he must make his objection promptly and seek redress by moving for a mistrial, or by having cautionary instructions given, if that is deemed adequate, or be held to waive whatever right may have existed to do so. Id. at pp. 187-188. [Emphasis added.]

In Ivie v. Richardson, 9 U.2d 5, 336 P.2d 781 (1959), the court stated:

There are additional circumstances in the instant case that are indicative of the fact that a fair trial was not had by the defendant.

Counsel for the plaintiff appears to have tried quite overtly to get before the jury the idea that the defendant was covered by insurance. Defendant's attorney found it necessary in cross-examining plaintiff to use a statement taken from her some time after the accident. Although counsel were well aware that this man was an insurance company investigator, plaintiff's counsel persisted in inquiring about identification of this man in the presence of the jury. Inquiry as to who the man was was quite proper, but inquiry as to his connections and purpose obviously lent itself to the thinly veiled ulterior design of getting the fact of insurance before the jury. There seems to be no question about the impression it made. Id. at pp. 786-787.

As explained at the end of Point II of this brief, plaintiff's only possible purpose in requesting questions regarding insurance was to get the inference of insurance before the jury. There was no possibility of bias resulting from an undisclosed presence of insurance. No juror worked for an insurance company and no impaneled juror knew the parties. No evidence was anticipated regarding insurance. Only if the jury was to be made aware that the defendants were insured, and insured by State Farm, could there be any possibility of bias. This did not occur.

Finally, it has long been Utah law that:

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.

* * *

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 is the duty of both counsel and the court to guard against it. Young v. Barney, 20 Ut.2d 108, 433 P.2d at 848-849 (1967). [Emphasis added.]

It should be noted that the Utah Supreme Court in Young emphasized this point in footnote, stating:

The writer recalls as pertinent here the wry comment of a much respected former member of this court in a comparable situation: "We could not make it any more definite unless we said damn it". [Emphasis added.] Id. at p. 849.

That such injection of insurance would be reversible error, see also, Gittens v. Lundberg, 3 Ut.2d 392, 284 P.2d 1115, 1118 (1955).

Clearly, it was well within the discretion of the trial court not to ask members of the jury about their connection with an insurance company in light of the fact that no issue in the case was to turn on insurance. Furthermore, the court's actual questioning about the juror's employment as well as their spouse's employment was sufficient to meet plaintiff's needs and within the discretion of the trial court. Finally, as the court noted in King v. Fereday, supra, plaintiff's counsel having failed to object at the time of trial waived any objection here.

CONCLUSION

It is undisputed, long standing Utah law that plaintiff cannot raise as a point on appeal an objection not raised at trial. Plaintiff's counsel had every opportunity to object and to put such objections on the record. This he did not do. He further failed to request any further questions which did not reach issues not covered in the jury voir dire when such further

questions were solicited by the trial court. He further passed the jury for cause without any objection and in fact made no protest whatsoever until after the jury returned a verdict against him.

The conduct of jury voir dire has long been within the discretion of the trial court. Without clearly showing that the trial court abused its discretion and that such abuse was prejudicial to plaintiff, no appeal is well taken even if it had been properly preserved.

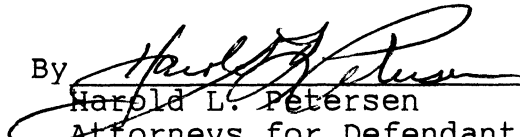
Notwithstanding the absence of plaintiff's objection at trial, the opportunity plaintiff had to have further questions submitted to the jury, and plaintiff's passing the jury for cause, the trial court's ruling, was not only within the court's discretion, but was required under Utah law. The court's holding in Saltas v. Affleck, subsequent to Balle v. Smith, as well as long standing Utah law state unequivocally that it is reversible error to inject insurance coverage into a negligent action such as this. The sole motivation for plaintiff's requested voir dire questions at issue in this case was to inform the jury of the presence of insurance. This was clearly inappropriate.

For the above-stated reasons, it is clear that the trial court's actions should be affirmed in every respect.

DATED this 4th day of December, 1987.

STRONG & HANNI

By


Harold L. Petersen

Attorneys for Defendant-
Respondent

CERTIFICATE OF HAND DELIVERY

I hereby certify that four true and correct copies copy
of the foregoing Respondent's Brief in the Case of Broberg v. Hess
was hand delivered this 4th day of December, 1987, to the
following:

Dale F. Gardner
Robert J. DeBry
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff-Appellant
4001 South 700 East, Fifth Floor
Salt Lake City, Utah 84107