

1997

# John Durrant v. Bradley E. Bryant, Workers Compensation Fund of Utah, Utah Transit Authority : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN DURRANT, )  
)  
Plaintiff/Appellant, )  
)  
vs. )  
)  
BRADLEY E. BRYANT, )  
WORKERS COMPENSATION FUND )  
OF UTAH, and UTAH TRANSIT )  
AUTHORITY, a Utah corporation, )  
)  
Defendants/Appellees. )

Appeal No. 970302

BRIEF OF THE APPELLANT

**97 - 0659 - CA**

APPEAL FROM  
THE SECOND JUDICIAL DISTRICT COURT  
OF WEBER COUNTY  
Judge Stanton M. Taylor

Oral Argument Priority Classification No. 15

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**FILED**

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COURT OF APPEALS

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	)	Appeal No. 970302
Plaintiff/Appellant,	)	
	)	
vs.	)	<b>BRIEF OF THE APPELLANT</b>
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## **JURISDICTION**

The Utah Supreme Court has jurisdiction to hear this matter pursuant to Utah Code Ann. § 78-2-2 (3) (k) (1996); and Utah Code Ann. § 78-2a-3 (2) (h) (1996).

## **STATEMENT OF THE ISSUES**

1. Did the trial court err in its denial of Plaintiff's motion for a directed verdict as to the liability of Defendant Bryant after Defendant admitted that he failed to yield the right-of-way in violation of Utah Code Ann. § 41-6-73 (1996) and failed to introduce evidence of a legally adequate excuse?

When reviewing a district court's ruling on a motion for directed verdict, the Court must view the evidence in the light most favorable to the non-moving party. Finlayson v. Brady, 121 Utah 204, 240 P.2d 491 (1952). The motion should have been granted if reasonable minds would not differ on the facts to be determined from the evidence presented. Management Comm. Of Graystone Pine Homeowners Ass'n ex rel. Owners of Condominiums v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982).

2. Did the trial court err in denying Plaintiff's motion for judgment notwithstanding the verdict when Defendant Bryant admitted he failed to yield the right-of-way and Defendant acted on signals given by Defendant UTA's driver?

With respect to the motion for judgment notwithstanding the verdict, the standard of review is whether, when the evidence is viewed in the light most favorable to the prevailing party, the evidence is insufficient to support the verdict. Hansen v. Stewart, 761 P.2d 14 (Utah 1988).

3. Did the trial court err in refusing to administer Plaintiff's proposed jury questionnaire regarding tort reform, and if so did the error substantially impair Plaintiff's ability to make informed peremptory challenges?

This issue is examined under an abuse of discretion standard. Evans v. Doty, 824 P.2d 460, 462 (Utah Ct. App. 1991), cert. denied 836 P.2d 1383 (Utah 1992). A trial court's discretionary ruling will be overturned only upon a showing that "the abuse of discretion rose to the level of reversible error." State v. Hall, 797 P.2d 470, 472 (Utah Ct. App. 1990), cert. denied 804 P.2d 1232 (Utah 1990). Reversible error has been committed when the appellant's right to the informed exercise of peremptory challenges has been "substantially impaired." Barrett v. Peterson, 868 P.2d 96, 103 (Utah Ct. App. 1993) (citing Hornsby v. Corporation of the Presiding Bishop, 758 P.2d 929, 933 (Utah Ct. App. 1988)).

## **DETERMINATIVE LAW**

Pursuant to Rule 24(a)(6) of the Utah Rules of Appellate Procedure, there are no constitutional provisions or statutes whose interpretation is determinative or of central importance to the appeal, with the exception of Utah Code Ann. § 41-6-73 (1996), which provides as follows:

The operator of a vehicle intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close to the turning vehicle as to constitute an immediate hazard.

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## STATEMENT OF THE CASE

### A. Procedural History

On March 17, 1994, Plaintiff/Appellant John Durrant filed a complaint for personal injury against Defendant/Appellee Bradley E. Bryant in the Second Judicial District Court of Weber County. (Dist. Ct. R. 4.) Defendant Bryant answered this complaint on April 13, 1994. (Dist. Ct. R. 14.) On October 26, 1994, Plaintiff filed a First Amended Complaint against Defendant Bryant, and added as defendants Workers Compensation Fund of Utah<sup>1</sup> and the Utah Transit Authority (“UTA”). (Dist. Ct. R. 1.) Defendant Bryant’s answer to the First Amended Complaint was filed on November 14, 1994. (Dist. Ct. R. 58.) Defendant UTA’s answer was filed on December 14, 1994. (Dist. Ct. R. 72.)

The matter came on for jury trial on October 30, 1996, before the Honorable Stanton M. Taylor. (Dist. Ct. R. 528.) The result was a mistrial because so many jurors were dismissed for cause that there were insufficient jurors left to make up a panel after peremptory challenges. (*Id.*) The case came on a second time on February 18-21, 1997. (Dist. Ct. R. 613.) Before the October, 1996 trial, Plaintiff filed a motion to submit a questionnaire regarding tort reform to the jury panel. (Dist. Ct. R. 436.) The questionnaire was not submitted to the panel at either trial. (Dist. Ct. R. 528, 618.)

After the conclusion of Plaintiff’s case on February 19, 1997, Plaintiff made a motion for directed verdict as to the liability of Defendant Bryant pursuant to Rule 50 (a) of the Utah Rules of Civil Procedure. (R. Vol. II 234:2-7.) This motion was denied by the court on February 21, 1997. (R. Vol. IV 39:15-20.) The jury returned a verdict of no cause of action on February 21,

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<sup>1</sup> Although Workers Compensation Fund was named as a defendant, it did not participate in the litigation or trial in any way and is not a party to this appeal.

1997. (Dist. Ct. R. 828-831.) Following the verdict, Plaintiff made a motion for judgment notwithstanding the verdict pursuant to Rule 50 (b) of the Utah Rules of Civil Procedure. (Dist. Ct. R. 618.) The trial court denied this motion. (Id.) The final judgment was signed by Judge Taylor on April 29, 1997, and was entered by the court on May 6, 1997. (Dist. Ct. R. 881.) Plaintiff filed his Notice of Appeal on May 23, 1997. (Dist. Ct. R. 890.)

### **B. Statement of the Facts**

This matter arises out of an automobile accident that occurred on September 30, 1993, on Riverdale Road in Ogden, Utah. (R. Vol. I 158:15-20.) Traffic was heavy due to construction on Riverdale Road. (R. Vol. I 163:15-18; 172:20-22). There were signs indicating that northbound traffic was merging into one lane. (R. Vol. I 167:17 - 168:3.) At the site of the accident, however, both northbound lanes were open for travel. (R. Vol. I 194:22-24; 202:25 - 203:4.)

Defendant Bryant, traveling southbound, stopped in the median to make a left hand turn. (R. Vol. I 172:23-25.) A UTA bus, traveling northbound in the lane next to the median, stopped before Defendant Bryant's car. (R. Vol. I 193:10-13.) The bus driver waved Defendant Bryant through, then checked his mirror and motioned for Defendant Bryant to stop. The driver checked his mirror again and then waved to Bryant to proceed in front of him. (R. Vol. I 173:10 - 174:13.) Acting on the bus driver's hand motions, Defendant Bryant proceeded to turn left. (Id.) *Defendant Bryant then struck Plaintiff's car, which was traveling northbound in the outside lane.* (Id.; R. Vol. I 186:23-25; 192:4-6).

Defendant Bryant admitted that he failed to yield the right-of-way to Plaintiff. (R. Vol. I 203:5-7.) Defendant also admitted that when he proceeded, he could not see whether the outside lane was clear because the bus blocked his view. (R. Vol. I 187:3-18.) Once Defendant's car

had cleared the bus, however, he did not stop to see if the outside lane was clear before proceeding. (R. Vol. I 174:12-16; 202:16-18.)

As a result of the accident, Plaintiff suffered two bulging discs and one herniated disc in his cervical spine. (R. Vol. II 38:17-24; 41:2-8.) Plaintiff had previously undergone several surgeries on his lower back. (R. Vol. II 31:7-10.) The accident of September, 1993, caused an increase in pain in this area. (R. Vol. II 30:16 - 31:5.) Plaintiff's injuries disabled him from work until January 24, 1994. (R. Vol. II 47:4-13.) Plaintiff incurred medical bills for treatment reasonably and necessarily related to the accident in excess of \$3,000. (R. Vol. II 67:8 - 68:5.)

### **SUMMARY OF ARGUMENT**

The Second District erred in its denial of Plaintiff's motion for a directed verdict as to the negligence of Defendant Bryant. When a public safety statute has been violated, it is prima facie evidence of negligence. The defendant then has the burden of presenting evidence of legally sufficient justification for the violation. Defendant Bryant presented no such evidence of a legal excuse, nor did he ever modify or explain his admission that he had failed to yield the right-of-way to Plaintiff. Therefore, the trial court should have granted Plaintiff's motion for a directed verdict.

The trial court erred in denying Plaintiff's motion for judgment notwithstanding the verdict for the same reasons. Defendant Bryant's own testimony showed that he failed to yield the right-of-way and failed to maintain a proper lookout. The jury's finding that Defendant was not negligent despite these admissions is not supported by the evidence.

With respect to UTA, a driver who signals to or directs another driver may be liable for a resulting accident if circumstances exist to show that the driver signaled to was reasonable in

relying on the signal. Given the size of the bus, the heavy traffic, and the bus driver's obvious checking of his mirror prior to waving Defendant Bryant through, there are sufficient circumstances to indicate that Bryant was reasonable in his reliance on the bus driver's signal. If this was the jury's conclusion, the jury should have found UTA negligent. If, alternatively, the jury found that Bryant was not reasonable in relying on the driver's signal, the jury should have found Bryant negligent. As the verdict stands, the jury's conclusion that neither party was negligent cannot be supported by the evidence.

The trial court further erred in refusing to give Plaintiff's proposed jury questionnaire regarding tort reform. Plaintiff has a right to discover all psychological biases or prejudices which may influence Plaintiff's choice of peremptory challenges, even if these biases do not rise to the level of a challenge for cause. Recent Utah appellate decisions specifically provide that this right includes an obligation on the part of the trial court to question jurors regarding their exposure to tort reform propaganda.

The trial court's refusal to administer the questionnaire or to question the panel specifically regarding tort reform propaganda denied Plaintiff the opportunity to discover which jurors had been exposed to articles or other publicity, or to explore the nature and extent of the exposure. Plaintiff's right to the informed exercise of peremptory challenges was thus substantially impaired, which constitutes reversible error.

Finally, beyond the refusal to ask tort reform-related questions, the court's refusal to use the questionnaire format resulted in irreparable tainting of the panel. Instead of maintaining confidential responses, the court permitted the entire panel to listen to each juror's prejudices and biases regarding lawsuits and insurance. The neutrality of the panel which was eventually selected was hopelessly destroyed. As a matter of policy, the court should have administered the

questionnaire to preserve the integrity of the panel and to allow counsel to explore issues of opinion such as tort reform and personal injury lawsuits in private.

## ARGUMENT

### **I. THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR DIRECTED VERDICT BECAUSE DEFENDANT BRYANT ADMITTED NEGLIGENCE.**

The court should have granted Plaintiff's motion for directed verdict because Defendant Bryant testified at trial that he failed to yield the right-of-way to Plaintiff in violation of Utah Code Ann. § 41-6-73. (R. Vol. I 203:5-7.) Violation of a public safety statute is prima facie evidence of negligence. Ames v. Mass, 846 P.2d 468, 475 (Utah Ct. App. 1993) (citing Gaw v. State ex. rel. Utah Dept. of Transp., 798 P.2d 1130, 1135 (Utah Ct. App. 1990), cert. denied per unpublished order of Utah Supreme Court (Jan. 11, 1991)). The evidence of negligence must then be rebutted by evidence of justification or excuse. Id.

In order to establish that the statutory violation was justified or excused, the person violating the law has the burden of proving one of the following exceptions:

1. Obeying the law would have created an even greater risk of harm.
2. The person who violated the law was faced with an emergency that person did not create, and, by reason of the emergency, that person could not obey the law.
3. The person who violated the law made a reasonable effort to obey the law, but was unable to do so.
4. The person who violated the law could not obey the law because the person was incapable of doing so.
5. The person violating the law was incapable of understanding the requirements of the law.

Hall v. Warren, 692 P.2d 737 (Utah 1984). See also Gaw, 798 P.2d 1130; Jorgensen v. Issa, 739 P.2d 80 (Utah Ct. App. 1987); MUJI 3.11 (1993).

None of these five excuses was established in the case at bar. Defendant Bryant testified that he failed to yield the right of way to Plaintiff when he turned left in front of Plaintiff's car. The import of this testimony could only be lessened if, at some other point in Defendant's testimony, he corrected, explained, or modified his statement. See Ewan v. Butters, 16 Utah 2d 272, 275, 399 P.2d 210, 212 (1965). Defendant Bryant never retracted or modified his admission in any way.

Once prima facie evidence of negligence had been established by this admission, Defendant failed to meet his burden by proving that the statutory violation was justified or excused. There was no evidence admitted at trial that Defendant had to violate the statute because of a greater risk of harm, emergency, incapacity or incapability to understand the law. The only remaining possibility is that Defendant reasonably tried to obey the law, but was unable to do so. Considering the evidence in the light most favorable to Defendant, though, even this possibility must be ruled out.

Defendant's sole explanation was that he had obeyed the signal of another driver, that he relied on the UTA bus driver who waved him through. However, this rationale is not sufficient to excuse Defendant's statutory violation. Defendant's own testimony demonstrates that he did not attempt to yield the right of way to Plaintiff. Defendant was in a position of safety in the median. (R. Vol. I 200:13-15.) Defendant was still in a position of safety when he moved in front of the bus. (R. Vol. I 200:16-18.) Defendant admitted that when he moved out from in front of the bus, into the outside lane of traffic, he became unsafe. (R. Vol. I 200:19-21.)

Despite this admission, Defendant also admitted that he never stopped to see if the outside lane of traffic was clear. (R. Vol. I 174:12-16; 202:16-18.) There was nothing to prevent Defendant from stopping as he left the safety of the bus's lane to check for traffic, and

Defendant never attempted to do so. Thus, even when Defendant's testimony is viewed in the light most favorable to him, Defendant did not meet his burden of showing that he tried to obey the law and was unable to do so.

Defendant's failure to provide evidence of a legally sufficient excuse for his violation of the statute left the evidence of negligence unrefuted. At that point, reasonable minds could not have differed in finding that Defendant was, in fact, negligent. Therefore, the court erred in denying Plaintiff's motion for a directed verdict as to the negligence of Defendant Bryant.

## **II. PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD HAVE BEEN GRANTED.**

### **A. The Motion Should Have Been Granted as to Defendant Bryant Because he Admitted Negligence.**

Defendant Bryant's testimony, which was set forth above, is straightforward: Defendant could not see past the bus, but proceeded when the bus driver waved him through and struck Plaintiff's car. Even when viewed in the light most favorable to Defendant Bryant, this evidence cannot support the jury's finding of no negligence. First, as argued in the preceding section, Defendant Bryant admitted he was guilty of a statutory violation and failed to provide any excuse. The jury was given MUJI 3.11 regarding statutory violations as Instruction No. 35.<sup>2</sup> The jury was also instructed that a driver has a duty to yield the right-of-way to any vehicle close enough to present an immediate hazard. (See Instructions 42, 45, and 46.)

The law is clear that Defendant had a duty, both to keep a proper lookout and to yield the right-of-way. The evidence establishes that Defendant proceeded when he did not know whether or not it was safe and that he breached his duty to yield the right-of-way. The jury could not

have found that Defendant was not negligent without completely disregarding the facts and the instructions. Therefore, the court should have granted plaintiff's motion for judgment notwithstanding the verdict as to Defendant Bryant.

**B. The Motion Should Have Been Granted as to Defendant UTA Because UTA's Driver Negligently Waved Bryant Through.**

As UTA's driver was never found to testify, the only evidence regarding his actions comes from Defendant Bryant. Bryant testified that the driver initially waved him on, then checked his mirror, motioned Bryant to stop, checked his mirror again, and finally gave Bryant a signal to proceed through. Defendant Bryant relied on these hand communications and proceeded past the bus, where he collided with Plaintiff's car.

Viewing this evidence in the light most favorable to UTA, it is possible that the jury found that Bryant completely misinterpreted the driver's hand signals. This explanation simply does not hold water. The signals, as explained and demonstrated by Defendant Bryant, are universal for "come on through" and "stop." Moreover, if the jury did conclude that Bryant misinterpreted the signals, it would have found Bryant liable.

The jury could also have found that Bryant understood the driver, but was not reasonable in relying on his signals. This finding is similarly inconsistent with the jury's finding that Bryant was not negligent. Further, the jury had been instructed that while signaling another driver to proceed is not necessarily negligence, such an act can be negligence if connected with other circumstances.<sup>3</sup> This instruction was based on Giron v. Welch, 842 P.2d 863 (Utah 1992), a case in which Plaintiff Giron was struck by a vehicle driven by Defendant Panter Noorbakhsh. Norbakhsh had been waved through the intersection by Defendant Jay Welch.

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<sup>2</sup> For the Court's convenience, this instruction is set forth at Appendix 1.



The Court in Giron noted:

It is possible that under certain conditions upon certain highways, such as hills or in the nighttime, a driver of a motor vehicle in signaling a car following such a vehicle to proceed, might, by such a signal or conduct on the part of the driver, be responsible for an accident in which the person relying upon such signal to proceed became involved.

Id. at 864 (quoting Devine v. Cook, 3 Utah 2d 134, 279 P.2d 1073, 1083 (1955)).

The Court then concluded that these conditions did not exist in Giron for two reasons.

First, Defendant Noorbakhsh had not relied on Defendant Welch's signal because she stopped once she passed the Welch vehicle and looked for oncoming traffic. Giron, 842 P.2d at 865.

Second, the Court found no indication that Defendant Welch had checked to his rear before waving Defendant Noorbakhsh on, and thus Noorbakhsh could not reasonably assume that the signal meant "all clear." Id.

The present case is distinguishable from Giron on both counts. Defendant Bryant's testimony is uncontroverted that he obeyed the hand communications of the bus driver and without looking or stopping, crossed into Plaintiff's lane of traffic. It is evident that Bryant did rely on the driver's signals. Further, Defendant testified that the bus driver checked his mirror twice before motioning Bryant to proceed and that at one point the driver gave him a "stop" signal after checking his mirror. Bryant, unable to see oncoming traffic because of the size of the bus and the heavy traffic, concluded that the driver had observed and evaluated approaching traffic before signaling.

These facts, when considered in conjunction with the instruction, leave the jury with two possible conclusions. The jury could have found that the circumstances cited in the instructions

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<sup>3</sup> Instruction No. 48 is reproduced at Appendix 2.

did not exist, but that would mean that Bryant was not reasonable in relying on the driver's signals and compel the conclusion that Bryant was negligent. Alternatively, the jury could have found that Bryant did reasonably rely on the driver. In that case, the jury would have impliedly found that the driver was at fault. The jury's verdict that neither defendant was negligent is a paradox which cannot be supported by the evidence and the instructions given to them. Therefore, the court should have granted Plaintiff's motion for judgment notwithstanding the verdict.

### **III. THE COURT'S FAILURE TO ADMINISTER A JURY QUESTIONNAIRE REGARDING TORT REFORM SUBSTANTIALLY IMPAIRED PLAINTIFF'S EXERCISE OF PEREMPTORY CHALLENGES.**

#### **A. The District Court Erred in Failing to Conduct Adequate Voir Dire Regarding Tort Reform.**

This Court has emphasized the critical role that jury voir dire plays in giving all litigants a fair and impartial trial. See, e.g., State v. James, 819 P.2d 781, 798 (Utah 1991).

The modern voir dire process is not merely conducted to determine that jurors who have been called to service are legally qualified to serve on a jury panel. The process has evolved into a means of detecting and, so far as possible, eliminating bias and opinion from the courtroom.

Id. (citations omitted). In addition to discovering actual bias, it is also a purpose of voir dire to ferret out data to assist counsel in making informed peremptory challenges. State v. Worthen, 765 P.2d 839, 844-45 (Utah 1988) (quoting State v. Taylor, 664 P.2d 439, 447 (Utah 1983)).

Certainly a trial judge has sound discretion in limiting voir dire examinations. However, judges are to take care to "adequately and completely probe jurors on all possible issues of bias . . . ." James, 819 P.2d at 799. Further, discretion is to be "liberally exercised in favor of allowing

counsel to elicit information from prospective jurors.” Id. (citations omitted). Voir dire should be conducted in a way “which not only meets constitutional requirements, but also enables litigants and their counsel to intelligently exercise peremptory challenges and which attempts, as much as possible, to eliminate bias and prejudice from the trial proceedings.” Id.

This Court has also pointed out:

The fairness of a trial may depend on the right of counsel to ask voir dire questions designed to discover attitudes and biases, both conscious and subconscious, even though they “would not have supported a challenge for cause.” . . . Juror attitudes revealed during voir dire may indicate dimly perceived, yet deeply rooted, psychological biases or prejudices that may not rise to the level of a for-cause challenge but nevertheless support a peremptory challenge.

Worthen, 765 P.2d at 845 (quoting State v. Ball, 685 P.2d 1055, 1060 (Utah 1984)).

In civil cases, juror attitudes regarding and exposure to tort reform propaganda are certainly relevant to the exercise of peremptory challenges. “Reason suggests that exposure to tort-reform propaganda may foster a subconscious bias within certain prospective jurors.”

Evans, 824 P.2d at 467.

In light of the pervasive dissemination of tort-reform information, and the corresponding potential for general exposure to such information by potential jurors, a plaintiff is entitled to know which jurors, if any, have been so exposed.

Barrett, 868 P.2d at 101. The reason why tort reform exposure is of such importance to litigants is that a juror’s bias may arise from widespread media reports and insurance advertisements.

Evans, 824 P.2d at 468. Such bias or prejudice may affect the very outcome of the case. “We cannot assume that a jury would manifest its bias by only reducing damages. It is equally likely that a biased jury might act on its bias by finding the defendant not negligent.” Id.

Stated another way, a juror who has become convinced that damage awards are way out of hand might not restrict the

manifestation of his or her bias to the issue of damages; such a juror may well perceive that the first line of attack in keeping damages as low as possible is in finding plaintiff has no cause of action.

Barrett, 868 P.2d at 100, fn. 4.

Evans was a medical malpractice case. At trial, the judge refused to ask many questions submitted by plaintiff's counsel to probe jurors' exposure to tort reform propaganda. Evans, 824 P.2d at 461-62. Instead, the trial court in Evans asked the jury as follows:

Many of you have heard and read articles, and there have been television programs, with regard to negligence on the part of doctors. Do any of you have any strong feelings as a result of seeing or reading anything about medical negligence that would make it so that you couldn't be fair and impartial here today?

Id. The Court of Appeals found that this inquiry was not sufficient because instead of first asking which jurors had been exposed to such programs, so that plaintiff could identify them, the court instead focused on discovering for-cause type bias. Id. Even when a plaintiff does not present specific examples of propaganda to the court, a "plaintiff has a legitimate interest in discovering which jurors may have read or heard information generally on medical negligence or tort reform." Id. "The trial judge's line of questions ignored [plaintiff's] need to gather information to assist in exercising her peremptory challenges." Id.

In the case at bar, the district court committed the same error as the court in Evans. Refusing to administer the jury questionnaire submitted by Plaintiff, the court instead asked one broad, general question regarding tort reform and related biases:

All right. I'd -- there have been a -- oh, kind of a lot of publicity in recent years arising out of some cases that are -- I think most people's perceptions were that there may have been some excessive judgments and that sort of thing.

I can't remember, but it seemed to me there was a lady who lost an eye when a 7-Up cap popped off and hit her; another lady who spilled a glass of -- or a cup of McDonald's coffee in her lap. And as a result of these kinds of things there's been a lot of publicity about tort reform.

Is there any of you here who can recall specifically reading articles on -- on the need to change the system? Do any of you remember reading anything like that? Is there anybody here who has not heard of these kinds of cases where -- where you felt like maybe there was an excessive judgment? Anybody here who has not heard of those kinds of cases?

(R. Vol. I 26:4-23.) The court then paused. Receiving no response at this point, the court continued:

The concern of the Court is that we have a case here to try. If -- if someone comes into the trial with a preconceived notion that a particular result should be brought about -- in other words, if someone has a preconceived notion of whether the plaintiff should win or the plaintiff should lose, a preconceived notion about if -- if the plaintiff wins how much money should be awarded, I kind of need to know if -- if you have some pretty strong feelings about that sort of thing. We -- we want the -- we want this case to be decided upon the facts that are adduced here in this court and not be influenced by someone's preconceived notions of what ought to happen or not to happen. Do you see my concern? Is there anybody here, for example -- yes, sir?

(R. Vol. I 26:25 - 27:15.)

The court then began receiving juror responses regarding bias or prejudice arising out of their personal experiences with the legal system. At each response, the court questioned the juror to determine whether he or she could set aside their bias, and if the eventual response was negative, the juror was dismissed for cause. (R. Vol. I 27-38.) The court never asked which jurors had been exposed to tort-reform propaganda, as required by Evans. Instead, the court merely asked if the jurors had heard of cases with large verdicts and whether they had any preconceived notions regarding the outcome of the case.

This is exactly the type of for-cause inquiry which was held to be insufficient in Evans. Had the court administered the jury questionnaire requested by Plaintiff, a copy of which is attached as Appendix 3, the parties would have been able to identify any juror who had been exposed to tort-reform propaganda and ascertain the nature and extent of the exposure. The court's refusal to administer the questionnaire or ask the questions contained therein denied Plaintiff the opportunity to intelligently exercise his peremptory challenges.

**B. The District Court's Error was Sufficiently Prejudicial to Warrant Reversal.**

The trial court's abuse of discretion alone would not require reversal, but "[s]ubstantial impairment of the right to informed exercise of peremptory challenges is reversible error." Hornsby, 758 P.2d at 933. The court in Evans found that the trial court's failure to conduct adequate voir dire did not rise to the level of reversible error, noting that the trial court had specifically asked jurors if they could not be impartial because of their exposure to tort reform material and that the court had asked about malpractice law in general. Evans, 824 P.2d at 468.

However, two years after Evans, in another medical malpractice case, the Court of Appeals found that a court's refusal to ask specific tort-reform questions was reversible error. Barrett, 868 P.2d at 103. Commenting that the Evans decision "must have been a close call," the Barrett court reasoned that it was a different matter when the trial court never mentioned articles and programs and never explored the idea that lawsuits against doctors could prompt strong feelings. Id. The court further explained that there are two crucial purposes served by preliminary questioning regarding exposure to tort reform information:

First, these questions identify those jurors to whom particularized questions aimed at detecting actual bias may be productively directed. Second, regardless of a prospective juror's response to particularized

questions about the effect of mere exposure, counsel can include the fact of exposure in the calculus for determining how to best utilize peremptory challenges.

Id.

Unless a party can identify jurors who have been exposed to tort reform materials, he will be unable to ask appropriate questions to discover bias and thus denied information to assist in the use of peremptory challenges. In this circumstance, inadequate voir dire substantially impairs the informed exercise of peremptory challenges and justifies reversal. Id. at 104.

This situation is precisely what occurred in the case at bar. The trial court glossed over the issue of exposure to articles and other propaganda, and instead drew the jury's attention to large, well-publicized verdicts. The court's sole question was then whether the panel had any pre-conceived notions which might affect their decision in the case. This voir dire utterly failed to identify jurors exposed to tort reform propaganda and thus prevented counsel from either exploring the issue further or factoring exposure into the decision regarding peremptory challenges. As plaintiff's right to the informed exercise of peremptory challenges was substantially impaired, this Court should reverse the trial court's decision and order a new trial.

**C. The Trial Court's Failure to Ask Tort-Reform Questions in a Questionnaire Format Tainted the Jury Panel.**

If this Court finds that the voir dire administered by the trial court regarding tort reform propaganda was sufficient, the Court should still order a new trial because of the trial court's refusal to use a questionnaire. By asking the panel in open court whether or not they had strong feelings about the outcome of the case, the trial court opened up the panel to listen to each jurors' individual biases about lawsuits. Two instances in particular demonstrate the damage.

A Mr. Cummings advised the court that he had been sued when someone playing with his

kids had been hurt. (R. Vol. I 28:15-24.) When the court attempted to rehabilitate him for purposes of cause, Mr. Cummings explained

Well, my feelings on lawsuits are there are way, way too many of them over stupid things and people need to start taking a little responsibility for their own actions instead of trying to blame them on somebody else.

(R. Vol. I 29:5-9.) The court's response was to comment that this was a fair statement. (R. Vol. I 29:10-13.) As the court continued to attempt to rehabilitate Mr. Cummings, Mr. Cummings told the panel that he gets "really disgusted" whenever he hears about someone suing somebody else. (R. Vol. I 30:10-12.) Although Mr. Cummings was eventually excused for cause (R. Vol. I 32:17-18), the entire panel listened for some minutes as he shared his opinions about lawsuits.

The second incident involved a Mr. Lee, who informed the court that he would have a bias against an insurance company. (R. Vol. I 35:5-7.) The court responded by telling him, "We don't have one of those here today." (R. Vol. I 35:8-9.) Comforted, Mr. Lee advised the court that he was fine as long as there was no insurance company involved. (R. Vol. I 35:14-15.) The court then told the panel emphatically, "There's no insurance company involved." (R. Vol. I 35:16-17.)

The Evans court noted that modern jurors will certainly suspect the existence of insurance. Evans, 824 P.2d at 464, fn. 3. Thus, Utah courts have recognized that "whether a plaintiff may discuss insurance with the jury must be evaluated from the particular facts of the individual case." Id. at 464. Regardless, any "inquiry into insurance-related issues cannot be used merely to inform the jury that defendant is covered by insurance . . . ." Barrett, 868 P.2d at 98 (citations omitted). Here, rather than advising the jury that the defendants were covered by insurance, the open-court voir dire process resulted in the jury being instructed that they were not



insured. Had Plaintiff advised the jury that insurance coverage existed, he would certainly have been subject to a motion for mistrial. This result was equally prejudicial.

In both of these instances, the panel was exposed to opinions and information which could have been kept confidential. Administration of a questionnaire would have permitted jurors to offer their opinions in writing, instead of subjecting every potential juror to outside bias and prejudice. Based on the nature of the responses, the court could then determine whether to attempt to rehabilitate jurors in chambers or in open court.

There is no Utah case law requiring the use of a questionnaire, or even that the court ask every specific question submitted by counsel. See Barrett, 868 P.2d at 104 (citing Hornsby, 758 P.2d at 933). However, Utah courts have strongly encouraged thorough voir dire, and trial courts' discretion is to be liberally exercised in favor of eliciting information. See James, 819 P.2d at 799. The Montana Supreme Court, in a decision relied on by both Evans and Barrett, explained:

When insurance companies inject the issue of insurance into the consciousness of every potential juror through a high priced advertising campaign, . . . they threaten every plaintiff's right to an impartial jury. . . . In such cases, it is only fair that attorneys have some means to secure this right for their clients.

Borkoski v. Yost, 183 Mont. 28, 39, 594 P.2d 688, 694 (1979) (citations omitted).

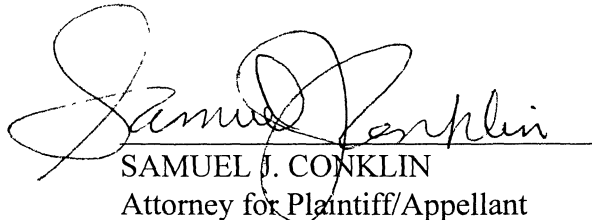
In the case at bar, where it was evident that expression of strong opinions and even the court's attempts at rehabilitation influenced an otherwise neutral panel, the use of a jury questionnaire would have prevented any possibility of jury taint. For policy reasons, this Court should support the use of a questionnaire where requested as what may be the only viable way to ensure a plaintiff's right to a fair trial.

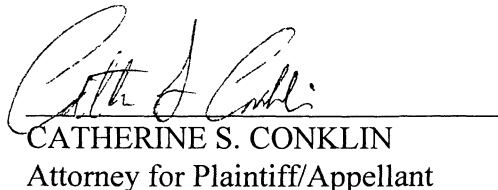
## CONCLUSION

This Court should reverse the trial court's denial of Plaintiff's motion for a directed verdict because Defendant Bryant admitted negligence and failed to provide an adequate excuse. Further, this Court should reverse the trial court's denial of Plaintiff's motion for judgment notwithstanding the verdict because of Defendant Bryant's admissions and the uncontroverted evidence that he relied on the hand signals of UTA's bus driver. Finally, the Court should find that the trial court erred in refusing to give the jury the questionnaire regarding tort-reform propaganda and to ask the questions contained therein. This refusal constitutes reversible error because it substantially impaired Plaintiff's right to informed peremptory challenges, and thus denied Plaintiff a fair trial.

DATED this 6<sup>th</sup> day of November, 1997.

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**IN THE UTAH STATE COURT OF APPEALS**

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JOHN DURRANT,	:	
	:	<b>PROOF OF SERVICE</b>
Plaintiff/Appellant,	:	
vs.	:	
BRADLEY E. BRYANT,	:	Case No. 970348-CA
WORKERS COMPENSATION	:	
FUND OF UTAH, and UTAH	:	
TRANSIT AUTHORITY, a Utah	:	
Corporation,	:	
Defendants/Respondents.	:	

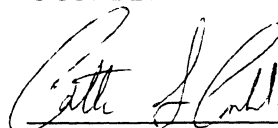
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I hereby certify that I served a true and correct copy of the BRIEF OF THE  
APPELLANT this 7<sup>th</sup> day of November, 1997, by mailing first-class, postage prepaid to:

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Tab 1

## **APPENDIX 1**

### **Jury Instruction No. 35**

A violation of a safety law is evidence of negligence if it is shown that:

1. The person injured belonged to a class of people the law intended to protect;  
and
2. The law intended to protect against the type of harm which in fact occurred as a result of the violation. However, there are five exceptions to this rule:
  - (1) When obeying the law would have created an even greater risk of harm.
  - (2) When the person who violated the law was faced with an emergency that person did not create, and, by reason of the emergency, that person could not obey the law.
  - (3) When the person who violated the law made a reasonable effort to obey the law, but was unable to do so.
  - (4) When the person who violated the law could not obey the law because the person was incapable of doing so.
  - (5) When the person violating the law was incapable of understanding the requirements of the law.

The person violating the law has the burden of proving one of the exceptions. If an exception is proven by a preponderance of the evidence, you must disregard the violation of the safety law, and simply decide whether the person acted with reasonable care under the circumstances.

Tab 2

## **APPENDIX 2**

### **Jury Instruction No. 48**

You are instructed that the waving of another driver to proceed in front of you is not negligence since all drivers should know that the waving driver does not have the authority to give up a right-of-way belonging to another driver.

However, such conduct can be negligence if connected with other circumstances relating to the accident, accident scene, condition of roadway, etc.

Tab 3



### APPENDIX NO. 3

#### **Juror Questionnaire Submitted by Plaintiff**

This questionnaire will be distributed only to the Court and attorneys for the parties. Please answer the following to the best of your ability. If you do not understand a question or do not know the answer, please write "Do Not Understand" in the space provided. If there is insufficient space provided for the answer, please write your answer in the margin next to the question. Please write or print legibly.

- 1) Have you read magazine or newspaper articles or other literature suggesting there is a lawsuit crisis or the need for "tort reform"?

\_\_\_\_\_ YES      \_\_\_\_\_ NO

If "Yes," please describe the magazine or newspaper and what the articles state:

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- 2) Have you read any articles or other literature suggesting that jury verdicts are excessive or unreasonable?

\_\_\_\_\_ YES      \_\_\_\_\_ NO

If "Yes," please describe the article or literature and its substance:

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3) Have you heard anything on television or radio about a lawsuit crisis or excessive jury verdicts?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If "Yes," please describe the talk show, news, tele-journal, etc., and what you saw and/or heard:

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4) Do you hold the opinion that in this country today there is a lawsuit crisis caused by excessive jury verdicts?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If "Yes," please explain:

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5) Do you feel insurance premiums are too high due to excessive lawsuits and/or jury verdicts?

\_\_\_\_\_ YES \_\_\_\_\_ NO

If "Yes," please explain:

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7) Do you believe a lawsuit is **not** a proper method of resolving disputes concerning compensation for personal injuries?

\_\_\_\_\_ YES      \_\_\_\_\_ NO

If "Yes," please explain:

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8) Do you feel that limits should be placed on a person's right to sue another for personal injuries or that juries should be limited in the amount they can award as damages?

\_\_\_\_\_ YES      \_\_\_\_\_ NO

If "Yes," please explain:

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9) If you find for the Plaintiff and if you find that the Plaintiff has suffered serious and substantial damages, will you have difficulty awarding the Plaintiff for the full amount of damages that the evidence supports?

\_\_\_\_\_ YES      \_\_\_\_\_ NO

If "Yes," please explain:

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