

1997

## Lynn B. Astill v. Leesha Clark : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LYNN B. ASTILL,

Plaintiff/Appellant,

LEESHA CLARK,

Defendant/Appellee.

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Appellate Court No. 970180

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REPLY BRIEF OF APPELLANT

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Appeal from orders of the Third Judicial District Court, Judge Pat B. Brian, from jury verdict and from order denying motion for new trial.

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FILED

AUG 29 1997

COURT OF APPEALS

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## **STATEMENT OF THE ISSUES**

As it is her appeal, Astill prefers her Statement of the Issues to Clark's.

## **STATEMENT OF THE CASE**

### **NATURE OF THE CASE**

Astill's statement of Nature of the Case is more fact specific than Clark's. In Clark's Answer, she does not reply to those facts and issues stated by Astill.

## **STATEMENT OF FACTS**

Astill's Statement of Facts is more fact specific because it states in detail facts presented by both sides.

Astill disagrees with Clark's ¶11, at page 5, which states that Astill's counsel made an issue of Clark's impact speed in his opening statement, claiming this established proof of precise impact speed was part of Astill's case in chief.

As opening statements were not transcribed, recitation of the statement is a matter of the memory of counsel. Recollection is aided by the argument between the Court and counsel at the conclusion of Clark's case as to whether Astill could call rebuttal witnesses. The Court asked Astill's counsel why, if they knew speed was a factor, they hadn't put Mr. Lord on in their case in chief, the Court saying it was persuaded that Turner v. Nelson required that. (R731, L. 12 - 23)

Counsel replied:

"MR. KING: It is a matter of the shift of the burden of proof, your Honor. We had the burden of proving there was an accident, and resulting from the accident there was an injury. The defense said they would prove that the impact was sufficiently low speed, that the injury would probably not have occurred. They may not have put on



that defense depending on how our case went. Depending on how effectively they put their case on, we may or may not need the expense of a rebuttal witness. But we certainly don't need to take the time of the Court and of the jury with rebuttal witnesses until they have carried their burden of proof by showing they have a serious challenge to our version of the facts. At that point we called the rebuttal witness, and that was what the rebuttal witness is for, and this is the classic use of it." (R731 L. 24 - R732 L.12)

"MR. KING: I didn't have — I didn't care what speed was testified to. When she talked about speed and measurements and so forth, I said those are approximations. She acknowledged that. She said it was at least ten miles an hour. But ten miles was not vital to our case.

"THE COURT: It is three times the amount of the anticipated testimony of the defense expert. You said that you have known all along he was going to estimate this speed at three to four miles an hour, even if you went at ten miles an hour.

"MR. KING: Supposing they decided not to call Mr. Knight.

"THE COURT: It would have been a plus for you, probably.

"MR. KING: Possibly. But the thing is I don't have to put on testimony that speed is a factor in the injury until they put on testimony that it is not." (R741 L. 6 - 22)

This dialog with the Court confirms Astill's counsel recollection of his opening statement, that he told the jury that Mrs. Astill who had estimated Clark's speed at 15 - 25 mph in her deposition was obviously too high because there would have been more damage to her car. Similarly, Mrs. Clark's deposition testimony that she merely touched the Astill vehicle was too low because the Astill Explorer bumper brackets were bent. As a result, Astill's counsel told the jury that the exact speed was unknown, but didn't have to be determined. What Astill would prove was that there was an impact sufficient to damage her car and injure her.

It was defense that made an issue of exact speed. This is further confirmed in the argument with the Court when the Court said:

“THE COURT: You don’t have to put anything on in a civil defense. They could have rested at the conclusion of your case, sent it to the jury, and let the jury do what they want to.

“MR. KING: They might have come up with 15 other theories.

“THE COURT: What they might have done and what they in fact did do are worlds apart, and the Court is of the opinion that you simply cannot sandwich the defense with testimony that you have known and anticipated right from the beginning, and hope to maybe get the last word in. I don’t know what it is.

“MR. KING: I didn’t know what to have Mr. Lord say until I heard exactly what Mr. Knight said and exactly the bases that he used. I couldn’t use Mr. Lord in advance.” (R742, L. 10 - 24)

The Court’s whole conceptual error that Plaintiff had to put in her case in chief evidence anticipating the defense is traceable directly to defense counsel misquoting Turner v. Nelson. The Court said:

“THE COURT: Let the Court reason outloud for a moment on the record, and then I will invite both counsel to respond. The Court has been cited by both counsel to the case of Turner vs. Nelson. It is a Supreme Court case decided March of 1994. The holding in that case regarding the calling of rebuttal witnesses centered on whether or not the evidence sought to be rebutted could reasonably have been anticipated prior to trial. If it could, then the witness should be called in the case in chief.

"MR. KING: No, your Honor, it is not what the case said.

(R734, L. 13 - 23)

That the erroneous ruling of law was due to defense misciting Turner is confirmed.

"MR. HANSEN: Having been counsel for Plaintiff in Turner vs. Nelson...

"THE COURT: Were you on the winning or losing side of that?

"MR. HANSEN: I was on the side that tried to present the new witness. I was on the losing side. We briefed this before the Supreme Court. So I know the arguments and the positions of the parties and the underlying facts. Let me indicate that I think the Court's reading of Turner vs. Nelson is exactly correct..." (R744, L. 2 - 11) (Emphasis added.)

Astill's testimony conformed to the Opening. She said she didn't know how fast Clark was going, estimated 15 mph, and said her figures were approximations. (R425 L. 13 - 427 L. 21)

Astill disagrees with Clark's ¶15, page 5, claim that the exclusion of witnesses was in the pre-trial order. There is no "pre-trial order." There is only a scheduling order (R28 - 29), and it makes no reference to exclusion of witnesses.

Astill disagrees with Clark's ¶16, page 6, as it omits the key factor used by Mr. Knight in his assessment of speed. This is covered in Astill's brief at pages 6 - 8, quoting Mr. Knight's repeated testimony that the impact speed had to be not over four miles an hour or the Taurus bumper would have deformed.

## **SUMMARY OF ARGUMENTS**

Concerning Clark's arguments in the last two paragraphs at page 10, that Astill is at fault for knowingly choosing to forego deposing Mr. Knight or choosing a neurologist of her own to attend her IME, please see Economic Realities, at page 14.

### **ARGUMENT**

#### **POINT I**

**THE COURT'S REFUSAL TO ALLOW PLAINTIFF TO CALL REBUTTAL WITNESSES WHEN THEIR PURPOSE WAS TO REBUT WRONG TESTIMONY GIVEN BY CLARK'S EXPERT CONSTITUTED PREJUDICIAL ERROR.**

Astill stands primarily on the statements in her brief, pages 13 - 21.

Astill takes exception to the statement in Clark's brief at page 12, bottom paragraph, that during the argument on Astill's right to call a rebuttal witness, he made a false statement of law regarding the duty of each party to carry its own burden of proof. Clark cites Ames v. Maas, 846 P.2d 467,471 (Utah App. 1993). A reading of that case will show it has no holding as Clark argues.

Responding to the heart of Clark's argument, which appears to be that if a plaintiff knows that the other side will raise a point in its defense, that the plaintiff has to anticipate that point in their case in chief, even though not vital to their stating of a prima facie case and even though the rebuttal would be restricted to new matter raised by the defense. Astill submits that is not the law.

Clark cites Sirotiak v. H.C. Price, 758 P.2d 1271, 1278 (Alaska 1988), “that plaintiff may not ignore known defense theories....” Clark did not include the beginning statement in that paragraph which states, “Although the plaintiff is not required to anticipate defenses...”

Astill notes that Clark, at page 15, restates the argument that Turner v. Nelson, supra, stands for the proposition that rebuttal witnesses should be excluded if Astill “knew or should have reasonably anticipated the defense,” as Plaintiff should call such witnesses in the case in chief.

While more moderately stated than at trial, defense’s use again of Turner v. Nelson for a rule of law it does not make, lends support to Astill’s Brief Point 7, pages 35 - 38, that this Court should consider an award of fees.

Clark’s Point I gives the view that the trial court’s decision to exclude Astill’s rebuttal witnesses was merely a matter of routine case management well within the discretion of the trial court. Clark does this by avoiding mention of the errors of Mr. Knight, or the affidavits of Hardle or Lord in Astill’s Brief, Ex. 7&8.

As Astill will demonstrate, if the rebuttal evidence is reliable, probative, and crucial, the court abuses its case management discretion in rejecting it.

Weiss v. Chrysler Corporation, 515 F.2d 449 (1975) involved the appellate reversal and remand for new trial of a trial court’s ruling excluding Plaintiff’s rebuttal witnesses to facts and theories presented by defense, which Plaintiff had not had to deal with in order to present her prima facie case, holding that plaintiff had no duty as part of her case in chief to negate manufacturer’s theory. The Court held

as a ground for reversal that the trial court improperly excluded the rebuttal evidence stating:

“While a trial judge has discretion to exclude rebuttal evidence which would have been admissible if offered as evidence in chief, such discretion should be tempered greatly where the probative value of the proffered evidence is potentially high and where such evidence, though admissible in the case in chief, was unnecessary for the plaintiff to establish in its prima facie case. We believe that the proffered testimony of Rader, (plaintiff’s excluded rebuttal witness) even if it might have been part of plaintiff’s case in chief, was not merely cumulative and should have been admitted in the exercise of sound judicial discretion.

“...But we also believe that Rader’s testimony was not necessarily a part of plaintiff’s case in chief. Plaintiff presented a prima facie case that the steering mechanism was defective. Her own testimony that the steering failed, the finding of a twice-fractured Pitman arm stud after the accident, and the testimony of the experts that the first fatigue fracture could have been followed by a final complete fracture before the car left the road satisfied her burden to go forward. She had made her prima facie case. In the words of Wigmore ‘For matters properly not evidential until the rebuttal, the proponent has a right to put them in at that time, and they are not subject to the discretionary exclusion of the trial court... matters of true rebuttal could not have been put in before, and to exclude them now would be to deny them their sole opportunity for admission.’

“That does not mean, of course, that in every case where evidence is improperly excluded on rebuttal there must be a new trial. On the contrary we must approach such questions with a rational liberality. The problem here is that the issue was crucial (emphasis added). The jury was entitled to hear the evidence and the plaintiff had no cause or duty to go forward to negate in its case in chief the defense opinion of Mazur negating as the cause of the accident the defect in the Pitman arm stud. ‘The plaintiff was not required to offer evidence which positively excluded every other possible cause of the accident...’ (Emphasis added.)

‘Where the proponent has found it necessary or desirable, by reason of the opponent’s cross examination, partly to anticipate his case in rebuttal by going to it during his case in chief, --for example,

on a re-direct examination; here he may take up the same subject again during the rebuttal.'

"Since we have found that the exclusion of Rader's testimony was critical because of its relevance to the central issue of the case, its exclusion is manifest error. The testimony excluded in this battle of experts might have changed the verdict." (Emphasis added.) (Citations omitted.)

Astill submits that Weiss states the general law, and mentions that a careful reading of all cases cited by Clark finds none requiring that Astill in a fact situation comparable to the one at bar need anticipate the defense by rebutting it in the Plaintiff's case in chief.

Two Utah cases published after Astill's brief establish tests on each point, probativeness and importance, that Astill accepts and incorporates.

In State v. Pearson, 323 Utah Adv. Rep. 15 (8/12/97), Defendant sought to rebut the State's evidence concerning his intent to kill in a shooting by use of a reconstruction test which would lead to a different result concerning his intent. Justice Durham noted that the comparison test accounted for only some of the factors and said:

"Thus, the evidence did not serve a significant probative function.

"With regard to unfair prejudice, among the important variables of the nature of the evidence offered, the quality of the other evidence available to the finder of fact, and the centrality of the issue to which the scientific evidence is directed...." (Emphasis added.)

Astill accepts this criteria that for there to be error the excluded evidence must have had a high probative value and been central to the issues. That Mr. Knight erred, is no longer in dispute.

We begin at the trial level with Astill's New Trial Motion. Annexed were the Affidavits of Lord and of Hardle (Astill Brief, Ex. 7, 8). Mr. Knight testified at trial that the Taurus had four different bumper support systems. Lord and Hardle said it only had one. Reconstructionists own and have access to automobile parts books. They use them continually for matters just such as this. If the Taurus in fact had four support systems, Clark would have filed a rebuttal affidavit including pages from the parts books. She didn't because she couldn't.

Similarly, on appeal, Clark makes no mention at all of Knight's error on this vital point. The effect is that having had the opportunity to point out that Astill's experts were wrong, instead she has vacated the field, thereby conceding they are right.

The dynamics of the trial, as stated in Astill's Brief on Appeal Point 1, is the reason Mr. Knight gave the wrong testimony.

In probing his foundation to give his speed opinions, Astill's counsel asked him if he knew the impact force necessary to bend the Taurus bumper supports. Rather than admit that he did not know the answer, which had a major bearing on impact speed, he said he couldn't answer because the Taurus had four different series of bumper support systems, and, as Clark's vehicle had been rented, returned to the renter, and could not be located, he couldn't tell which support system hers had and so couldn't answer the question. In so answering, he creatively and persuasively avoided having to admit that he knew so little about the Taurus that he couldn't answer the question.



This error in Knight's testimony had to be rebutted. It affects the jury's entire view as to his credibility or, here, the lack thereof.

As to Knight's other error, Clark has also admitted the accuracy of Astill's claim that the Taurus bumper rebounds from an impact up to over 15 mph without deforming (Lord Affidavit, ¶¶7, 8, Hardle Affidavit, ¶¶5 - 10). As with the parts books, data is available as to the basic impact absorption and reaction characteristics of the Taurus bumper. No such data, nor any knowledgeable contradicting affidavit was filed. Before this Court, Clark makes no mention of Mr. Knight's wrong impact absorption testimony, nor of its affect on the jury.

In sum, on the record, Knight's errors are admitted.

Thus, Astill's excluded rebuttal evidence meets the "probative value" test.

Astill now goes to the second part of the equation, importance or cruciality, as stated in the other recent Utah case, Jones v Cyprus Plateau Mining, Corp., 323 Utah Adv. Rpt 15 (8/12/97). Jones reviews and applies the Utah test to determine if error in exclusion of evidence is prejudicial. In Jones, admission of proof of failure of an employer, Defendant, to receive a Mine Safety and Health Administration citation for wrongdoing, was offered as probative to the jury of the fact that MSHA had investigated and had not found Defendant's conduct wrongful. The trial court refused to admit the evidence.

There was an issue as to whether the trial court abused its discretion under Rule 403 U.R.E., in excluding the evidence, but the appellate court held it did not have to reach the Rule 403 issue because whether the trial court erred was

immaterial as Defendant couldn't prove the error was prejudicial. The Court said there was no prejudice as on the facts whether the admission of the excluded evidence would have influenced the jury was "mere speculation."

The appellate court held, and this is the test Astill accepts:

"Harmful error occurs where 'the likelihood of a different verdict is "sufficiently high so as to undermine confidence in the verdict.'"

"...Because Cyprus has not demonstrated that it was prejudiced by the trial court's ruling to exclude this evidence, we need not consider its other contention."

When a jury hears un rebutted evidence by an expert it can assume the evidence would have been rebutted if it were not accurate. If that testimony is incontrovertibly and absolutely wrong, exclusion of rebuttal destroys plaintiff's chance of being believed by the jury. This makes rebuttal of Mr. Knight crucial evidence.

The only remaining basis to sustain the trial court's exclusion of rebuttal is its mistaken belief that Plaintiff had to anticipate the defense by putting evidence relating to the defense in the case in chief. Clark still argues as she did at trial that Turner v. Nelson so holds. (Clark Answer P. 15, 25) Astill replies that Turner does not hold that nor is it the law. (See infra, page 1-4)

This general rule is restated at 29 Am Jur 2d Evidence, §158:

"As a rule, a party is under no obligation to anticipate and negate in its own case in chief any facts or theories that may be raised by another party."

In accord, Duncan v. Cessna Aircraft Co., Tex App., 632 S.W. 2d 375 (1982).

Finally, In Pitasi v. Stratton Corp., 968 F.2d 1558 (2nd Cir. 1992), the appellate court held:

“It is well-settled that a trial court’s determination concerning the order of proof and the scope of rebuttal testimony will not be disturbed absent an abuse of discretion. However, ‘such discretion should be tempered greatly where the probative value of proffered evidence is potentially high and where such evidence, though admissible on the case in chief, was unnecessary for the plaintiff to establish in its prima facie case.’

“The testimony that Pitasi sought to elicit was not necessary for its prima facie case. Rather, it would have served the permissible rebuttal function of in fact impeaching Stratton’s witnesses who have testified during its case-in-chief that the side entrances to this trail had never been closed. Because this testimony was highly relevant and material to impeach the credibility of defendant’s employees, we hold that the district court erred in excluding it.” (Citations omitted.)

## **ARGUMENT**

### **POINT 2**

#### **THE COURT COMMITTED ERROR IN NOT ALLOWING ASTILL’S DESIGNATED EXPERT TO SIT BESIDE, AND ASSIST, ASTILL’S COUNSEL DURING TESTIMONY OF CLARK’S KEY ACCIDENT RECONSTRUCTION EXPERT.**

Astill stands on the point as she stated it in her Brief pages 21 - 25.

Clark in her Answer says the trial court has discretion to exclude all witnesses. That discretion is not unfettered.

To start, Rule 615, U.R.E., does not authorize the Court to exclude “(c) A person whose presence is shown by a party to be essential to the presentation of the parties’ cause.”

Mr. Lord has already been shown as being vital because he would have lead Astill's counsel to ask the right questions concerning Mr. Knight's errors on bumper deformation and multiple bumper support systems.

Morvant v. Const. Aggregates Corp., 570 F.2d 626 (6<sup>th</sup> Cir. 1978) is a case where a trial court's refusal to allow plaintiff's expert to attend testimony of defendant's expert, was found a basis for reversal.

In reversing, the Court stated:

"We perceive little, if any, reason for sequestering a witness who is to testify in an expert capacity only and not to the facts of the case. As Professor Wigmore's treatise summarizes:

'The process of sequestration consists merely of preventing one prospective witness from being taught by hearing another's testimony...'

"Theoretically at least, the presence in the courtroom of an expert witness who does not testify of the facts of the case but rather gives his opinion based upon the testimony of others hardly seems suspect and will in most cases be beneficial, for he will be more likely to base his expert opinion on a more accurate understanding of the testimony as it evolves before the jury.

"As made before the trial court, plaintiff's argument for invoking subsection (3) appears to be based upon the language of Rule 703 of the Federal Rules of Evidence, which at least implies that experts will be present in court to hear the evidence:

'The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing....'

"This view has support from Judge Weinstein, who observes:

'Certainly an expert who intends to base his opinion on "facts or data in the particular case" (Rule 703) will be

unable to testify if he has been excluded [from the court room by an order under Rule 615.”

Astill takes particular exception to the argument made by Clark in her Brief, page 20:

“B. Any harm to Astill from the exclusion could have been avoided if Astill’s counsel had taken Knight’s deposition before trial.”

Whether a party does, or not retain experts, or conduct extensive discovery, is discretionary with the party.

THE ECONOMIC REALITIES HAVE TO BE CONSIDERED.

Rule 1, U.R.C.P. says the purpose of the rules is to insure civil litigation will be handled in a manner that is “speedy, just, and inexpensive.”

These are three magnificent adjectives, chosen with great care.

Sometimes we lose sight of Rule 1. Astill submits that it is the foundation of all of the other rules, a point of reference by which all civil litigation should be regularly measured. Rule 1 applies directly to this case.

Astill’s evidence, supported by her doctor, husband, and co-worker, was that the accident really changed her life. If she spent a day hard at work, in office, house or yard work, she would have severe pain. She had to give up, or limit, the activities she had loved, such as waterskiing and gardening.

Her medical testimony was that her condition was incurable and permanent, that she would have to deal with pain each day of her life.

What is such a case worth?

The possible recovery determines the amount Astill spends. Defendant had \$25,000 in insurance on her rental car and another \$25,000 as her own liability limit, a total of \$50,000. This by the way is why she has two lawyers, one for each insurer.

Garnishment and executions on Clark's personal assets are subject to bankruptcy discharge.

Astill's lawyer's knew that if the jury accepted Astill's case as true and awarded a large verdict, the practical ceiling was \$50,000. They knew also that many Utah juries bring in conservative verdicts, and Astill might get an award of \$10,000 - \$20,000. Astill's counsel also knew that the real purpose of Clark calling two experts, the reconstructionist and the IME neurologist, was to doubly impeach Astill.

Each would say that she misstated on their separate topics. Astill's anticipation was correct, as they did so at trial.

This was a double negative equation. Without spending enough money she would be defenseless against Clark's experts. If she spent too much money and lost, she would have unpayable debt.

In a major case, case costs are almost no object, when seven figure, collectible, jury verdicts stand as a reward. Those cases are rare.

The typical automobile accident case maximizes at the defendant's liability limits, which are usually low, and then only if the jury can be persuaded to award them.

Astill is a typical client. She and her husband both worked, so they had an adequate income. They had four children to support, all dependent. They spent their money carefully.

A plaintiff's lawyer has to analyze each major case cost with his client before he spends the money. How far will a client go? The client knows they are obligated for actual expenses, win or lose, and they know most of these expenses are not taxable as court costs.

Astill agreed to spend the money to retain her doctor, agreed to spend the money to pay the expert witnesses' time charges to depose Dr. Nord, and agreed to spend the money to retain Mr. Lord, after Mr. Knight had been named as the defense witness. Those are major expenses.

Judge Brian's ruling that the only allowable monitor at her IME (Point 4, *supra*) would have to be a specialist in the same field as Dr. Nord, a neurologist. What would Astill's costs be to retain a neurologist for herself, knowing he would charge her at least \$300 an hour?

Her counsel would have to talk to him long enough to acquaint him with the issues and get his acceptance, he would first have to review her entire medical chart, he would travel to Dr. Nord's office and wait with her, an hour as it turned out, until Dr. Nord examined her, he would sit through the examination, he would read and critique Dr. Nord's report, he would spend adequate time with Plaintiff's counsel to prepare for trial, and then he would go to trial. This is an expense of at least 10

hours, \$3,000, and very possibly twice that figure. Astill couldn't afford a neurologist. Judge Brian gave her a remedy she couldn't afford.

Considering all that Astill spent, could she afford to depose Mr. Knight? There would not just be the cost of the court reporter. Deposing the opposing expert requires a commitment to pay his expert time fee for preparation, travel and attendance.

While her counsel told her they would like to depose Mr. Knight, they also told her that he was considered predictable and, if Mr. Lord sat in during his testimony, he could probably be effectively impeached.

If deposing Mr. Knight had been absolutely vital, Astill might have authorized the expense. Hard pressed as she was, she declined. She should not be faulted for that.

Let us assume she got a \$30,000 verdict. If she takes out \$7,000 - \$10,000 for costs, takes out a third for fees, pays \$3,000 back on her PIP, and more money for her other lien holding health insurers, she can look forward to taking \$5,000 - \$10,000 home.

The figures are realistic and routine. There is something wrong with this equation. The person with a permanent injury who wins her case needs better compensation.

Of course, plaintiffs urge that the minimum limit in Utah on liability coverage be \$100,000. This is supported by the social argument that the increase from \$25,000 costs little in premiums, and keeps many injured people from becoming



welfare recipients. That though is not a matter now before this court except as illustrative of argument.

Costs of case preparation and presentation are. They have become destructive to the goals of Rule 1.

The indulgence of this Court is requested to now apply these observations to the facts of the case.

Astill's decision not to spend money to depose Mr. Knight nor retain her own neurologist, is her legitimate decision based on two factors - what she could afford to spend and how vital the expense was to her case. She could legitimately consider whether an economic decision would hurt her, but not destroy her. She had constantly to judge between presenting a perfect case and managing her family assets. In this she is typical.

Anticipating Point 4, *supra*, Judge Brian's order authorizing her to obtain a neurologist to attend Dr. Nord's IME, but not allowing her to videotape that exam, at virtually no cost, is in context of this discussion, patently untenable. He gave her a right without a remedy.

Although Rule 35(a) U.R.C.P. gives the Court the right to refuse an IME, this discretion is almost never invoked in a tort case. The trial court routinely makes two decisions in such cases. First, the IME is allowed. Second, defense may choose the examiner no matter how extreme his reputation for partiality may be. The third routine order should be that the IME be videotaped.

Frequently it is the manner of the IME that is defective.

This case proves the point. Mrs. Astill claimed that she had fibrositis arising from the accident. Dr. Nord testified he found no symptoms of it.

Mrs. Astill, who gives therapy to people who have fibrositis, testified that she is familiar with fibrositis trigger points and that he did not palpate hers.

This produced a great contradiction between Astill and Dr. Nord.

Videotaping the IME would have also been preferable to her having her own neurologist attend. Had he done so, he would have testified the examination was inadequate. Dr. Nord would have testified that it was adequate. Then the jury would have to judge, or guess, between them as it gauged their credibility.

The videotape would have shown whether he precisely palpated the appropriate trigger point areas or not. Facts beat theories. Seeing beats interpretation.

Astill's counsel do not need to prove that every IME is slanted for the company that hires the doctor. Actually, two years ago counsel saw an IME that agreed with the plaintiff's attending physicians. He has noted that that doctor has never resurfaced on another IME.

The possibility that the IME might be slanted, or equally that it might be perfectly performed and that the plaintiff complains unduly, is a real possibility. Either way if the dispute concerns the manner of the examination, the videotape preserves the evidence better than any other mechanism.

Defenders know that they can spend plaintiffs into positions where they can't respond. After all, plaintiffs frequently have interrupted earnings as a result of their accident.

Mrs. Astill asks that her economic decisions not be used against her by the very party who forced her to make them.

## **ARGUMENT**

### **POINT 4**

THE COURT ERRED IN DENYING ASTILL'S MOTION TO HAVE HER ATTENDING PHYSICIAN ATTEND THE INDEPENDENT MEDICAL EXAMINATION GIVEN ASTILL BY CLARK'S DESIGNATED DOCTOR OR ALTERNATIVELY TO ALLOW VIDEOTAPING OF THE I.M.E. DURING TRIAL THERE WAS A CONFLICT BETWEEN ASTILL AND THAT DOCTOR AS TO THE ADEQUACY OF THE EXAMINATION GIVEN HER BY HIM AS THIS RESULTED IN A DIRECT CONFRONTATION OF CREDIBILITY BETWEEN THE TWO THAT COULD HAVE BEEN RESOLVED AND AVOIDED BY AN APPROPRIATE MONITOR OF THE EXAMINATION.

Astill submits the matter as argued by both sides, with reference to her preceding Economic Reality argument. Astill also submits that, "statutes or rules in particular jurisdictions may accord a litigant the right, or at least the opportunity, to have his or her attorney or physician present during a medical examination by an opponent's doctor." 84ALR4th 558, Counsel or Doctor at Examination.

Further, Michigan Court Rules state that the litigant has the right to a monitor (See Nemes v. Smith, 194 NW 2d 440). Also specific statutes in Illinois (cited in McDaniel v. Toledo, 36 FR Serv 2d 101) and in the state of California (cited in Vinson v. Superior, 740 P.2d 404), also allow the monitor.

## **ARGUMENT**

### **POINT 7**

**ASTILL IS ENTITLED TO FEES AS THE COURT'S PRIMARY ERROR WAS IN EXCLUDING ASTILL'S REBUTTAL WITNESSES AND THE COURT WAS LED INTO THIS ERROR BY KNOWINGLY WRONG ARGUMENT CONCERNING TURNER v. NELSON, 882 P2d. 1021 (Utah 1994).**

Astill refers to page 1-4, *infra*.

Astill notes that Clark at pages 15 and 25 of her Answer still maintains that her counsel made a good faith argument, that Turner v. Nelson supports the proposition that Astill has to anticipate a defense in her case in chief rather than by meeting the defense in rebuttal. Turner never said that. Turner dealt with a surprise rebuttal witness. Mr. Lord was identified as a rebuttal witness to Clark's counsel over one month before trial. He was not a surprise.

Clark's counsel, Mr. Hansen, was counsel for Turner in that case and on the appeal. He told this to Judge Brian and it naturally enhanced his credibility - he was the resident expert on the point.

The effect on Astill was tremendous. Turner was the only case submitted to Judge Brian in Clark's motion to exclude Mr. Lord and Mr. Hardle as rebuttal. Except for that misleading argument, there is a good probability that Mr. Lord and Mr. Hardle would have testified. Had they done so, there is an overwhelming probability that Astill would have obtained a verdict.

When counsel submits a single case to a judge on a surprise motion, counsel must be constrained to cite that case accurately. Defense counsel did not do so.

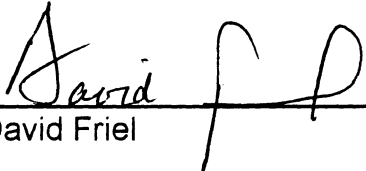
While it may be hard to hold them liable for fees, it is much harder for Mrs. Astill to have to fund a second trial, this appeal and endure the long wait between trials.

### CONCLUSION

Plaintiff prays relief as in her Brief on Appeal.

Respectfully submitted.

Dated this 29 day of August, 1997.

  
\_\_\_\_\_  
David Friel

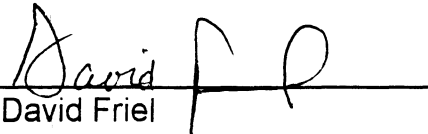
## CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, four true and correct copies of the foregoing document on this 29 day of August, 1997, by United States

Mail, first class, postage pre-paid, to:

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S:Astill.rpy br