

1998

Laina Roundy, Plaintiff-Appellant, vs. Travis Staley, Defendant/Appellee : Brief of Appellee

Utah Court of Appeals

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980062-CA

IN THE UTAH COURT OF APPEALS

LAINA ROUNDY,

Plaintiff/Appellant,

vs.

TRAVIS STALEY,

Defendant/Appellee.

Priority No. 15

Case No. 980062-CA

**BRIEF OF DEFENDANT-APPELLEE
TRAVIS STALEY**

APPEAL FROM THE ORDERS OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE DAVID S. YOUNG

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Julia D'Alessandro
Clerk of the Court

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LIST OF ALL PARTIES TO THE PROCEEDING

Plaintiff/Appellant, Laina Roundy (“Roundy”).

Defendant/Appellee, Travis Staley (“Staley”).

Thor B. Roundy and Anastasia Roundy, the husband and daughter of Laina Roundy, were original parties to this action. Their claims, which were based upon the theory of loss of consortium, were summarily dismissed. Neil Staley, Travis Staley’s father, was also initially a defendant to the action. Roundy’s claims against Neil Staley, which were based upon a theory of negligent entrustment, were also summarily dismissed. The trial court’s orders regarding the dismissal of these parties are not before this Court on appeal.

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STATEMENT OF JURISDICTION

This matter is an appeal from a final judgment and order of the Third Judicial District Court of Salt Lake County, State of Utah. The Judgment reflecting the jury verdict was entered on July 11, 1997. The Order Denying Roundy's Motion for New Trial was entered on November 4, 1997. The Utah Court of Appeals has jurisdiction over this matter pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure and Utah Code Annotated § 78-2(a)-3(2)(j). The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Annotated § 78-2-2(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court properly allow Staley to present surveillance video evidence of Roundy at trial in order to rebut Roundy's credibility and testimony regarding the extent of her injuries?

In reviewing questions of the admissibility of evidence that do not involve the balancing of specified factors this Court employs a correctness standard. *Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372 (Utah 1995); *Utah Dept. of Trans. v. 6200 South Asso.*, 872 P.2d 462 (Ut. Ct. App. 1994); *Turner v. General Adjustment Bureau, Inc.*, 832 P.2d 62 (Ut. Ct. App. 1992).

2. Did the District Court commit reversible error by denying Roundy's Motion for New Trial based upon Rule 59(a)(3) of the Utah Rules of Civil Procedure which provides that a district court "may" grant a new trial on the basis of "[a]ccident or surprise, which ordinary prudence could not have guarded against," because the District Court allowed Staley to present surveillance video evidence of Roundy to rebut her credibility and testimony regarding the extent of her injuries?

The granting or refusal to grant a new trial is a matter of broad discretion of the trial court. *Haslam v. Paulsen*, 389 P.2d 736 (Utah 1964); *Page v. Utah Home Fire Ins. Co.*, 391 P.2d 290 (Utah 1964). Thus, the trial court's decision will be reversed on appeal only for an abuse of discretion. *Smith v. Shreeve*, 551 P.2d 1261 (Utah 1976); *Schmidt v. Intermountain Health Care, Inc.*, 635 P.2d 99 (Utah 1981).

3. Did the District Court commit reversible error by denying Roundy's Motion for New Trial based upon Rule 59(a)(1) of the Utah Rules of Civil Procedure which provides that a district court "may" grant a new trial on the basis of "irregularity in the proceedings" and because the District Court allowed Staley to present surveillance video evidence of Roundy to rebut her credibility and testimony regarding the extent of her injuries?

The trial court's decision to refuse to grant a new trial will be reversed on appeal only for an abuse of discretion. *Smith v. Shreeve*, 551 P.2d 1261 (Utah 1976); *Schmidt v. Intermountain Health Care, Inc.*, 635 P.2d 99 (Utah 1981).

4. Did the District Court commit reversible error by denying Roundy's Motion for New Trial based upon Rule 59(a)(7) of the Utah Rules of Civil Procedure which provides that a District Court "may" grant a new trial on the basis of "error in the law," because the District Court allowed Staley to present surveillance video evidence of Roundy to rebut her credibility and testimony regarding the extent of her injuries?

The trial court's decision to refuse to grant a new trial will be reversed on appeal only for an abuse of discretion. *Smith v. Shreeve*, 551 P.2d 1261 (Utah 1976); *Schmidt v. Intermountain Health Care, Inc.*, 635 P.2d 99 (Utah 1981).

5. Did the District Court commit reversible error in granting Staley's Motion for Directed Verdict on Roundy's cause of action for punitive damages?

Reversal of a trial court's grant of directed verdict is required only if reasonable men could arrive at a different conclusion. *Rhiness v. Dansie*, 472 P.2d 428 (Utah 1970);

Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991); *Onyeabor v. Pro Roofing, Inc.*, 787 P.2d 525 (Ut. Ct. App. 1990).

STATEMENT OF THE CASE

This action arises from an automobile accident that occurred on May 18, 1994 in Salt Lake County, Utah. The accident took place at the intersection of Redwood Road and the I-80 on/off ramp. (Tr. of May 13, 1997 proceedings at 30.) Just prior to the accident Staley's vehicle approached the intersection traveling northbound on Redwood Road. (Tr. of May 14, 1997 proceedings at 78.) Roundy's vehicle was traveling southbound on Redwood Road. (Tr. of May 13, 1997 proceedings at 31-32.) The accident occurred as Roundy made a left turn through the intersection on to the I-80 on ramp across the path of Staley's vehicle. (Tr. of May 13 1997 proceedings at 34.) Of 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. As a result of the accident Roundy claims to have sustained cervical soft tissue injuries. She also complained of injuries to her head, arm, back and chest. (Tr. of May 13, 1997 proceedings at 57-62.)

On October 19, 1994 Roundy submitted Plaintiffs' First Set of Interrogatories, Requests for Production of Documents and Things and Requests for Admissions to Defendants ("written discovery requests"). (Addendum to Roundy's Opening Brief.) Roundy's written discovery requests, and Staley's responses thereto include the following:

INTERROGATORY NO. 2: Identify all witnesses you intend to call on your behalf at trial in this matter. Include in your answer a brief summary of their proposed testimony.

ANSWER: OBJECTION. Discovery is on-going and counsel for defendant has not yet made decisions about which witnesses may be called at trial. Counsel for defendant will comply with the court's order for designating witnesses at the time designated by the court. Without waiving that objection, it is anticipated at this time that defense counsel will call: plaintiffs, defendants Neil Staley and Travis Staley, Melodie Kraft, Officer Hawk, Maryann Jiminez, expert witnesses as yet undetermined and undoubtedly others.

INTERROGATORY NO. 3: Identify all individuals who may have information concerning the allegations of Plaintiff's Complaint and Defendant's Answer. Include in your answer a brief summary of the information which they may have.

ANSWER: Plaintiff would best know who has information about their Complaint. As to defendants' Answer, Objection: The answer was prepared by counsel, and is the product of counsel's mental impressions and legal analysis; as such the information requested is protected as work product pursuant to Utah Rule of Civil Procedure 26(b)(3). As to the general subject matter of this litigation, plaintiffs, defendants Neil Staley and Travis Staley, Officer Hawk, Melodie Kraft, Maryann Jiminez, plaintiff's treating physicians and undoubtedly others.

INTERROGATORY NO. 4: Identify all individuals you plan to use as expert witnesses at trial in this matter. Include in your answer a copy of their résumé or curriculum vitae, and a brief summary of their proposed testimony.

ANSWER: OBJECTION. Discovery is on-going and counsel for defendant has not yet made decisions about expert witnesses that may be called at trial. Counsel for defendant will comply with the court's order for designating witnesses at the time designated by the court. Without waiving that objection, it is anticipated at this

time that defense counsel will call an accident reconstructionist, one or more medical experts, who are undetermined at this time, and one or more medical experts who will perform Independent Medical Examinations; other experts may likely be called as well.

INTERROGATORY NO. 6: Identify all documents (in the detail required by “Definitions” paragraph 5, above) you intend to use on your behalf at trial in this matter.

ANSWER: OBJECTION. This discovery is on-going and counsel for defendant has not yet made decisions about which exhibits may be used at trial. Counsel for defendant will comply with the court’s order for providing exhibits or exhibit lists at the time designated by the court.

None of Roundy’s interrogatories asked specifically if Staley had a surveillance video tape of Roundy or regarding the existence of surveillance evidence at all. None of Roundy’s request for production of documents asked Staley to produce copies of the surveillance video tape or other surveillance evidence. Roundy never filed a motion to compel additional discovery sought pursuant to her First Set of Interrogatories, Request for Production of Documents and Things and Request for Admissions to Defendants. *Id.*

On September 25, 1996, Roundy submitted a Rule 26(e) Request for Supplementation. On November 13, 1996, Staley provided his responses thereto. (Addendum to Roundy’s Opening Brief.) Roundy’s supplemental written discovery requests and Staley’s responses thereto include the following:

INTERROGATORY NO. 2: Identify all witnesses you intend to call on your behalf at trial on this matter. Include in your answer a brief summary of their proposed testimony.

ANSWER: Counsel for defendant has not yet made decisions about which witnesses may be called at trial. Counsel for defendant will comply with the court's order for designating witnesses at the time designated by the court. Without waiving that objection, it is anticipated at this time that defense will call: Laina Roundy, Travis Staley, Melodie Kraft, Officer Hawk, Maryann Jiminez, Anita Sanchez and undoubtedly others.

INTERROGATORY NO. 4: Identify all individuals you plan to use as expert witnesses at trial in this matter. Include in your answer a copy of their résumé or curriculum vitae, and a brief summary of their proposed testimony.

ANSWER: OBJECTION. Discovery is on-going and counsel for defendant has not made decisions about expert witnesses that may be called at trial. Counsel for defendant will comply with the court's order for designating witnesses at the time designated by the court. Without waiving that objection, it is anticipated at this time that defense counsel will call Ronald L. Probert, accident reconstructionist, Gerald Moress, M.D., and other experts may likely be called as well.

INTERROGATORY NO. 6: Identify all documents (in the detail required by "Definitions" paragraph 5 above) you intend to use on your behalf at trial on this matter.

ANSWER: Discovery is on-going and counsel for defendant has not yet made decisions about which exhibits may be used at trial. Counsel for defendant will comply with the court's order for providing exhibits or exhibit lists at the time designated by the court. Without waiving that objection, defendant may use the following exhibits at trial: a diagram of the accident scene involved in the subject accident; defendant may use a computer animation/recreation of the subject accident; photographs of the accident scene; portions of plaintiff's medical records and medical expenses, including extracts and summaries of such; copies, redacted as necessary, of the investigating officers' reports, diagrams and statements; Photographs of the defendant's vehicle; Photographs of the plaintiff's vehicle; Repair Records of the

parties' vehicles; Income, benefits and employment records of plaintiff, including extracts and summaries of such; IME reports; Expert's reports; Defendant reserves the right to submit additional exhibits obtained from materials in conjunction with formal discovery in this matter; Defendant reserves the right to submit additional exhibits as needed for rebuttal of plaintiff's claims; Defendant reserves the right to submit additional exhibits prepared from the date of this Supplemental Answer to Interrogatories and the date of trial.

None of Roundy's supplemental written discovery requests specifically asked Staley to identify or provide surveillance evidence. Once again, Roundy did not submit a motion to compel discovery responses from Staley for which she was dissatisfied. *Id.*

The trial court did not order a deadline for the parties to designate fact or expert witnesses. The trial court did not impose a deadline for the parties to designate trial exhibits. (Scheduling Order, Addendum.)

During the first day of trial, counsel for Staley identified Mr. Ronald Gunderson ("Gunderson") as a "possible" rebuttal witness that might be called during trial. (Tr. of May 9, 1997 proceedings at 13.) Gunderson is a private investigator who obtained surveillance video tape evidence of Roundy that was probative as to her damage claims. (Tr. of May 14, 1997 proceedings at 218.) Specifically, the surveillance video tape shows Roundy engaged in physical activities that contradict her claims of physical injuries and physical limitations. (Tr. of May 14, 1997 proceedings at 22.) Gunderson was ultimately called as a rebuttal witness to lay foundation for the video tape. (Tr. of May 14, 1997 proceedings at 218-223.) The surveillance video tape was also shown to Dr. Gerald Moress who had performed an independent medical

examination of Roundy. (Tr. of May 14, 1997 proceedings at 22.) Based upon his review of the videotape, and his examination of Roundy, Dr. Moress concluded that Roundy's physical injuries and limitations were not as severe as Roundy had indicated during his meeting with her. *Id.*

Roundy presented evidence in support her case during three days of the four-day trial. As Roundy notes, the overwhelming evidence presented established that the traffic signal was green or yellow for Staley as he entered the intersection where the accident took place. (Roundy's Opening Brief at 8-9.) As a result, Roundy had an obligation to yield to Staley. (Utah Code Ann. section 41-6-73). After the presentation of Roundy's case, Staley moved for a directed verdict on Roundy's claim for punitive damages. (Tr. of May 14, 1997 proceedings at 91-92.) The trial court granted the motion. (Tr. of May 14, 1997 proceedings at 95-96.) At the conclusion of trial, the jury determined that Roundy was 60% at fault for the accident. (Judgment, Addendum.) Because Roundy's fault exceeded that of Staley's, the jury did not address the issue of damages. *Id.* Judgment was entered on July 11, 1997. *Id.* Roundy subsequently filed her Motion for New Trial which was denied by the trial court on November 4, 1997. (Order on Plaintiff's Motion for New Trial, Addendum.)

Roundy has filed this appeal on the basis that even though she did not inquire regarding the existence of a surveillance video tape or surveillance evidence in her initial and supplemental written discovery requests, and even though she did not file a motion to compel additional discovery from Staley for those discovery responses that she now asserts were

inadequate, the trial court erred by admitting the surveillance video tape evidence and the related foundational testimony from Gunderson. Roundy also asserts on appeal that the trial court erred by granting Staley's motion for directed verdict on Roundy's claim for punitive damages.

SUMMARY OF ARGUMENT

1. The trial court properly allowed Staley to present surveillance video evidence of Roundy at trial because Roundy never sought discovery of the video tape or any other type of surveillance evidence through available discovery methods. Furthermore, the trial court properly allowed Gunderson testify as a "rebuttal" witness to lay foundation for the surveillance video tape.

2. The trial court properly denied Roundy's Motion for New Trial, which was based on Roundy's assertion that admission of the surveillance video evidence was an "accident or surprise which ordinary prudence could not have guarded against." Roundy could have guarded against admission of the surveillance evidence had she testified candidly regarding her physical injuries and damages. Moreover, Roundy could have guarded against the video surveillance evidence by using available discovery methods to learn of its existence.

3. The trial court properly denied Roundy's Motion for New Trial, which was based on Roundy's assertion that "irregularity in the proceedings" occurred. Roundy fails to identify any "irregularity in the proceedings" or to provide legal support for her assertion that the

admission of surveillance evidence, that is not requested in discovery, should be considered “irregularity in the proceedings.”

4. The trial court properly denied Roundy’s Motion for New Trial, which was based on Roundy’s assertion that “error in the law” occurred in this case. Roundy fails to provide legal support for her assertion that the admission of surveillance evidence, that is not requested in discovery, should be considered an “error in the law.” Moreover, assuming that an error occurred with regard to the surveillance evidence which was used to rebut Roundy’s lack of candor about her injuries, Roundy is not entitled to a new trial because this evidence addressed only the damages element of Roundy’s case. The jury did not go beyond the liability element of Roundy’s claims to reach the issue of damages in its deliberations. Thus, the “error,” if any, was harmless.

5. The trial court properly granted Staley’s motion for directed verdict on Roundy’s cause of action for punitive damages. The overwhelming evidence presented at trial was that Staley entered the intersection where the accident took place on a green or yellow light and that Roundy made an improper left turn across Staley’s travel lane in violation of Utah Code Ann. section 41-6-73. Roundy also failed to establish that Staley was speeding or that he should be held to a higher standard of care than other drivers simply because he was driving a suburban at the time of the accident. As a result, Roundy was unable to establish her punitive damage claim by clear and convincing evidence.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY ALLOWED STALEY TO PRESENT SURVEILLANCE VIDEO EVIDENCE OF ROUNDY AT TRIAL.

A. Staley had No Obligation to Produce the Surveillance Video Tape, Nor to Disclose its Existence Prior to Trial, Because Roundy Never Requested Surveillance Evidence in Discovery.

A review of Roundy's relevant written discovery requests reveals that Roundy never asked Staley to produce the surveillance video tape or even about the existence of surveillance evidence. Moreover, after receiving Staley's responses to these written discovery requests Roundy never filed a motion to compel additional information about surveillance video tape evidence or about Staley's trial witnesses. Even though Roundy never asked for this information in discovery she asserts she was "ambushed" and "surprised" by surveillance video evidence that was presented by Staley at trial. Roundy also asserts that the trial court erred in refusing to protect Roundy from the effect of this surveillance video evidence which shows Roundy engaged in physical activities that contradict her testimony regarding the injuries and physical limitations that she claims resulted from the accident.

In *Feola v. Egan*, 1998 WL 666964 (Conn. Super. Ct.) the plaintiff made a similar argument. In *Feola* the plaintiff brought action for personal injuries that she claimed resulted from a motor vehicle accident. The trial court allowed the defendant to present surveillance video tape evidence during trial. On appeal, the plaintiff asserted that admission of the video

tape evidence was error because it had not been disclosed prior to trial. The court disagreed holding that because the plaintiff had not asked the defendant to reveal the existence of surveillance video tape evidence in any interrogatory or discovery proceeding, the defendant had no obligation to reveal its existence.

Similarly, in *Detiller v. Smith*, 638 So.2d 445 (La. Ct. App. 1994), the court was asked to address whether the plaintiff was prejudiced and unfairly surprised by the admission of surveillance video tape evidence that was made of the plaintiff during the course of trial. The video shows the plaintiff on a trial lunch break during which she removes a cervical collar that she had worn in the courtroom. In the video the plaintiff turns her head from side to side and tilts her head back as she drinks a soft drink. This evidence directly contradicted the plaintiff's testimony that she was in constant pain and that her weakness was so great that the only things she could do for herself was feed herself and go to the bathroom. *Id.* at 448. The court held that because the plaintiff had not submitted specific discovery requests that sought to obtain, or even inquired regarding the existence of surveillance video tape evidence, the defendant had no duty to produce the video tape and the evidence was admissible at trial.

Finally, in *Kiss v. Jacob*, 633 A.2d 544 (N.J. Ct. App. 1993), *overruled on other grounds*, 650 A.2d 336 (N.J. 1994), the court addressed the situation where the plaintiffs did not request surveillance evidence even though they knew of its existence. In *Kiss* the plaintiffs asked about the existence of surveillance photographs in their written discovery requests to the defendant. In his initial response, the defendant stated that no such evidence existed. The

defendant later supplemented his response to indicate that he had subsequently obtained surveillance evidence. Thereafter, the plaintiffs never requested the surveillance evidence which was admitted at trial. On appeal, the plaintiffs claimed they were unfairly surprised by the surveillance evidence and that the defendant had a discovery obligation to produce the surveillance evidence eventhough it had not been requested after it was disclosed to the plaintiffs. The court disagreed holding that absent a specific discovery request for the surveillance evidence, the defendant had no obligation to produce it. *Id.* at 547.

In accordance with the holdings of these cases Staley had no obligation to provide Roundy surveillance video evidence because it was never requested by Roundy. Furthermore, if Roundy was dissatisfied with Staley's responses to her discovery requests Roundy's remedy would have been to file a motion to compel. Roundy did not file a motion to compel and did not take any action to discover whether there was surveillance evidence. Roundy cannot complain of unfair surprise when she did nothing to determine the existence of surveillance evidence through available discovery methods.

The few cases cited by Roundy in her Opening Brief do not support her argument that Staley had a duty to produce the surveillance video tape when it was not specifically requested. In fact, only two of these cases involve surveillance video tape evidence.

The first case, *Dodson v. Persell*, 390 So.2d 704 (Fla. 1980), actually supports Staley's assertions in this matter. In *Dodson* the plaintiff submitted specific interrogatories to "discover whether surveillance of the [plaintiff] had taken place, whether photographs or movies

were taken, and, if so, the time and place taken, the substance of what the films purported to show, and the qualifications of the photographer.” The defendant objected to the request on the basis of the work product privilege and refused to produce the requested materials. The plaintiff then filed a motion to compel responses to these specific discovery requests, which was denied. Surveillance materials were presented at trial. On appeal the court held, “upon request a party must reveal the existence of any surveillance information he possesses whether or not it is intended to be presented at trial.” (Emphasis added.)

In the present case Roundy did not inquire regarding the existence of surveillance evidence or seek to obtain the surveillance video tape. Roundy did not seek to compel discovery from Staley as was done in *Dodson*. Moreover, as the *Dodson* court held, the surveillance video tape of Roundy was privileged work product until it was decided that it would be used at trial. (See also, *Grossman v. Emergency Cesspool and Sewer Cleaners, Inc.*, 617 N.Y.S.2d 422 (1994); *Ranft v. Lyons*, 471 N.W.2d 254 (Wis. Ct. App. 1991). This decision was not made until Roundy took the stand and testified inconsistent with her actual physical activities. Roundy cannot now complain that the trial court erred in allowing the admission of this evidence, nor can she complain that she was prejudiced by evidence of her own conduct that contradicts her testimony regarding her injuries and damages

In the second case cited by Roundy, *Lascano v. Vowell*, 940 P.2d 977 (Colo. Ct. App. 1996), the parties were required by rule to submit disclosure certificates including “a description, attached copy, or photograph of any exhibit that he or she might offer at trial” at

least 90 days before trial. Supplementation was required by rule at least 80 days before trial.

Defendant obtained a surveillance video tape of plaintiff and attempted to include it as an exhibit after the disclosure deadlines. The court would not allow the admission of the evidence because the defendant had failed to disclose it prior to the deadlines.

In the present case there is no rule that required Staley to designate trial exhibits or witnesses by a particular deadline. The trial court did not impose a deadline for the disclosure of trial exhibits or trial witnesses. Roundy never requested information regarding surveillance evidence in her discovery requests. Roundy never submitted a motion to compel additional discovery from Staley for the responses in which she was dissatisfied. Roundy's own failure to use available discovery methods to obtain information regarding surveillance evidence does not support her assertions that she was "ambushed" and "surprised" by surveillance video evidence presented by Staley at trial. Accordingly, Staley had no obligation to disclose the existence of the surveillance video or to produce it to Roundy.

B. Gunderson's Testimony and the Surveillance Video Tape Were Rebuttal Evidence.

In *Feola v. Egan*, 1998 WL 666964 (Conn. Super. Ct.), the Connecticut Superior Court upheld the trial court's admission of video surveillance evidence of the plaintiff that had not been disclosed prior to trial. The court also held that the trial court did not err in allowing a private investigator, who was not disclosed as a trial witness, to testify regarding the surveillance video tape, and about plaintiff's behavior that he observed that was not included on the video tape. *Id.* at 449. The court held the private investigator was a rebuttal fact witness.

Roundy cites *Turner v. Nelson*, 872 P.2d 1021 (Utah 1994), in support of her assertion that Gunderson, who prepared and testified regarding the surveillance video tape of Roundy, cannot be considered a rebuttal witness. In *Turner* the plaintiff attempted to call a witness to “rebut” evidence from the defendant that a stop sign was partially obstructed at an intersection where the automobile giving rise to the action occurred. The plaintiff asserted that this defense was a surprise and the witness she intended to call was a rebuttal witness. *Id.* at 1023. On appeal the Utah Supreme Court held that the trial court had the discretion to order the parties to disclose all potential witnesses prior to trial, which it had done. The Court also held that the trial court “had all of the evidence before it and was in the best position to determine whether [plaintiff] could reasonably have anticipated the obstructed-sign testimony.” The court held it would not reverse the trial court unless the plaintiff could demonstrate that the trial court had clearly abused its discretion and thereby affected the plaintiff’s rights. *Id.* at 1023-1024. Because the trial court had ordered the parties to disclose all witnesses prior to trial and because plaintiff “knew or should have anticipated that [defendant] would claim the sign was obstructed,”¹ the appellate court held it had properly precluded the plaintiff from calling the previously undisclosed witness.

¹The Court noted that the defendant had designated a “traffic design expert” witness and a fact witness to the accident who both testified that the stop sign at the intersection where the accident took place was obstructed. *Id.* at 1025. Thus, the plaintiff had prior notice of this defense.

In this case the trial court also had all of the evidence before it and was in the best position to determine whether Gunderson should have been allowed to testify as a rebuttal witness regarding his surveillance of Roundy. Furthermore, Staley did not know if Roundy would testify candidly regarding her injuries and physical limitations until she actually presented her testimony at trial. That is why when Gunderson was disclosed on the first day of trial, he was identified only as a “possible” witness. When Roundy failed to be forthright in her testimony counsel for Staley called Gunderson and presented the surveillance video tape evidence to rebut Roundy’s testimony.

Roundy also cites *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), for the proposition that it is error for a trial court to allow a previously undisclosed witness to testify at trial. Neither of these cases involve surveillance video tape evidence. In *Perez-Perez* the court held it was improper for the trial court to allow the plaintiff to call a previously undisclosed medical expert witness to testify at trial regarding the defendant’s eyesight. The court noted that this witness introduced, for the first time, a novel theory of liability in the case. Thus, the defendant had no time to review any records or conduct discovery regarding this theory. *Id.* at 286 -287. Likewise, in *Smith v. Ford Motor Co.* the court held that the defendant was unfairly prejudiced because the trial court allowed the plaintiff to call a previously undisclosed medical expert witness at trial to present a completely new and unexpected liability theory. *Id.* at 797.

In the present case neither Gunderson nor the surveillance video tape introduced a new theory of liability to the case. They simply presented facts regarding Roundy's own behavior which was relevant to Roundy's damage claims. This evidence, which counters Roundy's trial testimony regarding the severity of her physical injuries and her damage claims, is the classic form of rebuttal evidence because it shows Roundy contradicting herself through her own actions.

POINT II

THE DISTRICT COURT PROPERLY DENIED ROUNDY'S MOTION FOR NEW TRIAL, WHICH WAS BASED ON HER ASSERTION THAT AN ACCIDENT OR SURPRISE OCCURRED WHICH ORDINARY PRUDENCE COULD NOT HAVE GUARDED AGAINST.

Rule 59(a)(3) of the Utah Rules of Civil Procedure provides that a new trial "may" be granted on the basis of "accident or surprise, which ordinary prudence could not have guarded against." In *Anderson v. Bradley*, 590 P.2d 339 (Utah 1979), the Utah Supreme Court held that a surprise which could have been guarded against by the utilization of available discovery methods, such as a motion to compel, may not serve as grounds for a new trial under this provision.

Roundy asserts that Staley's use of Gunderson and the surveillance video tape evidence was a surprise which ordinary prudence could not have guarded against and that she is therefore entitled to a new trial. Contrary to Roundy's assertion, Roundy could have guarded against the "surprise" of this evidence had she testified honestly and consistently regarding her

physical injuries and damages. She did not. Moreover, even if the Court considers the surveillance evidence a surprise, Roundy had an opportunity to guard against it using available discovery methods. Roundy could have inquired specifically regarding the existence of surveillance evidence. She did not. Roundy also could have submitted a motion to compel to inquire further about Staley's anticipated trial witnesses. She did not. Accordingly, the trial court properly denied Roundy's Motion for New Trial which was based on Rule 59(a)(3) of the Utah Rules of Civil Procedure.

POINT III

THE DISTRICT COURT PROPERLY DENIED ROUNDY'S MOTION FOR NEW TRIAL, WHICH WAS BASED ON HER ASSERTION THAT "IRREGULARITY IN THE PROCEEDINGS" OCCURRED.

Roundy also asserts that she is entitled to a new trial pursuant to Rule 59(a)(1) of the Utah Rules of Civil Procedure. This rule states that a new trial "may" be granted if the court determines that there was "[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial." Roundy, however, fails to make even one reference to the record to support the allegation that "irregularities" occurred. Instead, Roundy vaguely refers to the record as a whole and concludes that the non-disclosure of the surveillance evidence was "most 'irregular'". (Roundy Opening Brief at 20.) Roundy also fails to provide legal support for her assertion that the admission of rebuttal surveillance evidence, that was not sought in discovery, should be considered an irregularity in the proceedings that entitles her to a new trial. Accordingly, the

trial court properly denied Roundy's Motion for new trial which was based on the unsupported assertion that an irregularity occurred that prevented her from having a fair trial.

POINT IV

THE DISTRICT COURT PROPERLY DENIED ROUNDY'S MOTION FOR NEW TRIAL, WHICH WAS BASED ON HER ASSERTION THAT "ERROR IN THE LAW" OCCURRED.

Rule 59(a)(7) provides that the trial court "may" grant a new trial if it determines that an "[e]rror in the law" has occurred. The "error" to which Roundy refers is the trial court's admission of surveillance evidence. Roundy fails to provide legal support for her assertion that the admission of rebuttal surveillance evidence, that was not sought by Roundy in discovery is error in the law.

Furthermore, Rule 59(a) of the Utah Rules of Civil Procedure provides that a new trial may be granted only if one of the several circumstances discussed by Rule 59 exists, and "subject to the provisions of Rule 61 of the Utah Rules of Civil Procedure." By Rule 61, even if an error has been committed, a new trial may not be granted if the error is harmless. The Utah Supreme Court has held that "an error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine [the appellate court's] confidence in the verdict." *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 796 (Utah 1991).

In *McDougal v. McCammon*, 455 S.E.2d 788 (W.V. 1995), the sole issue before the court on appeal was whether the trial court improperly admitted surveillance video evidence of one of the plaintiffs. The surveillance evidence was not disclosed to the plaintiffs prior to

trial, even though they had expressly requested such evidence in discovery. The Supreme Court of West Virginia characterized this evidence as contradiction or rebuttal in nature, and was therefore admissible to impeach the plaintiff. *Id.* at 795. The court also held that the defendant had violated discovery rules in failing to produce the surveillance video because it had been requested in discovery. However, the court held that the surveillance video evidence was relevant only to the issue of damages. Because the jury returned a verdict in favor of the defendant on the liability issue, and did not reach the issue of damages, the admission of the surveillance video tape was harmless error. The court stated, “[i]n conclusion, we hold that although the admission of the video tape may have been error, because the video tape in dispute did not affect the question of liability, its admission was not reversible error.” *Id.* at 799.

Assuming, *arguendo*, that an error was committed in this case with regard to the admission of surveillance evidence which was used to rebut Roundy’s lack of candor about her injuries, Roundy is not entitled to a new trial because this evidence only addressed the damages element of Roundy’s case. The jury did not go beyond the liability element of Roundy’s claims to reach the issue of damages in its deliberations. Instead, it determined that Roundy was 60% at fault for the accident. Thus, the alleged error raised by Roundy was harmless and her assertion that the trial court committed reversible error in denying her Motion for New Trial is groundless.

POINT V

**THE DISTRICT COURT PROPERLY GRANTED STALEY'S MOTION FOR
DIRECTED VERDICT ON ROUNDY'S CAUSE OF ACTION FOR PUNITIVE
DAMAGES.**

Punitive damages may be awarded only under limited circumstances as set forth by Utah Code Ann. Section 78-18-1(1)(a):

Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and disregard of, the rights of others.

In *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179 (Utah 1983) the Utah Supreme Court cautioned that punitive damages should be awarded in the infrequent, exceptional case and that “[s]imple negligence will never suffice as a basis upon which punitive damages may be awarded.”

The basis for Roundy’s punitive damage claim prior to trial was that it was reckless disregard for Staley to enter an intersection, driving a suburban, knowing the traffic signal had turned red. Roundy took three days of the four-day trial to present evidence in support of her assertion. She called numerous witnesses to support her claims. Contrary to Roundy’s allegations, the evidence presented established that the traffic signal was green or yellow when Staley entered the intersection and that Staley was traveling within the speed limit. Even Roundy admits that she was the only witness of the many called at trial that testified

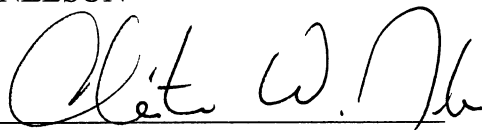
otherwise. (Roundy Opening Brief at 8-9.) Roundy also failed to establish that Staley should be held to a higher standard of care than other drivers simply because he was driving a suburban at the time of the accident. At the conclusion of her case the trial court directed verdict on Roundy's punitive damage claim because Roundy could not establish the evidence to support this claim by clear and convincing evidence. The trial court's determination on this claim was proper. Staley's operation of a vehicle of the size and weight of a van or pickup truck, into an intersection on a green or yellow traffic light, within the speed limit, cannot be considered unreasonable conduct or an extreme departure from ordinary care. This conclusion is also supported by the fact that the jury returned a verdict in favor of Staley on the issue of liability. Accordingly, the trial court's grant of directed verdict in favor of Staley at the conclusion of Roundy's case was proper and should be upheld on appeal.

CONCLUSION

For the foregoing reasons, Staley respectfully urges this Court not to disturb the jury verdict rendered in this case, and to affirm the judgment of the trial court and its order denying Roundy's Motion for New Trial.

RESPECTFULLY SUBMITTED this 7th day of December, 1998.

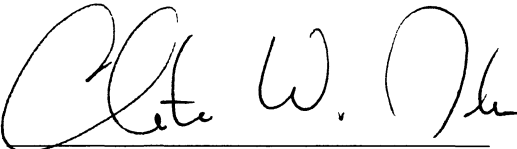
RICHARDS, BRANDT, MILLER
& NELSON



LYNN S. DAVIES
CHRISTIAN W. NELSON
Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that eight true and correct copies of the foregoing Brief of Appellant was hand delivered to the Court of Appeals and two true and correct copies of the foregoing Brief of Appellant was mailed, first-class, postage prepaid to counsel, on this 7th day of December, 1998.



6016-1519-228355

ADDENDUM

FILED FOR RECORDING
Third Judicial District

JUL 11 1997

BY K. Collins

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LAINA ROUNDY, Plaintiff, vs. NEIL STALEY, Defendant.	JUDGMENT Civil No. 940906068 Judge David S. Young
--	--

The above-captioned action was tried to a jury of eight, the Honorable David S. Young presiding, on May 8-9 and May 13-15, 1997. Plaintiff was represented by her attorney Peter C. Collins; defendant was represented by his attorney, Lynn S. Davies. At the conclusion of the trial, the jury answered and returned a Special Verdict, responding to the questions as follows:

1. Was Defendant, Travis Staley, negligent?

ANSWER: Yes X No

2. Was Travis Staley's negligence a proximate cause of the injuries sustained by Plaintiff Laina Roundy?

ANSWER: Yes X No

3. Was Plaintiff, Laina Roundy, negligent?

ANSWER: Yes X No

4. Was Laina Roundy's negligence a proximate cause of her own injuries?

ANSWER: Yes X No

5. Assuming that the total negligence of the parties equals 100%, state the percentage of negligence attributed to each party.

Travis Staley 40 %

Laina Roundy 60 %

TOTAL 100%

The jury was then polled, with all eight jurors affirming that this was in fact their verdict as to Questions Nos. 1-4, and seven jurors affirming that this was in fact their verdict as to Question No. 5.

Based on the foregoing findings of the jury, and good cause appearing therefor, the Court hereby enters judgment as follows:

IT IS HEREBY ORDERED that judgment is hereby entered in favor of defendant, Travis Staley, no cause of action. The issue of costs is reserved for future consideration.

DATED this 11th day of July, 1997


BY THE COURT


THE HONORABLE DAVID S. YOUNG
THIRD DISTRICT COURT

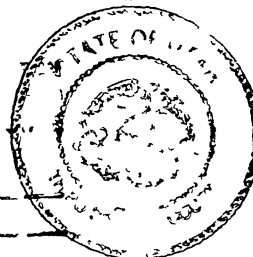
Costs \$ _____

APPROVED AS TO FORM:

BUGDEN, COLLINS & MORTON


PETER C. COLLINS
Attorneys for Plaintiff

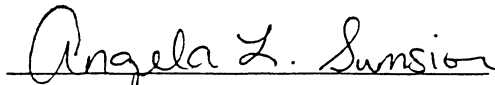
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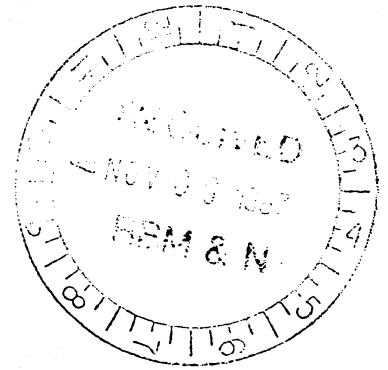


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 15th day of July, 1997, to the following

John Edward Hansen
SCALLEY & READING
261 East 300 South, Suite 200
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LAINA ROUNDY,

Plaintiff,

vs.

TRAVIS STALEY,

Defendant.

**ORDER ON PLAINTIFF'S MOTION
FOR NEW TRIAL AND ON
PLAINTIFF'S MOTION FOR PARTIAL
JUDGMENT NOTWITHSTANDING
THE VERDICT**

Civil No. 940906068

Judge David S. Young

Plaintiff's Motion for New Trial and her Motion for Partial Judgment

Notwithstanding the Verdict came on for hearing on September 5, 1997 before the above referenced Court. Plaintiff was represented by her counsel, Peter Collins. Defendant was represented by his counsel, Lynn S. Davies. After review of Plaintiff's Motions and the supporting memoranda thereto, Defendant's memorandum in opposition thereto, and argument presented by the parties, the Court hereby finds that:

1. Plaintiff fails to cite to any reference in the record to support her claim that "irregularities" or "errors of law" occurred during the course of the trial. There was sufficient evidence to justify the jury verdict considering the evidence presented at trial.

2. The Court considers Mr. Ron Gunderson's trial testimony and the related surveillance videotape he presented at trial to be evidence which Plaintiff, with ordinary prudence, could have learned of and guarded against. Plaintiff could have learned about Mr. Gunderson and the evidence he presented by submitting a Motion to Compel discovery from Defendant if she was not satisfied with the answers Defendant provided regarding his intended trial witnesses. Furthermore, the Court considers Mr. Gunderson and the evidence he presented to be evidence in rebuttal to Plaintiff's testimony regarding her physical injuries and damages.

3. Any error that took place at trial is harmless considering the fact that the jury reached its verdict on the basis of liability and the issues raised by Plaintiff in her Motion for New Trial and Motion for Partial Judgment Notwithstanding the Verdict address her injury and damage claims.

Accordingly, the Court denies Plaintiff's Motion for New Trial and Plaintiff's Motion for Partial Judgment Notwithstanding the Verdict.

DATED this 4th day of November, 1997.

BY THE COURT:

B. DAVID S. YOUNG
The Honorable David S. Young
Third District Court

Approved as to Form:

BUGDEN, COLLINS & MORTON



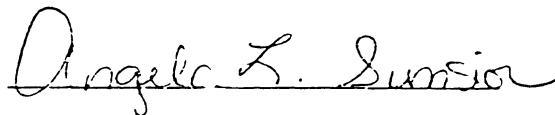
Peter C. Collins
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 29th day of October, 1997, to the following:

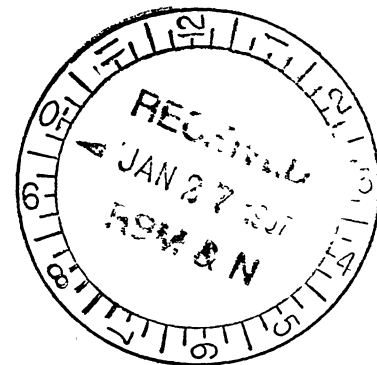
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Salt Lake City, Utah 84107

John E. Hansen
SCALLEY & READING
261 East 300 South, Suite 200
Salt Lake City, Utah 84111



6016-1519
171094

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH



ROUNDY, LAINA
ROUNDY, THOR

PLAINTIFF,

-VS-

STALEY, NEIL
STALEY, TRAVIS

DEFENDANT.

:
:
: SCHEDULING ORDER AND
: TRIAL NOTICE
:
: CASE NO. 940906068 CV
:
: HONORABLE DAVID S. YOUNG

PURSUANT TO THE SCHEDULING CONFERENCE HELD ON 1-24-97
THE FOLLOWING DATES WERE SET AND MATTERS DISCUSSED:

1. THIS CASE IS SET FOR TRIAL ON MAY 8, 1997 AT 10:00 A.M.
2. ANTICIPATED TRIAL TIME IS 04 DAYS.
3. THE CASE IS SET FOR JURY TRIAL. COUNSEL ARE TO
SUBMIT AN AGREED SET OF JURY INSTRUCTIONS TO THE COURT BY
. OBJECTED TO INSTRUCTIONS ARE TO BE SUBMITTED
SEPARATELY.
4. ALL DISCOVERY INCLUDING RESPONSES MUST BE CONCLUDED BY
(DISCOVERY CUTOFF 10-31-96)
5. ALL DISPOSITIVE MOTIONS ARE TO BE HEARD BY
6. EXHIBIT AND WITNESS LISTS ARE TO BE EXCHANGED BY
7. A FINAL PRETRIAL SETTLEMENT CONFERENCE WILL BE HELD ON
APRIL 30, 1997 AT 8:00 A.M. TRIAL COUNSEL AND CLIENTS, OR
AN INDIVIDUAL WITH AUTHORITY TO SETTLE THIS CASE ARE TO BE
PRESENT. OUT OF STATE PARTIES MUST BE AVAILABLE BY PHONE AT THE
TIME OF THE PRETRIAL SETTLEMENT CONFERENCE.
8. FAILURE TO APPEAR AT THE PRETRIAL SETTLEMENT CONFERENCE
MAY RESULT IN A DEFAULT.
9. THE FOREGOING DATES SHOULD BE CONSIDERED FIRM SETTINGS
AND WILL NOT BE MODIFIED WITHOUT COURT ORDER, AND THEN ONLY
UPON A SHOWING OF MANIFEST INJUSTICE. COUNSEL ARE INSTRUCTED TO
STAY IN CONTACT WITH THE CLERK OF THIS COURT AS THE TRIAL DATE
APPROACHES REGARDING THE TRIAL SETTING.
11. OTHER MATTERS: DEFENDANT'S MOTION FOR PARTIAL SUMMARY
JUDGMENT IS DENIED

DATED THIS 24TH DAY OF JANUARY, 1997.


DISTRICT COURT JUDGE

COPIES MAILED TO PARTIES AT THE ADDRESSES INDICATED ON THE
ATTACHED MAILING CERTIFICATE.

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT I MAILED A TRUE AND CORRECT COPY OF THE
ATTACHED SCHEDULING ORDER AND TRIAL NOTICE, BY FIRST CLASS MAIL,
POSTAGE PREPAID, TO THE FOLLOWING:

COLLINS, PETER C.
ATTORNEY FOR DEFENDANT
4021 SOUTH 700 EAST
#400
SALT LAKE CITY UT 84107

DAVIES, LYNN S.
ATTORNEY FOR PLAINTIFF
50 SOUTH MAIN, #700
P. O. BOX 2465
SALT LAKE CITY UT 84110

DATED THIS 24 DAY OF January 1997
Porter
DEPUTY CLERK