

1998

# Laina Roundy, Plaintiff-Appellant, v. Travis Staley, Defendant-Appellee : Reply Brief

Utah Court of Appeals

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Lynn S. Davies; Christian W. Nelson; John Edward Hansen; Scalley & Reading; Attorneys for Appellee.

Peter C. Collins; Bugden, Collins & Morton; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS NO. 980062-CA

LAINA ROUNDY,

Plaintiff-Appellant,

-v-

TRAVIS STALEY,

Defendant-Appellee,

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:  
:

REPLY BRIEF OF  
PLAINTIFF-APPELLANT,  
LAINA ROUNDY

Priority No. 15

Case No. 980062-CA

APPEAL FROM FINAL JUDGMENT AND FINAL ORDER  
OF THE THIRD JUDICIAL DISTRICT COURT OF  
SALT LAKE COUNTY, STATE OF UTAH  
(JUDGE DAVID S. YOUNG)

LYNN S. DAVIES, #0824  
CHRISTIAN W. NELSON, #5771  
RICHARDS, BRANDT, MILLER &  
NELSON  
Key Bank Tower, Seventh Floor  
50 S. Main Street  
P.O. Box 2465  
Salt Lake City, UT 84110-2465  
Telephone: (801) 531-2000

JOHN EDWARD HANSEN  
SCALLEY & READING  
261 East 300 South, Suite 200  
Salt Lake City, UT 84111  
Telephone: (801) 531-7870

Attorneys for Defendant-Appellee

PETER C. COLLINS, #0700  
BUGDEN, COLLINS & MORTON, LC  
4021 South 700 East, #400  
Salt Lake City, UT 84107  
Telephone: (801) 265-1888

Attorneys for Plaintiff-Appellant

**FILED**  
JAN 11 1999  
COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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Plaintiff-Appellant,	:	REPLY BRIEF OF
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	:	LAINA ROUNDY
-v-	:	
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TRAVIS STALEY,	:	
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P.O. Box 2465  
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Telephone: (801) 531-2000

JOHN EDWARD HANSEN  
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261 East 300 South, Suite 200  
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Telephone: (801) 531-7870

Attorneys for Defendant-Appellee

PETER C. COLLINS, #0700  
BUGDEN, COLLINS & MORTON, LC  
4021 South 700 East, #400  
Salt Lake City, UT 84107  
Telephone: (801) 265-1888

Attorneys for Plaintiff-Appellant

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## **I. INTRODUCTION**

Plaintiff-appellant, Laina Roundy, submits this Brief in reply to the Brief of defendant-appellee, Travis Staley.

Ms. Roundy stands by her legal analysis, and its application to the instant dispute, set forth in her Opening Brief. She seeks to refrain from unnecessarily repeating the arguments, regarding the correctness of which she remains confident, that appear in that Brief.

## **II. ARGUMENT**

### **A. THE INADEQUACY OF MR. STALEY'S OBJECTIONS, THE LACK OF FAIR NOTICE THAT MS. ROUNDY WOULD HAVE TO FILE A MOTION TO COMPEL TO DISCOVER THE PLANNED TESTIMONY AND VIDEOTAPE, AND THE LIKELY FUTILITY OF SUCH A MOTION**

Mr. Staley argues that Ms. Roundy should have filed a Motion to Compel, but his subject discovery responses gave Ms. Roundy no notice of the existence of the videotape, or of Mr. Gunderson, or of the planned testimony of Dr. Moress. Mr. Staley's responses identified some witnesses and some documents, without suggesting there was a videotape or a Mr. Gunderson, and they failed to put Ms. Roundy on notice that there was anything to be compelled in the event the District Court should grant a motion to compel.

Interrogatory No. 3 (quoted in Ms. Roundy's Opening Brief at 13 and in Mr. Staley's Brief at 5) sought, among other things, the identity of all individuals with information concerning the allegations of Ms. Roundy's Complaint and asked Mr. Staley to include in his Answer a brief summary of information possessed by such

persons. Among those allegations were damages allegations, set forth in paragraphs 37-40 of the Complaint. R. at 5-6. Mr. Staley's Answer to that Interrogatory (also quoted at the referenced pages of Ms. Roundy's Opening Brief and Mr. Staley's Brief) interposed no objection to the question about the Complaint and stated, simply: "Plaintiff would best know who has information about their Complaint." Ms. Roundy did not, of course, know about Mr. Gunderson, and he, as the surveillance person, had information regarding the Complaint's allegations regarding Ms. Roundy's physical condition. His name was never mentioned. Nor was Ms. Roundy ever given a "brief summary" -- or any indication -- of the information that Mr. Gunderson had.

In her Rule 26(e) Request for Supplementation, Ms. Roundy requested that Mr. Staley supplement his earlier responses. Mr. Staley's supplemental responses (set forth in Ms. Roundy's Brief at 14 and in Mr. Staley's Brief at 6-8) included his Answer to Interrogatory No. 2, in which he stated that his counsel had not yet made decisions on what witnesses would be called, but in which he also listed several persons by name. His supplemental responses also included his Answer to Interrogatory No. 6, which asked him to identify all documents that he intended to use at trial. Mr. Staley's Answer dealt only with "exhibits" (presumably documents his counsel contemplated introducing into evidence) and listed numerous documents and categories of documents. It said nothing about a surveillance video, and it gave no hint of its existence. Nor did it object on a work-product basis.

Mr. Staley's supplemental Answer to Interrogatory No. 4, dealing with expert witnesses, designated Dr. Gerald Moress, but said nothing about his commentary

on the videotape.

Likely worthy of note are the facts that, on April 9, 1997, weeks after Mr. Gunderson had done the surveillance work that went into the videotape (Gunderson trial testimony, Tr. of May 14, 1997 proceedings, at 221; 225), Mr. Staley further supplemented his Answers to Interrogatories (with the names of additional experts) (R. at 513-16) but that, even in that submission, he did not disclose the name of Mr. Gunderson, the videotape, or Dr. Moress's planned testimony regarding the videotape. Mr. Staley did no further supplementation.

In these circumstances, Mr. Staley cannot persuasively contend that Ms. Roundy's remedy was to file and pursue a motion to compel. How was she to know, given Mr. Staley's responses, that there was anything to compel? Also, based on the District Court's treatment of the issue during the colloquy that transpired during trial (Add. to Ms. Roundy's Opening Brief at 19-20), it appears that any such motion would have been futile.

**B. THE SUFFICIENCY OF MS. ROUNDY'S DISCOVERY REQUESTS AND REQUEST FOR SUPPLEMENTATION**

A central theme of Mr. Staley's argument (see, *e.g.*, the heading of Part I.A. of his Argument (appearing at page 12 of his Brief) is that Ms. Roundy's appeal is doomed by her failure specifically to request, in the discovery process, the production of information regarding surveillance evidence. A careful review, however, of Ms. Roundy's discovery requests, as well as the cases relied on by Mr. Staley, leads to the conclusion that that contention is fallacious. There is nothing in the Rules that

requires a litigant specifically to request surveillance-related evidence. Ms. Roundy's subject requests were broadly but comprehensively worded, and a fair reading of Mr. Staley's responses, which reveal the names of a number of witnesses and a large number of categories of documents, leads to the conclusion that a litigant in Ms. Roundy's position would see no need specifically to inquire about the existence, or planned evidentiary presentation concerning, surveillance evidence.

There is, further, nothing in any of the cases cited by Mr. Staley, or in any case unearthed by Ms. Roundy's counsel, that stands for the proposition that interrogatories worded as Ms. Roundy's are worded do not fairly put opposing counsel on notice of a litigant's desire to obtain pre-trial disclosure of the kind of information that is at issue here. In Feola v. Egan, 1998 WL 666964 (Conn. Super.), the trial court stated, in pertinent part:

... the plaintiff points to no interrogatory or discovery proceeding, or other form of procedure, that would have called for the defendant to reveal the existence of a videotape.

Here, Ms. Roundy's interrogatories, calling for the identity of witnesses, the nature of their testimony, and a description of documents (including, by definition -- see definition of "document" or "documents" set forth at pages 2-3 of the Addendum to Ms. Roundy's Opening Brief -- videotapes) Mr. Staley intended to use at trial, clearly called for Mr. Staley to reveal his planned evidentiary presentation.

In Detillier v. Smith, 638 So.2d 445 (La. App. 1994), the videotape was made during the trial. Probably more important is the fact that there is no mention whatsoever in that case of any discovery requests. In Kiss v. Jacob, 633 A.2d 544

(N.J. App. 1993), the problem was that the plaintiffs' counsel, having been informed by the defendant's counsel that "photographs" of the plaintiff existed and were available for inspection, did not take defendant's counsel up on his offer that plaintiff's counsel could review the "photographs" prior to trial. The dynamics of the instant case are, of course, completely different.

Instructive on this issue are the following emphasized remarks of the court in Hoey v. Hawkins, 332 A.2d 403 (Del. 1975), a case which reversed the trial court's denial of the plaintiff's motion for a new trial and which also eloquently explains the important policy principles underlying Ms. Roundy's position in this Appeal:

There is an obvious tension between pretrial disclosure and the raw spirit of adversariness. Chancellor (then Judge) Quillen summed up the countervailing positions in Olszewski v. Howell, Del.Super. 253 A.d 77 (1969):

"... On the one hand, a plaintiff shows need for protection against the rather distasteful business of having an opposing litigant possibly use, and even misuse, motion pictures of the plaintiff, taken secretly without the plaintiff's knowledge and consent, in a manner deliberately designed to impeach the plaintiff's credibility and to degrade the plaintiff generally. On the other hand, a defendant demonstrates a need to protect himself against a possible exaggerated claim, and even false claim, of personal injury and shows that a premature disclosure of the impeachment evidence could result in a conscious or subconscious tailoring of the plaintiff's case in chief to meet the challenge."

The Court there found good cause had been established for production, recognizing the

"... well established policy of pretrial disclosure which is based on a rationale that a trial decision should result from a disinterested search for truth from all the available evidence rather than tactical

maneuvers based on the calculated manipulation of evidence and its production."

It appears that the apparently damaging evidence in controversy here was intentionally and not inadvertently secreted by defendant during the discovery stage. It makes no difference that defendant's counsel did not know anything about the film until the eve of trial. Indeed, that tends to emphasize the hidden and surprise aspects of what was done. A party certainly cannot avoid his duty under the Rules to give discovery by withholding facts from his own counsel.

The obvious tactical objective sought was to surprise and that does not comport with the spirit of the Discovery Rules. We thought that had been settled almost twenty years ago as Chief Justice (then Judge) Hermann wrote in *The New Rules of Civil Procedure in Delaware*, Del. 18 F.R.D. 327 (1956):

"... In the application of the new Rules, we see a complete reversal of attitude as to discovery. Each party is now entitled to the use of any relevant information in the possession of the other party, if not privileged. Depositions, interrogatories, inspection of books and records, medical examination, and requests for admission are discovery devices now in widespread and constant use in this jurisdiction.

Broad and liberal discovery has revolutionized litigation in Delaware courts. By use of available discovery devices, a lawyer may now come to trial almost as familiar with his opponent's case as with his own. The objection to the 'fishing expedition' is repudiated, surprise has been reduced to a minimum and the 'sporting theory of justice' has been eliminated in the interest of the ascertainment of truth. The exponents of surprise testimony as the best weapon against a perjurious adversary become fewer and fewer as experience proves the contrary view. Discovery under the Rules may enable a party to establish the legal rights which might have been otherwise denied to him. Discovery and pretrial practices usually result in the narrowing and clarifying of issues so as to shorten trials and to bring about a greater degree of clarity and justice in the presentation of facts to jurors."

We take the occasion to emphasize that purpose and spirit of the Discovery Rules.

Defendant's failure to disclose the pertinent facts does not conform to the letter of the Discovery Rules. Plaintiff's interrogatories directed defendant to disclose the identity of persons who had knowledge of the facts alleged in the pleading or had been interviewed in defendant's behalf. Defendant contends that the scope of these questions was too broad to require disclosure about the identity of the detective, absent a particularized query as to films or photos. We disagree.

332 A.2d at 405-06 (emphasis added).

Also unavailing to Mr. Staley is his attempt to cause this Court to believe that a case cited by Ms. Roundy in her Opening Brief, Dodson v. Persell, 390 So.2d 704 (Fla. 1980), actually supports Mr. Staley's position. The fact that, in Dodson, the plaintiff's counsel specifically requested the pre-trial disclosure of surveillance-related evidence does not mean that discovery requests of the kind Ms. Roundy propounded are not sufficient. Nor, of course, is it of any assistance to Mr. Staley's position in this Appeal that Ms. Roundy, unlike the plaintiff in Dodson, did not file a motion to compel pre-trial disclosure. For, unlike the defendant's counsel in Dodson, Mr. Staley's counsel did not prior to trial disclose the existence of the evidence, and, unlike the plaintiff in Dodson, Ms. Roundy had no reason to think that the evidence even existed.

This Court should, as a result of common judicial sense, and as the Delaware Supreme Court did in Hoey, hold that Ms. Roundy's subject Interrogatories were sufficient to cause Mr. Staley's counsel to disclose the subject surveillance and surveillance-related evidence, in seasonable fashion prior to trial.

### C. THE INAPPLICABILITY OF THE "WORK-PRODUCT" DOCTRINE

Mr. Staley, in his Brief, at 15, appears for the first time to contend that the surveillance evidence was "privileged work product until it was decided it would be used at trial." A review of Mr. Staley's subject discovery responses (see, *e.g.*, Mr. Staley's Brief at 5-8) will reveal that no such objection was made to any of the subject Interrogatories. Accordingly, that objection, if it were valid and had anything to do with the instant dispute, was waived. If the objection had not been waived, and even if Mr. Staley's counsel had not, prior to trial, determined to use the surveillance and surveillance-related evidence (including the (to Ms. Roundy and her counsel) unforeseen, and unforeseeable, testimony of Dr. Moress -- referenced at pages 7-8, footnote 1, and page 16 of Ms. Roundy's Opening Brief), the work-product doctrine would have been unavailing. For, in the words of Rule 26(b)(3) of the Utah Rules of Civil Procedure, Ms. Roundy had -- and would have been able to demonstrate this to the District Court if she'd known what was afoot --

substantial need of the materials in the preparation of [her] case and ...  
was unable without undue hardship to obtain the substantial equivalent of  
the materials by other means.

Instructive on this point are the observations of the New Jersey Supreme Court in Jenkins v. Rainer, 350 A.2d 473, 477 (N.J. 1976):

We turn to the provision of R. 4:10-2(c) [apparently, the New Jersey equivalent of Rule 26(b)(3)] that the party seeking discovery must be "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Plaintiff contends this requirement is met by the impossibility of creating the equivalent of the motion pictures, they

having been taken sometime in the eighteen month period prior to Waldman's deposition.

The point does not require much exposition. If the evidence is unique, such that a party cannot copy or otherwise recreate it, then the hardship in obtaining a substantial equivalent seems manifest. Defendants do not offer any suggestion as to what steps plaintiff might now take to reproduce the evidence contained in their motion pictures. The likelihood of any substitute, were we able to think of one, being the substantial equivalent of the films is slim indeed, given the tremendous impact of movies. See Balian v. General Motors, 121 N.J.Super. 188, 128, 296 A.2d 317 (App. Div. 1972); Paradis, "The Celluloid Witness," 37 U. Colo. L. Rev. 235. Plaintiff herein has satisfied the requirement of the Rule.

See, also, a case relied on by Mr. Staley for its "harmless error" analysis, McDougal v. McCammon, 455 S.E.2d 788, 796 n. 9 (W.Va. 1995): "Obviously, the defendant cannot consider this a serious argument." "... the defendant's tactics border on misconduct." *Id.*, n. 10. Finally, the work-product doctrine applies only to documents, and it offers Mr. Staley no aid with respect to his refusal to provide the requested information regarding witnesses and the areas of their expected testimony.

**D. THE INSIGNIFICANCE OF THE LACK OF A PRE-TRIAL ORDER REQUIRING DISCLOSURE OF WITNESSES AND EXHIBITS**

Mr. Staley makes much of the fact that there was no District Court order, in this case, that required the parties to identify witnesses or exhibits and seeks, on that basis, to distinguish authorities such as Lascano v. Vowell, 940 P.2d 977 (Colo. App. 1996), brought to the Court's attention by Ms. Roundy in her Opening Brief. There is nothing, however, in Utah law or policy -- or, to Ms. Roundy's counsel's knowledge, in American jurisprudence at large -- that allows a party to rest on the absence of such an

order in an effort to evade his, her, or its obligation to answer Interrogatories in a forthright fashion or to supplement Answers in timely fashion. The fact that there was no such order in this case does not lead to the conclusion that Mr. Staley could flout the discovery Rules.

**E. THE APPLICABILITY OF THE PRINCIPLES SET FORTH IN THE NON-SURVEILLANCE EVIDENCE CASES CITED BY MS. ROUNDY**

Mr. Staley in essence urges this Court to ignore authorities such as Perez-Perez v. Popular Leasing Rental, Inc., 993 F.2d 281 (1st Cir. 1993), and Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir. 1980), simply because they don't deal specifically with surveillance evidence. It is for the general principles of pre-trial disclosure that Ms. Roundy has cited these cases. Regardless of Mr. Staley's apparent attempt to convince the Court that surveillance evidence cases are *sui generis*, Ms. Roundy urges the Court to consider those named cases, and the others cited in those cases (including those mentioned at 19-20 of Ms. Roundy's Opening Brief), for their analyses of discovery abuses, unfair surprise, and results reached, including reversals of judgments on jury verdicts and denials of motions for new trial.

**F. THE SIGNIFICANCE OF MS. ROUNDY'S DEPOSITION TESTIMONY**

Mr. Staley makes much of his supposed planned use of the surveillance evidence only if it eventuated, at trial, that Ms. Roundy would lie about her physical limitations. The fact of the matter is that Ms. Roundy's deposition was taken twice (the second time on May 1, 1997, after Mr. Gunderson's surveillance work was done and a

week before the trial began). In the deposition process, Ms. Roundy testified essentially as she did at trial. Tr. of proceedings of September 5, 1997, at 9-10. Mr. Staley's counsel knew, based on that deposition testimony, how Ms. Roundy would testify, at trial, regarding her physical limitations. See, also, Ms. Roundy's trial testimony. Tr. of May 13, 1997 proceedings at 57-63; 201 (direct examination); 220-234 (cross-examination, including (beginning at 226) questions dealing with that second deposition testimony); tr. of May 14, 1997 proceedings at 231-34. Mr. Staley's contention that he would use the surveillance evidence only if he should be "surprised" by her trial testimony is thus unmasked as a sham. If this aspect of Mr. Staley's argument is significant to the Court, and if the Court needs any more support<sup>1</sup> for the proposition that the surveillance evidence was not true "rebuttal" evidence, this should do it.

**G. MR. STALEY'S ERRONEOUS AND LOGICALLY FLAWED ARGUMENT THAT MS. ROUNDY COULD HAVE GUARDED AGAINST THE SURPRISE EVIDENCE**

Mr. Staley argues, in Point II of his Brief, that Ms. Roundy could, with "ordinary prudence," have guarded against the surprise testimony of Dr. Moress and Mr. Gunderson and the surprise videotape itself. The first prong of Mr. Staley's argument -- that Ms. Roundy should have propounded discovery requests dealing specifically with surveillance evidence and could have filed a motion to compel -- has already been addressed. The second prong -- that Ms. Roundy could have avoided the

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<sup>1</sup>See, also, the quote from the Hoey case set forth at 5-7, *supra*; and the quote from the Jenkins case set forth at 12-13, *infra*.

surprise by simply testifying "honestly and consistently" (Mr. Staley's Brief at 19) -- is most curious. First, and as stated in her Opening Brief at 8, Ms. Roundy maintains, although she acknowledges that the jury -- especially after Dr. Moress testified -- may have viewed this differently, that she was candid in her testimony. Ms. Roundy suggests, in this connection, that the Court compare her trial testimony (Tr. of May 13, 1997 proceedings at 57-63; 201; 220-34; tr. of May 14, 1997 proceedings at 231-34) with the surveillance videotape (Mr. Staley's Exhibit 23-D) and with Dr. Moress's testimony (Tr. of May 14, 1997 proceedings at 22-23). Second, Ms. Roundy urges the Court to recognize the logical fallacy of Mr. Staley's contention. Without citing any case or other authority for the proposition, Mr. Staley asks this Court to conclude that his counsel's version of truthfulness is "ordinary prudence," as contemplated by Rule 59(a)(3) of the Utah Rules of Civil Procedure. The proposition that a surveillance videotape is ever "the exclusive repository of truth and virtue" was soundly and eloquently debunked by the New Jersey Supreme Court in Jenkins v. Rainer, 350 A.2d 473, 476-477 (N.J. 1976), a case of which Ms. Roundy respectfully suggests this Court take particular notice. That court there observed, in the course of reversing a trial court:

Twenty-five years ago Chief Justice Vanderbilt pointed out:

Our Rules for discovery ... are designed to insure that the outcome of litigation in this State shall depend on its merits in the light of all of the available facts, rather than on the craftiness of the parties or the guile of their counsel. [Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 338, 78 A.2d 705, 707 (1951).]

This policy is in keeping with the modern trend which recognizes "the

need to make available to each party the widest possible sources of proof as early as may be so as to avoid surprise and facilitate preparation.” *McCormick, op. cit. supra*, § 96 at 202.

Quite aside from its departure from this long-established policy, defendants’ position suffers from an obvious analytical weakness: it is based on the premises that defendants’ evidence (in the form of the undercover films) is the exclusive repository of truth and virtue and its disclosure prior to trial will deprive them of the opportunity to demonstrate to the jurors the fraud plaintiff seeks to work upon them. While defendants do not state that assumption quite so bluntly, their argument rests upon it at least implicitly. The premise is one we can hardly indulge. It is no more unlikely that a defendant may resort to chicanery in fabricating motion pictures of one alleged to be the plaintiff than it is that a plaintiff may indeed be a faker. The camera itself may be an instrument of deception, capable of being misused with respect to distances, lighting, camera angles, speed, editing and splicing, and chronology. Hence, “that which purports to be a means to reach the truth may be distorted, misleading, and false.” *Snead v. Amer. Export-Isbrandtsen Lines, Inc.*, 50 F.R.D. 148, 150 (E.D. Pa. 1973).

The surprise which results from distortion of misidentification is plainly unfair. If it is unleashed at the time of trial, the opportunity for an adversary to protect against its damaging inference by attacking the integrity of the film and developing counter-evidence is gone or at least greatly diminished. The delay which would inevitably ensue from an interruption of the trial to permit examination and perhaps testing of the films should be avoided. If on the other hand the motion pictures actually portray plaintiff engaged in some strenuous activity which on depositions she had already testified is beyond her capacity, then it is not probable that pretrial disclosure of that kind of inconsistency will enable her to salvage the case; more likely it will hasten a settlement. If the inconsistency is not glaring or is susceptible of explanation, or if for other reasons settlement opportunities are not enhanced, then the adversarial system will be called upon to work, but now in the environment in which it works most efficiently -- where the parties are aware of all the evidence.

(Emphasis added.) Ms. Roundy urges the Court soundly to reject Mr. Staley’s

contention that the surprise in this case was one that "ordinary prudence" could have guarded against.

**H. "IRREGULARITY IN THE PROCEEDINGS" AND "ERROR IN LAW"**

Mr. Staley asks this Court to accept the proposition that there was nothing "irregular" about the conduct of Mr. Staley's counsel, or about the District Court's allowing the subject evidence, in the interest of courtroom drama (see discussion in Ms. Roundy's Brief, at 7), that denied Ms. Roundy a fair trial. Ms. Roundy concedes that her counsel has been unable to find any case law applying an "irregularity" analysis to a history such as this, but urges the Court to recognize, as an alternative basis for granting her a new trial, that the lack of case law does not necessarily mean that the analysis does not fit this history.

Mr. Staley also urges the Court to accept the proposition that the District Court's admission of the surveillance and surveillance-related evidence does not amount to an "error in law." Again, as with the "irregularity" aspect of her argument, Ms. Roundy has been unable to locate case law that directly supports the "error in law" aspect of her appeal. Again, however, she urges the Court to apply common judicial sense, even in the absence of extant case law, and to determine that the District Court's allowing the evidence in question, which was not true "rebuttal" evidence," did, indeed, amount to a Rule 59(a)(7) "error in law."

**I. THE EVIDENCE THAT THE LIGHT WAS EITHER GREEN OR YELLOW WHEN MR. STALEY ENTERED THE INTERSECTION WAS BY NO MEANS "OVERWHELMING"**

Mr. Staley has acknowledged, in his Brief at 4, that

[o]f primary dispute at trial was the color of the traffic signal governing the intersection at the time that Roundy made her left turn, and at the time that Staley entered the intersection.

That is precisely why, as explained by Ms. Roundy' in her Opening Brief, at 21-23, the overall credibility of Ms. Roundy, who was the only witness directly to testify that the light had to be red when Mr. Staley entered the intersection (*e.g.*, Ms. Roundy's Opening Brief at 8-9), was so important to her case and is so important in this Appeal. It is, however, wrong for Mr. Staley to contend, as he does at page 9 of his Brief, that the "overwhelming evidence presented established that the light was green or yellow when Mr. Staley entered the intersection, and that Ms. Roundy has "note[d]" that in her Opening Brief. Mr. Staley has offered no record citation for his "overwhelming evidence" proposition, and Ms. Roundy has nowhere acknowledged that to be a fact. The Court's independent review of the trial record (testimony of Mr. Staley, eyewitnesses Anita Sanchez and Maryann Jiminez, Salt Lake City Police Officer Robert Hawk, Ms. Roundy's accident reconstructionist John Burraston, and Mr. Staley's accident reconstructionist Ronald Probert) will, if the Court determines, in the absence of Mr. Staley's citation to the record, to embark on such an exercise, reveal that the evidence on the question was anything but "overwhelming."

**J. THE SURPRISE EVIDENCE, THE IRREGULARITY IN THE PROCEEDINGS, AND THE ERROR IN LAW WERE NOT "HARMLESS"**

Ms. Roundy acknowledges that she, and this Court, must address Rule 61 of the Utah Rules of Civil Procedure, and its mandate that Rule 59 surprise, misconduct, or error does not lead to the granting of a new trial if it is "harmless." In the circumstances of this case, however, this Court should recognize, and rule, that refusal to grant a new trial would be, in the words of Rule 61, "inconsistent with substantial justice."

Ms. Roundy acknowledges that the jury in this case did not get to damages and that therefore, by superficial analysis, the errors of which she complains, all dealing with the surveillance and surveillance-related evidence, had nothing to do with the verdict. Conspicuous and most telling, however, is the abject failure of Mr. Staley's Brief to address the contention, set forth in Ms. Roundy's Opening Brief (at 8; 22-23), that Ms. Roundy's supposed lack of credibility -- as supposedly proved by the surveillance and surveillance-related evidence -- was central to Mr. Staley's liability defense (given, again, the crucial fact that Ms. Roundy was the only witness who definitively testified that the light was red). Also conspicuous by its absence is any response by Mr. Staley to Ms. Roundy's discussion, in her Opening Brief at 25, of the case of Green v. Denver & Rio Grande Western R. Co., 59 F.2d 1029, 1033-34 (10th Cir. 1995), where the court reversed and remanded for new trial, on all issues, including liability issues, in a case where the jury found the defendant not negligent and where the pertinent issue on appeal dealt, superficially, only with damages.

Contrary to Mr. Staley's contention, made in his Brief at 22, the evidence at issue in this case did not address "only ... the damages element of Roundy's case." It dealt, by Mr. Staley's counsel's own acknowledgment, with all aspects of Ms. Roundy's credibility. See, particularly, the following excerpt from Mr. Staley's counsel's closing argument (also set forth at 27-28 of the Addendum to Ms. Roundy's Opening Brief):

Now let's talk for a minute about plaintiff's injuries. And this goes -- the discussion I want to have with you for a minute here goes to not only what injuries the plaintiff has, but also to the whole issue of her credibility in this case.

Whether it has to do with the accident that occurred itself or her injuries or her medical treatment or whatever, because as I read from the instructions earlier, if you find that she's wilfully testified falsely, you can throw out all of her testimony, and all the evidence she provided.

Mr. Staley's counsel's own words thus clearly bely Mr. Staley's contention that the evidence in question dealt only with and went only to damages. And, again, Ms. Roundy's credibility was crucial to her liability case.

Mr. Staley relies, in connection with the "harmless error" aspect of his argument, on the case of McDougal v. McCammon, 455 S.E.2d 788 (W.Va. 1995). In McDougal, however, as noted by Mr. Staley, "the video tape in dispute did not affect the question of liability ...." *Id.* at 799. Here, and by Mr. Staley's counsel's own acknowledgment, via closing argument, it clearly did. And, as pointed out by the Court in McDougal,

It must be noted that had the video tape been relevant to the liability issue, we would not hesitate to reverse the judgment of the trial court and remand for a new trial. The deliberate failure by the defendant not to supplement the discovery of such obviously pertinent materials in her

possession is error of such a magnitude warranting a new trial.

*Id.* at 798, n. 13 (emphasis added).

Here the surveillance and surveillance-related evidence was clearly relevant to the liability issue, and here this Court should reverse and remand for new trial.

**K. THE DIRECTED VERDICT ON MS. ROUNDY'S PUNITIVE DAMAGES CLAIM**

Ms. Roundy urges the Court to include, in its remand Order, instructions to the District Court to allow her to proceed, in the new trial, with her punitive damages claim. If the evidence comes in -- as it did in the first trial and as she expects it will in the new trial -- from Ms. Roundy and from her accident reconstructionist, who relied substantially on Ms. Roundy's version of the events, that Mr. Staley, driving a large vehicle, roared blindly, and without braking, into an intersection on a light that had been red for as long as two seconds, that will support a case for the imposition of punitive damages. It will then be for the jury in the new trial to determine, under Utah Code Ann. § 78-18-1, and pursuant to the Court's observations in Gleave v. Denver & Rio Grande Western R. Co., 749 P.2d 660, 670 (Utah App. 1988), discussed in Ms. Roundy's Opening Brief at 26-27, whether, if it determines the liability issues in Ms. Roundy's favor, and if it awards compensatory damages, an award of punitive damages is in order. This is not necessarily, contrary to Mr. Staley's apparent contention, a "simple negligence" case. And if the new jury chooses, as will be its prerogative, fully to accept Ms. Roundy's version of the facts and to reject contrary

versions of the facts, it will be free, even under the "clear and convincing evidence" standard on which it will be instructed, appropriately to impose an award of punitive damages. This is, it must be kept in mind, a directed verdict question, and it was not, and will not be, one on which reasonable persons could not differ.

### **III. CONCLUSION AND STATEMENT OF RELIEF SOUGHT**

Under Rule 59(a)(3) of the Utah Rules of Civil Procedure ("surprise, which ordinary prudence could not have guarded against"), and/or Rule 59(a)(1) of the Utah Rules of Civil Procedure ("irregularity in the proceedings ..."), and/or under Rule 59(a)(7) of the Utah Rules of Civil Procedure ("error in law"), Ms. Roundy is entitled to a new trial. Neither the Court's allowing the evidence nor Mr. Staley's counsel's conduct was "harmless," and Ms. Roundy was denied substantial justice. Also, Ms. Roundy's punitive damages claim was, and remains, viable.

Ms. Roundy urges the Court, in the interest of fair play and in the interest of justice, to reverse and remand for new trial.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of January, 1999.



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PETER C. COLLINS  
BUGDEN, COLLINS & MORTON, L.C.  
Attorneys for Plaintiff-Appellant, Laina  
Roundy

CERTIFICATE OF SERVICE

I hereby certify that, on the 11<sup>th</sup> day of January, 1999, I caused to be served two true and correct copies of the foregoing REPLY BRIEF OF PLAINTIFF-APPELLANT LAINA ROUNDY by the method indicated below, and addressed to the following:

Lynn S. Davies  
Christian W. Nelson  
Richards, Brandt, Miller & Nelson  
Key Bank Tower, Seventh Floor  
50 S. Main Street  
P.O. Box 2465  
Salt Lake City, UT 84110-2465

☐ HAND DELIVERY  
☒ U.S. MAIL  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)  
(532-5506)

John Edward Hansen  
Scalley & Reading  
261 East 300 South, Suite 200  
Salt Lake City, UT 84111

☐ HAND DELIVERY  
☒ U.S. MAIL  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)  
(531-7968)

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