

1997

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN DURRANT,

Petitioner,

vs.

BRADLEY E. BRYANT, WORKERS  
COMPENSATION FUND OF UTAH, a  
Utah Corporation, and UTAH  
TRANSIT AUTHORITY,

Defendants.

Case No. 970659-CA

**BRIEF OF THE APPELLEE/UTA**

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

Oral Argument Priority Classification No. 15

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**UTAH COURT OF APPEALS  
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Utah Code Ann. § 78-2a-3(2)(h) (1996) . . . . .	.1

## **JURISDICTION**

The Utah Court of Appeals 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).

## **DETERMINATIVE LAW**

Pursuant to Rule 24(a)(6) of the Utah Rules of Appellate Procedure, there are no constitutional provisions nor statutes whose interpretation is determinative or of central importance to the appeal.

## **SUMMARY OF ARGUMENT**

Plaintiff's Motion for Directed Verdict was focused solely on the co-Defendant, Bradley Bryant, and not the Utah Transit Authority. Plaintiff's Motion was based on Bryant's responses to questions relating to his own perceived "failure to yield" and the UTA did not need to respond to Plaintiff's Motion at the trial level nor should it be required to do so on appeal.

The trial court correctly denied Plaintiff's Motion for Judgment Notwithstanding the Verdict based upon all the facts and evidence presented to the jury. Material issues of fact upon which a jury could reasonably rely included Bryant's admission that he did not know exactly why the bus driver put his hand up, no verbal communication occurred between the drivers, and importantly, comparative fault arguments on the Plaintiff himself.

Additionally, the trial court instructed the jury that "the waiving 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, conditions of the roadway, etc." (See Instruction No. 48) In light of all the evidence and inferences presented, together with applicable law, the trial court correctly allowed the jury to decide the matter.

Finally, the trial court was under no obligation to use Plaintiff's questionnaire and conducted adequate voir dire to eliminate bias and prejudice from the courtroom. First, the trial judge asked a series of questions to the panel as a whole and then individually, probing each potential juror for possible bias or preconceived opinions. Second, the trial court allowed the parties to conduct personal voir dire with Plaintiff failing to ask one single question to one single juror on tort reform.

#### **ARGUMENT**

##### **I. PLAINTIFF'S MOTION FOR DIRECTED VERDICT WAS DIRECTLY FOCUSED ON BRADLEY BRYANT AND NOT THE UTA**

At the conclusion of Plaintiff's case-in-chief on February 19, 1997, Plaintiff made a motion for directed verdict as to the liability of Defendant, Bradley Bryant, pursuant to Rule 50(a), U.R.C.P. Specifically, Plaintiff stated:

Ms. Conklin: Yes, your honor. Actually, the Plaintiff would like to move for a directed verdict on the issue of liability only as to Mr. Bryant based on his admission that he failed to yield the right-of-way, which would then leave, if it was granted, just the question of apportionment. (R. Vol. II 234: 2-7).

Plaintiff's motion was denied by the Court on February 21, 1997. (R. Vol. IV 39: 15-20 and Dist. Ct. R. 618).

Following the verdict, Plaintiff made a Motion for Judgment Notwithstanding the Verdict pursuant to Rule 50(b), U.R.C.P.

Again, the trial court denied this motion. (Dist. Ct. R. 618).

As clearly manifest in the record, Plaintiff's motion was directed solely at Bryant and not the Utah Transit Authority. The motion was based on Bryant's responses regarding questions relating to his own perceived "failure to yield." Plaintiff's motion was not directed at the Utah Transit Authority nor was it responded to at the trial level, and it need not be addressed by this Defendant, nor this Honorable Court, on appeal.<sup>1</sup>

**II. THE DISTRICT COURT CORRECTLY DENIED PLAINTIFF'S  
MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT  
BASED UPON ALL THE EVIDENCE PRESENTED**

The evidence presented by the parties to the jury was sufficient to support the verdict. Plaintiff's conclusory remarks found in Point II of his argument are based only on a portion of the record while omitting critical details as they pertain to the Utah Transit Authority.

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<sup>1</sup> Pollesche v. Transamerica Ins. Co., 27 Utah 2d 430, 497 P.2d 236 (1972). The failure of a party to make a motion for a directed verdict not only forecloses the trial court from consideration of a motion for judgment notwithstanding the verdict, but such failure in addition precludes the appellate court from reviewing the sufficiency of the evidence to sustain the verdict. Rule 50(b), U.R.C.P.; Brigham v. Moon Lake Electric Assn., 24 Utah 2d 292, 296, 470 P.2d 393 (1970). Consequently, plaintiff may not allege error on the part of the trial court in its denial of the motion for a judgment notwithstanding the verdict.



First, Plaintiff asserts that while "it is possible that the jury found that Bryant completely misinterpreted the driver's hand signals [yet] . . . this explanation simply does not hold water." (See Appellant's Brief, p. 10). In point of fact, Bryant clearly admitted to the jury, with the assistance of his deposition testimony during cross-examination, that he did not know exactly why the bus driver put his hand up. (R. Vol. I 197: 2-5). Bryant interpreted the hand signals to motion him through although he did not know why the driver put his hand up.

Second, no verbal communication occurred between the bus driver and Bryant whatsoever, leaving any hand gestures open to individual interpretation (R. Vol. I 195: 12-19). No conversation, oral communication or statement was entered into by the bus driver and Bryant although the co-Defendant, Mr. Bryant, was quite adamant that "we both knew what I was there for, to turn . . . he knew what he was there to do was to help - let me get over." (R. Vol. I 195: 21-24).

Again, the bus driver was never identified by any party as the bus was merely listed as a non-contract vehicle by the investigating officer (R. Vol. I 159: 22-24).

Third, and quite importantly, Plaintiff argues that "these facts, when considered in conjunction with the instruction, leave the jury with two possible conclusions . . . that either Bryant was negligent or, . . . alternatively, that the bus driver was at fault." (See Appellant's Brief, pp. 11-12). Whatever happened to

the possible conclusions that, perhaps, the Plaintiff was at fault or no one was to blame?

The record is replete with evidence, facts, and inferences that Mr. Durrant was at fault regarding this accident, irrespective of the allegations made by Plaintiff. Again, counsel for Bryant, highlighted four specific areas in her closing argument to the jury, based upon the evidence, directly relating to Plaintiff's actions. They include (1) Plaintiff's negligence in failing follow traffic signs, (2) Plaintiff's failure to merge into the left lane in a reasonable manner, (3) plaintiff's failure to operate his vehicle at a speed that was reasonable for the conditions, and (4) Plaintiff's failure to keep a safe and proper lookout. (Rptr. T. 20: 7-25; 21: 1-12).

Apparently, the jury was persuaded by these and other similar arguments as reflected in their decision and the trial court correctly denied Plaintiff's Motion for Judgment Notwithstanding the Verdict discerning ample evidence to support their verdict.

Finally, Plaintiff cites Giron v. Welch, 842 P.2d 863 (Utah 1992), under the proposition that "Bryant was not reasonable in relying on the bus driver's signals" thus supporting his position that "this finding is similarly inconsistent with the jury's finding that Bryant was not negligent." (See Appellant's Brief, p.10).

The Supreme Court held in Giron the following:

Both parties agree that Devine controls the outcome of this case. In that case, we concluded that the trial court erred in denying a motion for a directed verdict in favor of a signaling driver under circumstances

substantially similar to the instant case. We held that as a matter of law the signalling of another driver to proceed was not an act of negligence. We there wrote:

All the signal amounted to, if given, was a manifestation on the part of Metcalf to Mrs. Cook that as far as he was concerned Mrs. Cook could proceed. At the most all he did was to signal to Mrs. Cook and indicate, as far as Metcalf was concerned, he yielded her the right-of-way.

It further 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 signalling 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 Ut.2d 134, 279 P.2d 1073, 1083 (1955)).

Such conditions as outlined by the Supreme Court, i.e., hills and nighttime, were not present in the case at hand as clearly presented to the jury by both drivers. (R. Vol. I 204: 8-13). Following Plaintiff's case-in-chief, Defendant, Utah Transit Authority, made a Motion for Directed Verdict, based upon Giron and Devine, which motion was denied by the court. (R. Vol. II 216-232: 23).

Notwithstanding these facts and arguments, the trial court stated that material issues of fact would need to be decided by the jury and allowed the decision to be made by them. A decision was made based upon sufficient evidence presented to them. And whether or not their deliberations included a bus driver relinquishing only his right-of-way in his lane of travel (See Jury Instruction No. 48), or the perceived fault of either Bryant and/or Durrant, or neither; such discussions were solely within the province of the

fact-finder to decide based upon all the evidence presented. Indeed, the trial court correctly concluded that material issues of fact were present and allowed the jury to reach a conclusion and likewise, denied Plaintiff's Motion Notwithstanding the Verdict.

**III. THE DISTRICT COURT HAD NO OBLIGATION TO  
ADMINISTER PLAINTIFF'S QUESTIONNAIRE AND  
CONDUCTED SUFFICIENT VOIR DIRE TO ELIMINATE  
BIAS AND PRECONCEIVED OPINIONS FROM THE COURTROOM**

As Plaintiff reluctantly notes in his own brief, "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). In fact, the trial judge has sound discretion in limiting voir dire examinations as they "adequately and completely probe jurors on all possible issues of bias." State v. James, 819 P.2d 781, 798 (Utah 1991).

Two important points need to be discussed in rebuttal to Plaintiff's allegations. First, Plaintiff attacks the District Court for "failing to conduct adequate voir dire regarding tort reform" by asking "one broad, general question." (See Appellant's Brief, pp. 12-14). However, when reviewing the actual transcript taken in full context, it becomes evident that the District Court asked a series of questions regarding jury bias and opinions accompanied by appropriate commentary and specific examples. As a prelude to the court's questions, Judge Taylor stated:

Now, what we're going to do in the next few moments is we're going to be asking questions of each of you. And believe me, the questions are not to embarrass anyone or make anyone feel bad. The questions are simply so that we can get to know you, so that we can hear - so we

can hear you talk, and so we can kind of get a feel for who you are.

The second reason relates to the fact that there are only eight of you who are going to be called upon to serve as jurors in this case, and what we're going to be seeking are eight people who can be completely neutral, who will be willing to sit and listen carefully to the evidence and decide the case based upon that evidence, not based upon some preconceived notion or how you feel about a particular thing. A willingness to be neutral, to listen to the facts, to listen to the law, and to render justice. That's - that's why we need to talk to you and kind of get to know you. (R. Vol. I 4: 8-25, 5: 1-11).

Following this commentary and outline, the judge asked four (4) specific questions to the jury panel as a whole. They included:

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

(No response)

(R. Vol. I 26: 16-23).

As an addendum to this series of questions, the court stated:

The court: 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 ought not to happen. Do you see my concern? (R. Vol. I 27: 1-14).

Thereafter, the trial judge explored actual and potential bias with each and every juror who raised a hand with either a comment or question. Such voir dire was not only appropriate but required at the hands of a trial judge.

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.

State v. James, 819 P.2d 781, 798 (Utah 1991).

It is interesting to note that Plaintiff terms the judge's numerous questions as an "attempt to rehabilitate" specific individuals during voir dire i.e., Messrs. Cummings and Lee, as if the neutral bench was somehow advocating one side or the other. Again, pointing to the record itself, the District Court was clearly ferreting out data to assist counsel in making informed peremptory challenges as required by the Supreme Court of this great state. State v. Worthen, 765 P.2d 839, 844-45 (Utah 1988) (quoting State v. Taylor, 664 P.2d 439, 447 (Utah 1983)).

Second, following the court's own voir dire of each and every potential juror regarding possible bias and prejudice, Judge Taylor allowed each side full and fair opportunity to conduct personal voir dire of the panel commencing with the Plaintiff.

The court: Did you wish to address questions directly to the panel?

Mr. Conklin: I do, your Honor.

The court: . . . go ahead, Mr. Conklin.

(R. Vol. I 98: 23-25, 100: 19).

Thereafter, Plaintiff's counsel gave the following preamble to the jury panel collectively, followed up with a variety of questions to specific individuals and the group as a whole.<sup>2</sup>

Ladies and Gentlemen, this is the time where the attorneys have an opportunity to ask the panel some - or some individuals some questions. And if I were sitting where you are, I would be thinking I've already answered every question that I want to answer and this is taking a long time.

Let me explain to you, its our - our responsibility in representing our client to make sure that we understand that there are no biases, or that you come in as we like to call it, with a clean slate. And the court has asked almost all the questions that we really need to ask, but I'm going to ask the panel as a whole a couple of questions and if its redundant, I am sorry but well, just indulge me. Okay. (R. Vol. 101: 3-17).

Plaintiff alleges that the District Court erred in failing to conduct adequate voir dire regarding tort reform without so much as asking one question on the subject himself. Was Plaintiff somehow precluded from asking voir dire questions on tort reform on the simple basis that the District Court did not use Plaintiff's questionnaire?

It seems ironic that Plaintiff would quote the Supreme Court in Ball, 685 P.2d 1055, 1066 (Utah 1984) when it stated, "The fairness of a trial may depend on the right of counsel to ask voir dire questions designed to discover attitudes and biases, both

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<sup>2</sup> Plaintiff repeatedly queried the jury panel whether they could be "fair and impartial to both sides" as evidenced on at least five (5) occasions on the record." (R. Vol. I 105: 10, 22; 106: 14; 107: 8-9; and 108: 9).

conscious and subconscious, even though they 'would not have supported a challenge for cause,' " (p. 13?) and yet not ask a single question to a single juror concerning tort reform when given the opportunity to do so by the court itself.

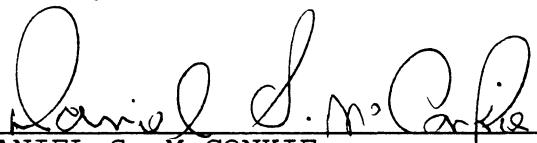
Is it Plaintiff's actual position that the "only viable way to ensure a plaintiff's right to a fair trial" rests with a trial court's use of a questionnaire? (See Appellant's Brief, p. 19) If so, it might do Plaintiff justice to review centuries of jury-trial practice wherein no such questionnaires were ever utilized.

#### **CONCLUSION**

This honorable court need not address Plaintiff's Motion for Directed Verdict concerning UTA as it was not directed at this Defendant. Further, this honorable court should affirm the trial court's denial of Plaintiff's Motions for Directed Verdict and Judgment Notwithstanding the Verdict based upon the evidence presented to the jury and the material issues of fact upon which they could base their decision. Finally, the court should find that the trial court had no obligation to administer plaintiff's questionnaire and conducted sufficient voir dire to eliminate bias and preconceived opinions from the courtroom.

DATED this 10th day of December, 1997.

**HANSON, EPPERSON & WALLACE**

  
\_\_\_\_\_  
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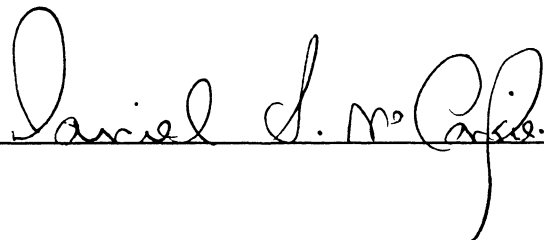


CERTIFICATE OF SERVICE

I certify that I caused to be mailed, postage prepaid on this 10th day of December, 1997, two (2) true and correct copies of the foregoing Brief of the Appellee/UTA, to each of the following:

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A handwritten signature in cursive script, reading "Daniel D. McCall", is written over a horizontal line.