

1998

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

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.

Recommended Citation

Brief of Appellant, *Roundy v. Staley*, No. 980062 (Utah Court of Appeals, 1998).
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IN THE UTAH COURT OF APPEALS

980062-CA

LAINA ROUNDY,

Plaintiff-Appellant,

-v-

TRAVIS STALEY,

Defendant-Appellee,

:
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:
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:
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:
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:

OPENING 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

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

LAINA ROUNDY,	:	
	:	OPENING BRIEF OF
Plaintiff-Appellant,	:	PLAINTIFF-APPELLANT,
	:	LAINA ROUNDY
-v-	:	
	:	Priority No. 15
TRAVIS STALEY,	:	
	:	Case No. 980062-CA
Defendant-Appellee,	:	

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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

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

Attorneys for Defendant-Appellee

COMPLETE LIST OF ALL PARTIES

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the undersigned counsel for appellant represents that the named parties, Laina Roundy and Travis Staley, are now the only parties to this litigation, and that Thor B. Roundy (Laina Roundy's husband) and Anastasia Roundy (the minor child of Laina Roundy and Thor B. Roundy) and Neil Staley (Travis Staley's father) have been but are no longer parties to this litigation.

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I. STATEMENT OF JURISDICTION

This case is on appeal from a final judgment and a final order of the Third Judicial District Court of Salt Lake County (Judge David S. Young). Laina Roundy, the plaintiff-appellant, appealed to the Utah Supreme Court, which has jurisdiction pursuant to Utah Code Ann. § 78-2-2(j). The Utah Supreme Court, pursuant to Rule 42 of the Utah Rules of Appellate Procedure, “poured” this appeal “over” to this Court. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, in this personal injury case, the District Court committed reversible error in refusing to order counsel for defendant-appellee Travis Staley to disclose a planned “surveillance video” evidentiary presentation and planned testimony regarding that video.

Applicable Standard of Appellate Review

The applicable standard of appellate review with respect to this issue appears to be *de novo* (as purely a question of law). “[A]ppellate review of a trial court’s determination of the law is usually characterized by the term ‘correctness’” State v. Pena, 869 P.2d 932, 936 (Utah 1994); “correctness” means “the appellate court decides the matter for itself and does not defer in any degree to the trial judge’s determination of the law.” *Id.*; State v. Deli, 861 P.2d 431, 433 (Utah 1993). See, also, inasmuch as the issue deals with the application of Rule 26(e) of the Utah Rules of Civil Procedure, rather than the “balancing of factors” analysis that might lead to an

"abuse-of-discretion" standard of review, State v. Horton, 848 P.2d 708, 713 (Utah App. 1993); Schreiter v. Wasatch Manor, Inc., 871 P.2d 570, 572 (Utah App. 1994).

This issue was preserved in the District Court proceedings by oral objections raised by oral argument by counsel for Ms. Roundy (Tr. of proceedings of May 9, 1997, at 13-22; Tr. of proceedings of May 13, 1997, at 6-10).

2. Whether the District Court committed reversible error in denying Ms. Roundy's Motion for New Trial based on "... surprise, which ordinary prudence could not have guarded against" under Rule 59(a)(3) of the Utah Rules of Civil Procedure, inhering in Mr. Staley's said planned evidentiary presentation.

Applicable Standard of Appellate Review

The applicable standard with respect to this issue appears to be whether the District Court clearly abused its discretion in denying the Motion for a New Trial. Amoss v. Bennion, 517 P.2d 1008, 1010 (Utah 1973).

This issue was preserved in the District Court proceedings by Ms. Roundy's Motion for New Trial (R. at 916-17); by her Memorandum in Support of that Motion (R. at 918-38); by her Reply Memorandum in Support of that Motion (R. at 999-1000); and at oral argument on that Motion (Tr. of September 5, 1997 proceedings, at 6-21).

3. Whether the District Court committed reversible error in denying Ms. Roundy's Motion for New Trial based on "irregularity in the proceedings of the ... adverse party, or any order of the court, or abuse of discretion by which [Ms. Roundy] was prevented from having a fair trial," under Rule 59(a)(1) of the Utah Rules of Civil

Procedure, inhering in Mr. Staley's said planned evidentiary presentation and the District Court's said refusal to order disclosure thereof.

Applicable Standard of Appellate Review

The applicable standard with respect to this issue appears to be whether the District Court clearly abused its discretion in denying the Motion for a New Trial. Amoss v. Bennion, 517 P.2d 1008, 1010 (Utah 1973).

This issue was preserved in the District Court proceedings by Ms. Roundy's Motion for New Trial (R. at 916-17); by her Memorandum in Support of that Motion (R. at 918-38); by her Reply Memorandum in Support of that Motion (R. at 999-1000); and at oral argument on that Motion (Tr. of September 5, 1997 proceedings, at 6-21).

4. Whether the District Court committed reversible error in denying Ms. Roundy's Motion for New Trial based on the "[e]rror in law," under Rule 59(a)(7) of the Utah Rules of Civil Procedure, inhering in the District Court's said refusal to order disclosure of Mr. Staley's planned surveillance video and related evidentiary presentation.

Applicable Standard of Appellate Review

The applicable standard with respect to this issue appears to be whether the District Court clearly abused its discretion in denying the Motion for a New Trial. Amoss v. Bennion, 517 P.2d 1008, 1010 (Utah 1973).

This issue was preserved in the District Court proceedings by Ms. Roundy's Motion for New Trial (R. at 916-17); by her Memorandum in Support of

that Motion (R. at 918-38); by her Reply Memorandum in Support of that Motion (R. at 999-1000); and at oral argument on that Motion (Tr. of September 5, 1997 proceedings, at 6-21).

5. Whether the District Court committed reversible error in granting Mr. Staley's Motion for Directed Verdict on Ms. Roundy's punitive damages claim.

Applicable Standard of Appellate Review

The applicable standard of appellate review with respect to this issue appears to be whether there was any substantial evidence, or reasonable inferences to be drawn therefrom, on which a reasonable jury could reach a verdict contrary to the result sought by the motion. *E.g.*, Crookston v. Fire Ins. Exch., 817 P.2d 789, 799 (Utah 1991); Hansen v. Stewart, 761 P.2d 14 (Utah 1988); Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985); Koer v. Mayfair Mkts, 431 P.2d 566 (Utah 1967); Onyeabor v. Pro Roofing, Inc., 787 P.2d 525, 529 (Utah App. 1990).

This issue was preserved in the District Court proceedings, by oral argument (Tr. of May 14, 1997 proceedings, at 91-97).

III. STATEMENT OF THE CASE

STATEMENT OF FACTS AND HISTORY OF SIGNIFICANT PROCEEDINGS IN DISTRICT COURT LITIGATION

On May 18, 1994, Laina Roundy, plaintiff-appellant, was, while driving her Pontiac Bonneville, attempting to make a left turn from southbound Redwood Road onto the eastbound I-80 on-ramp in Salt Lake City. She pulled into the left turn lane and waited for traffic to clear. She testified that she started her left turn just as the

light was turning from yellow to red (*e.g.*, Tr. of May 13, 1997 proceedings, at 40) and after several vehicles, proceeding northbound on Redwood Road, in the inside or westernmore of the two lanes of through traffic, had stopped or slowed on the yellow light (*id.* at 36). A Chevrolet Suburban, driven by Mr. Staley and proceeding in the outside or easternmore of the two lanes of northbound Redwood Road, entered the intersection at approximately 45 mph (*e.g.*, Tr. of May 9, 1997 proceedings, at 94), and collided with Ms. Roundy's car. Mr. Staley did not brake or take any evasive action (*e.g.*, Tr. of May 14, 1997 proceedings, at 83). The collision was nearly head-on. Ms. Roundy's airbag deployed but she still sustained allegedly serious personal injuries. Mr. Staley testified that the light had just turned yellow (Tr. of May 14, 1997 proceedings, at 102) when he entered the intersection, but no witness gave a fact-based explanation for why several vehicles traveling in the direction Mr. Staley was traveling would be slowing and stopping (Mr. Staley acknowledged that slowing and stopping to be a fact -- Tr. of May 14, 1997 proceedings, at 108-09) except in response to a yellow light. Each driver's view of the other driver's vehicle was obscured by one or more high-profile vehicles in that westernmore lane of northbound Redwood Road (*e.g.*, Tr. of May 13, 1997 proceedings, at 38; Tr. of May 14, 1997 proceedings, at 85).

Ms. Roundy brought this action seeking to recover for her injuries and damages suffered, sustained, and incurred in the subject collision. She was originally represented by her husband, Thor B. Roundy. When it became apparent that the case was headed for trial, Ms. Roundy retained her present counsel.

During the jury selection process, counsel for Mr. Staley, in the course of

giving the names of witnesses he would call at trial, gave the name of one Ron Gunderson as a possible "rebuttal" witness. Neither Ms. Roundy nor her counsel nor anyone associated with her side of the case knew who Ron Gunderson was or what his role in the case would be (*e.g.*, Tr. of May 9, 1997 proceedings, at 13; Affidavit of Peter C. Collins (R. at 941-44); Affidavit of John H. Burraston, III (R. at 945-47)). Mr. Staley had not disclosed the existence of Mr. Gunderson or his proposed role in the case or anything regarding the surveillance videotape, in response to Ms. Roundy's discovery requests seeking pre-trial disclosure of trial witnesses and exhibits (R. at 1030-40). Approximately 7 1/2 months prior to trial, Ms. Roundy propounded, under Rule 26(e) of the Utah Rules of Civil Procedure (R. at 1041), a request for supplementation of discovery responses. Even in response to that request, neither Ron Gunderson's name nor his proposed involvement in the case was ever divulged prior to trial. Nor was the existence of the surveillance video that was ultimately commented on by defendant's witnesses and shown to the jury ever divulged or shown to Ms. Roundy, or her counsel, prior to trial.

Shortly after Mr. Gunderson's name was first mentioned by Mr. Staley's counsel, Ms. Roundy's counsel inquired of Mr. Staley's counsel regarding Mr. Gunderson and inquiring, specifically, about the nature of his proposed involvement in the case (Tr. of May 9, 1997 proceedings, at 13). Mr. Staley's counsel refused to disclose the requested information (*id.*), and Ms. Roundy's counsel brought the matter up with the District Court (*id.* at 13-22). In the course of argument on the matter, Mr. Staley's counsel contended, among other things, that, because there was no court

order that all witnesses be disclosed, Mr. Staley and his counsel were under no obligation to disclose Mr. Gunderson's identity or the subject matter of his proposed testimony prior to trial and that (in the face of Ms. Roundy's counsel's contention that Rule 26(e) of the Utah Rules of Civil Procedure required Mr. Staley to supplement his responses to discovery requests when Ron Gunderson's possible involvement became apparent to Mr. Staley's counsel) Ms. Roundy's remedy, if she was dissatisfied with Mr. Staley's discovery responses, was to have filed a motion to compel prior to trial (*id.* at 16). Counsel for Mr. Staley also contended that the District Court's requiring him to divulge the role of Mr. Gunderson and his projected testimony would do away with what he essentially acknowledged to be the surprise nature of the projected testimony and that Mr. Gunderson's testimony would be used to show that Ms. Roundy was a liar (*id.* at 17). The District Court, after expressing the view that it could conceive of nothing more dramatic in a courtroom than a witness's being exposed as a liar (*id.* at 20), and apparently rejecting Ms. Roundy's counsel's responding contention that the Rules make no exception for drama (*id.* at 20-21), denied Ms. Roundy's request that the nature of Mr. Gunderson's proposed evidentiary presentation be disclosed (*id.* at 22).

Mr. Gunderson ultimately testified and played to the jury a surveillance videotape that purported to show Ms. Roundy engaged in activities she purportedly told the jury she could not do. Prior to the time that Mr. Gunderson testified and prior to the time that the video was shown, Dr. Gerald Moress, defendant's "independent" medical examination doctor and a very well-credentialed neurologist (Tr. of May 14, 1997 proceedings, at 6-9), who had prepared an independent medical evaluation

("IME") report setting forth his view that Ms. Roundy had suffered a 5% permanent impairment (*id.* at 21) as a result of the subject motor vehicle collision, in essence testified that, after rendering that impairment opinion, he had viewed the videotape and, based on that viewing, had reason to question Ms. Roundy's veracity (*id.* at 22).¹

Dr. Moress never supplemented his written IME report.

Ms. Roundy maintains that she was candid in her testimony and that the videotape shows nothing different from what she testified to but acknowledges that the jury may have viewed it differently, especially after having been told by as eminent an authority as Dr. Moress, that it showed things contrary to what she had told him about.

The testimony of Mr. Gunderson and his surveillance videotape did not deal with the issue of who had what percentage of fault in the subject collision, but, as evidenced by Ms. Roundy's counsel's Affidavit (R. at 941-44) and the Affidavit of Ms. Roundy's liability expert (R. at 945-47), submitted subsequent to trial, the concern with the mysterious matter of Ron Gunderson considerably distracted Ms. Roundy's team. Probably more importantly, Mr. Staley's counsel developed a central theme, throughout the case, including in his closing argument (*e.g.*, Tr. of May 15, 1997 proceedings, at 25-26; 40-41; 46-47), linking Ms. Roundy's supposed lack of credibility with respect to the severity of her injuries with her supposed lack of credibility regarding how the subject collision occurred. Because Ms. Roundy's testimony that the

¹It was only during Dr. Moress's testimony, on direct examination, and not in response to a question that signalled what was coming (Tr. of May 14, 1997 proceedings, at 21-22), that Ms. Roundy and her counsel became aware of the existence of the surveillance video.

light was red when Mr. Staley entered the intersection (*e.g.*, Tr. of May 13, 1997 proceedings, at 40-41) was the only direct evidence on that crucial particular,² her credibility was central to her liability case.

At the conclusion of Ms. Roundy's case, Mr. Staley moved for directed verdict (Tr. of May 14, 1997 proceedings, at 92) on Ms. Roundy's punitive damages claim. Even though evidence had been introduced that supported the proposition that Mr. Staley, driving a heavy, truck-like vehicle, roared blindly into a busy intersection on a light that had been red for as long as two seconds (*e.g.*, Tr. of May 9, 1997 proceedings, at 105-08), or longer, the District Court granted that Motion (Tr. of May 14, 1997 proceedings, at 96).

The jury ultimately determined, by its Special Verdict (R. at 887-89), that both Mr. Staley and Ms. Roundy were negligent and that the negligence of each of them was a proximate cause of Ms. Roundy's injuries. The jury also determined (*id.*), having been instructed that if Ms. Roundy should be adjudged to have had 50% or more of the causal fault she would recover nothing (R. at 855), that Mr. Staley had 40% of the causal fault and that Ms. Roundy had 60% of the causal fault, and answered none of the questions regarding Ms. Roundy's damages.

The District Court then entered judgment, on the verdict, in favor of Mr. Staley (R. at 907-09).

²In his opening statement, Mr. Staley's counsel himself stated: "So it's going to be a question of what color the light was and exactly how this transpired." Second Tr. of May 8, 1997 proceedings, at 23.

Ms. Roundy then filed her Motion for a New Trial (R. at 916-17), contending that she was entitled to a new trial on alternative bases including the following:

1. "Irregularity in the proceedings of the court ... or adverse party, or any order of the court, or abuse of discretion by which [Ms. Roundy] was prevented from having a fair trial" (Rule 59(a)(1));
2. "Accident or surprise, which ordinary prudence could not have guarded against" (Rule 59(a)(3));
3. "Error in law" (Rule 59(a)(7)).

The District Court denied that Motion (R. at 1054-56), and this Appeal ensued.

IV. SUMMARY OF ARGUMENTS

1. The District Court committed reversible error in refusing to order counsel for Mr. Staley to disclose the planned surveillance video and related evidentiary presentation.

2. The District Court abused its discretion and committed reversible error by denying Ms. Roundy's Motion for New Trial based on "... surprise, which ordinary prudence could not have guarded against," under Rule 59(a)(3) of the Utah Rules of Civil Procedure, inhering in Dr. Moress's testimony regarding the surveillance videotape, in Mr. Gunderson's testimony regarding the surveillance videotape, and in the surveillance videotape itself.

3. The District Court abused its discretion and committed reversible

error by denying Ms. Roundy's Motion for New Trial based on "irregularity in the proceedings of the ... adverse party, or any order of the court, or abuse of discretion by which [Ms. Roundy] was prevented from having a fair trial," under Rule 59(a)(1) of the Utah Rules of Civil Procedure, with such irregularity and abuse of discretion having to do with Mr. Staley's counsel's refusing to disclose, in timely fashion, the surveillance video and related evidence, and the District Court's countenancing that non-disclosure.

4. The District Court abused its discretion and committed reversible error by denying Ms. Roundy's Motion for New Trial based on the District Court's "[e]rror in law," under Rule 59(a)(7) of the Utah Rules of Civil Procedure, inhering in the District Court's refusal to order disclosure of Mr. Staley's planned surveillance video and related evidentiary presentation.

5. The District Court committed error in granting Mr. Staley's Motion for Directed Verdict on Ms. Roundy's punitive damages claim.

V. ARGUMENT

A. MR. STALEY'S COUNSEL FAILED TO ADHERE TO THE RULES IN REFUSING TO DISCLOSE HIS PLANNED EVIDENTIARY PRESENTATION, THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO ORDER DISCLOSURE, AND MS. ROUNDY IS ENTITLED TO A NEW TRIAL UNDER EITHER THE "*DE NOVO*" STANDARD OF REVIEW OR THE "ABUSE-OF-DISCRETION" STANDARD OF REVIEW.

1. PRE-TRIAL PROCEDURAL BACKGROUND

As this Court will readily observe, the first four of the five aspects (presented immediately hereinabove) of Ms. Roundy's argument are interrelated. They

all deal with the conduct of Mr. Staley's counsel in refusing to disclose Mr. Staley's planned evidentiary presentation regarding the surveillance video and the District Court's countenancing that conduct.

Rule 26 of the Utah Rules of Civil Procedure provides, in pertinent part:

- (e) **Supplementation of responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
 - (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
 - (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
 - (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

On or about October 19, 1994, Ms. Roundy propounded Plaintiffs' First Set of Interrogatories, Requests for Production of Documents and Things and Requests for Admission to Defendants. In that request Ms. Roundy included detailed definitions pertinent to the discovery requests at issue. Comprehensive definitions of the terms

"document" and "identify" appear in the Addendum hereto, at 2-4. Mr. Staley's pertinent responses to those discovery requests are the following (also reproduced in the Addendum hereto), at 6-8:

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: 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 Plaintiffs' 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 it 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, plaintiffs' 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 resume 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 on this matter.

ANSWER: OBJECTION. 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.

On or about September 25, 1996, Ms. Roundy propounded her Rule 26(e)

Request for Supplementation (reproduced in the Addendum hereto, at 9). Mr. Staley responded as follows (also reproduced in the Addendum hereto, at 10-12):

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 counsel will call: Laina Roundy, Travis Staley, Melodie Kraft, Officer Hawk, Maryann Jiminez, Anita Sacher 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 resume 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 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 officer's 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; Experts' 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 between the date of this Supplemental Answer to Interrogatories and the date of trial.

That was the status of things at the commencement of trial.

2. TRIAL DEVELOPMENTS

The pertinent trial developments are detailed, hereinabove, at pages 5-9,

and Ms. Roundy incorporates, by this reference, that history. The colloquy, argument, and District Court ruling on the Ron Gunderson Mystery are reproduced in the Addendum hereto, at 14-22, and those things are, by this reference, incorporated herein. Suffice it to say, in the interest of refraining from repetition, that Ms. Roundy and her counsel knew nothing about Mr. Gunderson and his planned role in the case, or about any surveillance video, until Dr. Moress (Mr. Staley's "independent" medical examiner) mentioned the surveillance video in the course of a lengthy narrative (Tr. of May 14, 1997 proceedings, at 20-22) in response to a question that did not signal the impending dropping of the bombshell. At that point, "the cat was out of the bag," and Ms. Roundy and her counsel had to deal with the surprise nature of the testimony as well as they could.

3. LEGAL ANALYSIS

Mr. Staley's counsel had a duty, under Rule 26(a) of the Utah Rules of Civil Procedure, especially in the face of Ms. Roundy's Request for Supplementation, to disclose Mr. Gunderson's role, the existence of the videotape, and the fact that Dr. Moress would make reference to the videotape in his testimony. Mr. Staley's contention that Ms. Roundy had a duty to proceed by a Motion to Compel, when she had no inkling of the nature of the evidence whose disclosure she would be seeking to compel,³ is sophistry. Nor can Mr. Staley's counsel rest comfortably, in the face of

³It may be of interest that Mr. Staley's counsel himself expressed the view (Tr. of proceedings of May 13, 1997, at 9-10) that it is unlikely that a Motion to Compel would have been granted.

Ms. Roundy's discovery requests and Request for Supplementation, on his contention that he was excused from providing substantive discovery responses by the fact that there was no separate court order mandating the disclosure of witnesses.

Furthermore, Mr. Staley's contention that the evidence was "rebuttal" evidence misapprehends the nature of "rebuttal" evidence. A "rebuttal" case is a case that a plaintiff puts on after the defendant's case. A "rebuttal" argument is argument that a plaintiff's lawyer makes after the defendant's lawyer has completed his or her argument. And "rebuttal" evidence is typically evidence that a plaintiff puts on to rebut a defendant's evidence.

Mr. Staley's counsel had taken two depositions of Ms. Roundy, the second one very shortly before the trial and limited to inquiry regarding Ms. Roundy's then-present condition. Mr. Staley knew, in essence, through his counsel, what Ms. Roundy was going to say at trial about her physical condition and has never contended that he was surprised by any supposed change between her deposition testimony and her trial testimony.

If Mr. Staley's position is taken to its logical conclusion, a defendant could get away, in a virtually limitless number of situations, with non-disclosure of planned evidentiary presentation, simply by calling his evidence "rebuttal" evidence and, given the defendant's own purported view of truth and falsity, take the position that that evidence would only be used if necessary to expose any witness as a "liar." The defendant would then be dictating the rules of discovery, and that is precisely what the District Court in this case allowed to happen. That cannot be the law.

Cases from Utah and from other jurisdictions express strong disapproval for the trial-by-ambush strategy employed by Mr. Staley and countenanced by the District Court.

In Turner v. Nelson, 872 P.2d 1021, 1023-24 (Utah 1994), a case in which the witness in question was the plaintiff's "rebuttal" witness, the Utah Supreme Court observed:

... disclosure [of all potential witnesses in advance of trial] ... serves a number of significant purposes.... It gives both parties the opportunity to prepare adequately for trial, including, among other things, deposing witnesses, investigating witnesses' testimony, and preparing an effective cross-examination.... It also encourages the parties to make a serious effort to investigate the facts and discover all relevant witnesses in a timely manner. Finally, it furthers the orderly and efficient administration of justice by avoiding delays which might otherwise be necessary to accommodate the need to prepare for a surprise witness.... When the offering party contends that the undisclosed witness is necessary to rebut the adverse party's evidence, the issue hinges on whether the evidence "sought to be rebutted could reasonably have been anticipated prior to trial."

Here there is no doubt that Ms. Roundy's testimony about her physical condition and limitations was "reasonably anticipated prior to trial."

In Lascano v. Vowell, 940 P.2d 977 (Colo. App. 1996), the appellate court held it to reversible error for the trial court to delay ruling on, and ultimately to allow, the admission of a late-designated defense surveillance video. Among the reasons given by that court for its ruling was that the "plaintiff was placed at a significant disadvantage by having to rebut the exhibit without sufficient time to prepare properly." *Id.* at 981.

In Dodson v. Persell, 390 So.2d 704, 705-07 (Fla. 1980), the court, in the course of reversing for new trial, held that the existence and contents of surveillance films to be used as evidence are discoverable and observed that pertinent discovery rules were adopted to eliminate prejudice inhering in the surprise disclosure of evidence.

In Perez-Perez v. Popular Leasing Rental, Inc., 993 F.2d 281 (1st Cir. 1993), the First Circuit reversed a judgment on a jury verdict, holding that the trial court's admission of an undisclosed witness's testimony was an abuse of discretion. There the court observed:

Without time to review [the witness's] records ... or arrange for a rebuttal expert, ... counsel was precluded from effectively addressing the charge.

We have no doubt that this state of the record exactly comports with the definition of unfair surprise succinctly set out by the Court of Appeals of the Fifth Circuit:

It is well settled that Rule 59 provides a means of relief in cases in which a party has been made the victim of surprise. The surprise, however, must be inconsistent with ... substantial justice in order to justify a grant of a new trial....

In Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir. 1980), the Tenth Circuit reversed a judgment on a jury verdict and, in the course of determining that the trial court abused its discretion in allowing testimony of an undisclosed witness, observed:

The failure of a party to comply with discovery requests under rule 26 has led to findings of prejudice resulting in the exclusion of the proffered evidence. Coleco Industries, Inc. v. Berman, 567 F.2d 569 (3d Cir. 1977), cert. denied, 439 U.S. 830, 99 S.Ct. 106, 58 L.Ed.2d 124 (1978);

Tabatchnick v. G. D. Searle & Co., 67 F.R.D. 49 (D.N.J. 1975).

Similarly, although district courts enjoy wide discretion in handling discovery and pretrial matters, Phil Crowley Steel Corp. v. Macomber, Inc., 601 F.2d 342 (8th Cir. 1979), reversible error has been found in allowing testimony without such discovery where there has been a "gross abuse of discretion resulting in fundamental unfairness in the trial of the case." Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1977); Shelak v. White Motor Co., 581 F.2d 1155 (5th Cir. 1978); Weiss v. Chrysler Motors Corp., 515 F.2d 449 (2d Cir. 1975).

626 F.2d at 794.

It cannot be seriously contended by Mr. Staley that the District Court did not commit error in refusing to order disclosure. Nor can it be seriously contended that Ms. Roundy and her counsel were not "surprised" or that "ordinary prudence" could have "guarded against" that surprise. Nor can it be seriously contended that the non-disclosure and/or the District Court's countenancing that non-disclosure did not amount to "irregularity in the proceedings of the adverse party, or any order of the court, or abuse of discretion by which [Ms. Roundy] was prevented from having a fair trial." Nor can it be seriously contended that the District Court's refusal to order disclosure did not amount to an "[e]rror in law."

Whether the focus of this Court's analysis is appropriately on the first designated issue on appeal (pages 1-2 hereinabove), calling for a *de novo* standard of review, or on any of the next three designated issues (pages 2-4 hereinabove), calling for an abuse-of-discretion standard of review, or on some combination of those issues, the outcome of the analysis should be the same: the District Court clearly erred in countenancing the non-disclosure, the non-disclosure was most "irregular"; the non-

disclosure and the District Court's countenancing it prevented Ms. Roundy from receiving a fair trial; and the District Court abused its discretion in refusing to order a new trial.

B. NEITHER MR. STALEY'S COUNSEL'S CONDUCT NOR THE DISTRICT COURT'S REFUSAL TO ORDER DISCLOSURE WAS "HARMLESS."

Ms. Roundy is, through her counsel, well aware of the "harmless error" aspect of the law that is embodied in Rule 61 of the Utah Rules of Civil Procedure and that is expressly referenced in Rule 59(a) of the Utah Rules of Civil Procedure. On the facts of this case, this Court should determine, in the words of Rule 61, that "refusal [to order a new trial]" would be "inconsistent with substantial justice."

Ms. Roundy acknowledges that a superficial review of the jury's verdict would cause any law-trained person to conclude that any error or irregularity in the proceedings having to do with the surveillance video and related evidence should be considered harmless. After all, that evidence dealt only with Ms. Roundy's damages -- or the lack thereof -- and the jury never got to damages on the Special Verdict. When it found that Ms. Roundy had 60% of the causal fault, its job was done. And it knew that to be the case. So, one asks, why was the District Court's error not harmless? And why were the irregularities of Mr. Staley's counsel not harmless?

The answer can be found, as suggested hereinabove, at page 8, in Mr. Staley's counsel's entire approach to the defense of this case. The liability issue in this case, when stripped to its essence, came down to the question of whether the traffic light was red when Mr. Staley's Suburban entered the intersection. Mr. Staley's counsel

essentially acknowledged that to be the case in his opening statement (Second Tr. of May 8, 1997 proceedings, at 23). For if, as Ms. Roundy testified, the light turned red⁴ just as she started her turn, and if, as the experts agreed (*e.g.*, Tr. of May 14, 1997 proceedings, at 164, 192 (Mr. Staley's expert testifying)), it took 2.4 seconds to 3.1 seconds from the time Ms. Roundy began her turn until impact occurred, the light was "cold red" when Mr. Staley entered the intersection, and no reasonable jury could have found that Ms. Roundy had, if any fault, more fault than Mr. Staley had.

As pointed out hereinabove, at pages 8-9, Ms. Roundy is the only witness who testified that the light was definitely red when Mr. Staley's Suburban entered the intersection. Her credibility thus became crucial to the success of her liability case. And, as explained hereinabove, at page 8, in his closing argument Mr. Staley's counsel played Ms. Roundy's supposed lack of credibility on the damages issue -- as supposedly proved by the surveillance video -- (Exhibit 23-D) for all it was supposedly worth, in connection with his argument on the liability issue. The most pertinent parts of that argument are reproduced in the Addendum hereto, at 25-30.

The jury had been instructed (R. at 855; p. 32 of Addendum hereto) that Ms. Roundy would recover nothing if she was found to have 50% or more of the causal fault. The jury had also been instructed (R. at 849; p. 31 of Addendum hereto) that if the jury believed that any witness (including Ms. Roundy) had willfully testified falsely

⁴Lest there be any uncertainty, the light for Ms. Roundy was, at all pertinent times, the same color as was the light for Mr. Staley (Tr. of May 9, 1997 proceedings, at 78-79).

as to any material matter (including, by implication, the severity of her injuries), the jury could disregard her entire testimony, except as corroborated by other, credible testimony. Mr. Staley's counsel (Tr. of May 15, 1997 proceedings, at 26; Addendum at 26) hammered on that instruction in his closing argument, and there was no solid corroborating evidence that the light was red when Mr. Staley's Suburban entered the intersection.

The link between Ms. Roundy's supposed lack of credibility on damages and liability issues and the significance of that supposed lack of credibility, founded substantially on the surprise surveillance video and Dr. Moress's surprise testimony regarding it, and the significance of that link to the jury's defense liability verdict is thus established.

What, then, of the question of what Ms. Roundy could have done with the surveillance video if she had been allowed to learn of its existence and that of its "author" and had been allowed to view it in perfectly timely fashion (or even when the issue was raised with the District Court on the second day of trial)? The list in response is long. The following are examples only. Her counsel could have, in the universally recognized crucial trial phase of opening statement, discussed it (if it had, indeed, survived a motion *in limine*). Her counsel could have deposed Mr. Gunderson to learn of the details of its taking. Her counsel could have interrogated Mr. Gunderson regarding its editing and the other details of the production process and thereby determined how realistic and full and accurate a picture it gave. Her counsel could have explored the nature of Mr. Gunderson's background and his working with

Mr. Staley's counsel. Her counsel could have prepared better cross-examinations of Dr. Moress and Mr. Gunderson. She would have had time (there was a weekend between the time of the Ron Gunderson discussion with the District Court and the time of Dr. Moress's testimony and the conclusion of the trial) to locate the exact fake "potted plant" depicted in the video and bring it to the courtroom so the jury could feel how light it really was. She could have had her very friend who is depicted in the video come to testify about her weakened condition. She could have been prepared to explain what was going on in her life and the "kind of day" she was having while the video was being taken. And her counsel could have moved, with, perhaps, success, under Rule 403 of the Utah Rules of Evidence, for exclusion of the video and all references to it by reason of such things as its prejudicial and confusing (*e.g.*, fake plant) nature.

The fact that we live in a video-intensive age needs no citation of authority. A jury that had spent several trial days dealing with essentially verbal evidentiary presentations, from both sides, would be expected to pay special heed to a "cloak-and-dagger" video investigative product. Mr. Staley's counsel played all this for all it was worth, and more. And the District Court itself (Tr. of May 15, 1997 proceedings, at 228) suggested turning off the lights in the courtroom. The significance of this surprise evidence, and of Dr. Moress's surprise reference to it, cannot be overstated, and neither Mr. Staley's counsel's conduct nor the District Court's countenancing that conduct was "harmless."

If this Court should grant Ms. Roundy's Motion for New Trial, it will not

be the first time that an appellate court has determined reversible, liability-case error to inhere in what appears, on superficial review, to be error that would deal only with damages issues. In Green v. Denver & Rio Grande Western R. Co., 59 F.3d 1029, 1033-34 (10th Cir. 1995), the Tenth Circuit reversed a judgment on a no-liability jury verdict in a situation where the trial court erroneously allowed evidence of collateral source payments to come to the jury's attention. The link there recognized --

The major reason for excluding collateral source evidence is the concern that juries will be more likely to find no liability if they know that plaintiff has received some compensation.

Id. at 1033 -- especially when there was no apparent attempt by the defendant's counsel there (unlike here) to link damages issues with liability issues, seems considerably weaker, if anything, than the link here.

The non-disclosure was not harmless, the District Court's refusal to order disclosure was not harmless, and Ms. Roundy is entitled to a new trial.

C. THE DISTRICT COURT COMMITTED ERROR IN GRANTING MR. STALEY'S MOTION FOR DIRECTED VERDICT ON THE PUNITIVE DAMAGES CLAIM.

Ms. Roundy's punitive damages claim was based on the proposition that Mr. Staley acted, in the language of Utah Code Ann. § 78-18-1, with a knowing and reckless disregard toward, and a conscious disregard of, the rights of others, if, as Ms. Roundy contends is the fact, he drove his Suburban, with his vision obstructed, into a busy intersection against a traffic light that had been red for approximately two seconds, or longer.

Ms. Roundy had the facts and the law to keep her punitive damages claim in the case, and the District Court erred in granting Mr. Staley's Motion for Directed Verdict on that claim. Ms. Roundy acknowledges that if she does not succeed in this Appeal on one or more of the grounds set forth hereinabove, the issue will be moot, but, confident of the proposition that this Court will reverse and remand for new trial on one or more of the issues discussed hereinabove, Ms. Roundy urges this Court to include, in its remand order, a directive to the District Court to enable her to proceed, in that new trial, with her punitive damages claim.

The standard for imposition of punitive damages is set forth in Utah Code Ann. §78-18-1:

. . . conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

That Utah statute appears to codify, verbatim, the holding of this Court in Gleave v. Denver & Rio Grande Western R. Co., 749 P.2d 660, 670 (Utah App. 1988) (citing three Utah Supreme Court cases). In Gleave, this Court, in discussing the trial court's granting of the defendant's motion for directed verdict on the punitive damages claim, applied an analysis that fits every directed verdict context:

If . . . reasonable inferences supporting judgment for the [party resisting the directed verdict motion] could be drawn from the evidence presented at trial, the directed verdict cannot be sustained [Utah Supreme Court citations omitted]. This is so even if reasonable persons might reach different conclusions on the punitive damages issue after considering the evidence and the reasonable inferences to be drawn therefrom.

Id. (emphasis added).

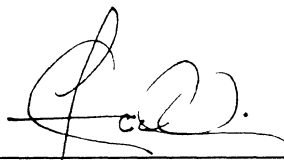
There are, undeniably, as is clear from the foregoing quotation from Gleave, cases in which it is appropriate for the jury to determine whether punitive damages should be awarded. The instant case is one such case. On Ms. Roundy's version of the liability facts of this case, the jury could well have determined and could in a new trial well determine, pursuant to the clear and convincing evidence standard of proof applicable to punitive damages claims, that Mr. Staley acted with "knowing and reckless indifference toward and disregard of the rights of others," including Ms. Roundy. Perhaps the jury will not in the new trial so find, but it is certainly a question on which reasonable minds could differ, under Ms. Roundy's version of the facts.

Utah law allows Utah jurors -- if there is some substantial basis that takes the case, as a matter for reasonable jury determination, outside the realm of mere inadvertence or mistake, or the "ordinary" run of cases, and when they are appropriately instructed on the statutory requirement for imposition of punitive damages -- to make the determination of whether an award of punitive damages is appropriate. If Mr. Staley made a decision -- something a jury would reasonably conclude to have occurred -- to drive into a busy intersection, on a red light, when his view of turning vehicles, like Ms. Roundy's, was obstructed, a jury should be allowed to decide whether that conduct is egregious enough to lead to the imposition of punitive damages.

VI. CONCLUSION

Based on the foregoing analysis, Ms. Roundy urges this Court to reverse and remand, for new trial, on one or more of the grounds discussed hereinabove, and also to reverse the District Court's granting of Mr. Staley's Motion for Directed Verdict on Ms. Roundy's punitive damages claim.

RESPECTFULLY SUBMITTED this 2nd day of November, 1998.



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

CERTIFICATE OF SERVICE

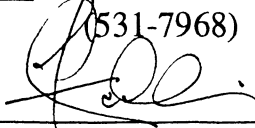
I hereby certify that, on the 2nd day of November, 1998, I caused to be served two true and correct copies of the foregoing OPENING BRIEF OF PLAINTIFF-APPELLANT LAINA ROUNDY by the method indicated below, and addressed to the following:

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

<u> </u>	HAND DELIVERY
<u>X</u>	U.S. MAIL
<u> </u>	OVERNIGHT MAIL
<u> </u>	TELECOPY (FAX)
	(532-5506)

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

— HAND DELIVERY
X U.S. MAIL
— OVERNIGHT MAIL
— TELECOPY (FAX)
(531-7968)

A handwritten signature in black ink, appearing to read "J. E. Hansen", is written over a horizontal line.

ROUNDY\APPEAL\BRIEF.APL

ADDENDUM

Kyle W. Jones (Bar No. 1744)
Co-counsel for Plaintiffs
Beneficial Life Tower, Suite 2650
36 South State Street
Salt Lake City, Utah 84111
Telephone (801) 359-7771

Thor B. Roundy (Bar No. 6435)
Co-counsel for Plaintiffs
660 South 200 East, Suite 425
Salt Lake City, Utah 84111
Telephone (801) 364-3229
Facsimile (801) 355-5080

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LAINA ROUNDY, an individual,	:	
THOR ROUNDY, an individual,	:	
and LAINA ROUNDY, as guardian	:	PLAINTIFFS' FIRST SET OF
ad litem for ANASTASIA ROUNDY,	:	INTERROGATORIES, REQUESTS
	:	FOR PRODUCTION OF DOCUMENTS
Plaintiffs,	:	AND THINGS AND REQUESTS FOR
	:	ADMISSIONS TO DEFENDANTS
v.	:	
	:	
NEIL STALEY, an individual,	:	
and TRAVIS STALEY, an	:	
individual,	:	
	:	Civil No. 940906068CV
Defendants.	:	

Judge David S. Young

Plaintiffs Thor and Laina and Anastasia Roundy ("Roundys"), by and through their undersigned counsel, hereby submit to Defendants Travis Staley and Neil Staley, Plaintiffs' First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions pursuant to the provisions of Rules 26, 33, 34, and 36 of the Idaho Rules of Civil Procedure. The Roundys demand that the aforementioned Defendants respond to each Interrogatory and

0001/019

Request for Admission under oath and produce the documents designated below that are in their possession, custody or control and do so at the law offices of Thor B. Roundy, 660 South 200 East, Suite 425, Salt Lake City, Utah, 84111 or at such other place as is mutually agreeable to counsel for the parties and to produce the things designated at such place as is mutually agreeable to counsel for the parties, within thirty (30) days of the date of service hereof. Pursuant to Rule 36, the Request for Admissions shall be deemed admitted unless such requests are responded to within thirty (30) days of the service of such requests. Upon such production, the Roundys further request that the aforementioned Defendants permit the inspection and/or copying of the documents produced.

DEFINITIONS

The following definitions shall be used herein except as indicated to the contrary:

1. The terms "you" and "your" refer to Travis Staley and Neil Staley.

To the extent that the answers of each defendant would differ, provide a separate answer for each defendant.

2. The term "document" or "documents" as used herein shall mean the originals and all nonidentical copies (whether different from the originals because of any alterations, notes, comments, or other material contained therein or attached thereto or otherwise) and drafts of all written, printed, recorded or graphic matter of every kind and description, together with any

attachment thereto or enclosure therewith, in any way relating or referring to or concerning the subject matter of the request, whether inscribed or mechanical, electronic, microfilm, photographic or by other means as well as all phonic or visual reproductions, including but not limited to: diaries, contracts, drafts, manuals, reports, telegrams, notes, compilations, schedules, tabulations, tallies, charts, tables, diagrams, drawings, interoffice and intra-office memoranda, memoranda for file, minutes of meetings, photocopies, circulars, pamphlets, registration statements, registration documents, memoranda of telephonic conversations, memoranda of meetings and conferences, correspondence, accounting records, computer-stored data or data bases, or computer printouts or programs, or any other documents such as a code for a computer run or printout, tape recordings of any statement or conversation, and any other retrievable data in your possession, custody or control as known to you, wherever located, including documents in the possession of any of your current or former agents, attorneys, accountants, servants, employers or employees.

3. The term "person" or "persons" shall mean the plural as well as the singular and shall include any natural person and any firm, corporation, partnership, association, or other legal entity.

4. The term "identify," in any of its various forms, when used in referring to persons, as defined above, shall mean and require you to state with regard to each person so designated:

- (a) the name of the person;
- (b) the person's present (or last known) business and home address;
- (c) the person's present (or last known) employer;
- (d) the person's title and duties of each position held with that employer.

5. The term "identify," in any of its various forms, when used in relationship to the term "document" or "documents" shall require you to state with regard to each document so designated:

- (a) the title and date appearing on the document; and the date of the document's preparation, if known;
- (b) a description of the document in sufficient detail to enable it to be specifically identified;
- (c) the name(s), address(es) and title(s) (if known) of the author(s) and signer(s) of the document;
- (d) the name(s) and business address(es) of the persons presently having custody of the original document (and of any copies thereof of which you have knowledge);
- (e) the name(s) and business address(es) of each person having knowledge of any factual assertions reflected in such documents;

LYNN S. DAVIES [A0824]
CHRISTIAN W. NELSON [A5771]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendants
Key Bank Tower, Seventh Floor
50 So. Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506

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

LAINA ROUNDY, an individual,
THOR ROUNDY, an individual,
and LAINA ROUNDY as guardian
ad litem for ANASTASIA ROUNDY,

Plaintiffs,

vs.

NEIL STALEY, an individual,
and TRAVIS STALEY, an
individual,

Defendants.

DEFENDANTS' ANSWERS TO
PLAINTIFFS' FIRST SET OF
INTERROGATORIES

Civil No. 940906068

Judge David S. Young

Defendants Neil Staley and Travis Staley hereby answer
Plaintiffs' First Set of Interrogatories as follows:

GENERAL OBJECTION: Plaintiffs' Interrogatories are
excessively long and unduly burdensome. They are also violative
of the provisions of Rule 26(b), second paragraph, items (i)-
(iii). Insofar as the Interrogatories relate to the Complaint,
the Complaint itself was unduly long and burdensome.

INTERROGATORY NO. 1: State the name of every person
who contributes to your answers to these discovery requests. For

each person, state the address and telephone number where they live and state every other address and telephone number at which they can be reached.

ANSWER: Defendants Neil Staley and Travis Staley, and their attorney, Lynn S. Davies and his staff at Richards, Brandt, Miller & Nelson.

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: 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 Jimenez, expert witnesses as yet undetermined and undoubtedly others.

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

ANSWER: Plaintiffs would best know who has information about their Complaint. As to defendants' Answer, Objection: the

Answer was prepared by counsel, and it 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 Jimenez, plaintiffs' 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 resume 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. 5: Identify all individuals you have consulted as experts but do not plan to use on your behalf

at a trial on this matter. Include in your answer a copy of their resume or curriculum vitae.

ANSWER: Objection - such information is protected as work product pursuant to URCP 26(b)(3). Without waiving that objection, there are no such experts at this time.

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

ANSWER: OBJECTION. 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.

INTERROGATORY NO. 7: Identify all documents (in the detail required by "Definitions" paragraph 5, above) which may contain information concerning the allegations of Plaintiffs' Complaint and/or Defendant's Answer. Include in your answer, but do not limit it to, an identification of all individuals with information concerning your response.

ANSWER: See Objection and Answer to Interrogatory No.

3. Without waiving that Objection, see Salt Lake Police Department Accident Investigation Report No. 94-65770.

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

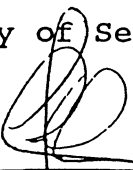
Attorneys for Plaintiff

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

LAINA ROUNDY,	:	
	:	PLAINTIFF'S RULE 26(e)
Plaintiff,	:	REQUEST FOR SUPPLEMENTATION
	:	
v.	:	
	:	
TRAVIS STALEY,	:	Civil No. 940906068CV
	:	
Defendant.	:	Judge David S. Young

Plaintiff Laina Roundy (the only remaining plaintiff in this case), by and through her lawyers, requests that defendant, pursuant to Rule 26(e) of the Utah Rules of Civil Procedure and specifically in response to this Request, supplement his responses to all Interrogatories and all Requests for Production of Documents previously submitted to defendant by plaintiff.

DATED this 25th day of September, 1996.



PETER C. COLLINS
BUGDEN, COLLINS & MORTON, L.C.
Attorneys for Plaintiff

LYNN S. DAVIES [A0824]
CHRISTIAN W. NELSON [A5771]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendants
Key Bank Tower, Seventh Floor
50 So. Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LAINA ROUNDY, an individual, Plaintiffs, vs. TRAVIS STALEY, an individual, Defendants.	DEFENDANTS' SUPPLEMENTAL ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES Civil No. 940906068 Judge David S. Young
--	--

Defendant Travis Staley hereby provides Supplemental Answers to Plaintiff's

First Set of Interrogatories as follows:

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 counsel will call: Laina Roundy, Travis Staley, Melodie Kraft, Officer Hawk, Maryann Jimenez, Anita Sacher 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 resume 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 Ronald L. Probert, accident reconstructionist, Gerald Moress M.D., and other experts may likely be called as well.

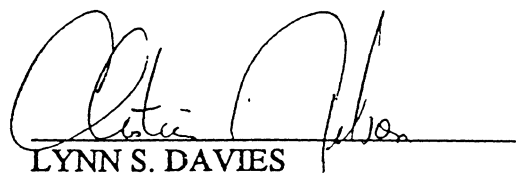
INTERROGATORY NO. 6: Identify all documents (in the detail required by "Definitions" paragraph 5, above) you intend to use on your behalf at a trial on this matter.

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 police officer's reports, diagrams and statements; Photographs of the defendant's vehicle; Photographs of the plaintiff's vehicle; Repair records for the parties' vehicles; Income, benefits and employment records of plaintiff, including extracts and summaries of such; IME reports; Experts' reports; Defendant reserves the right to submit additional exhibits obtained from materials supplied 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 between the date of this Supplemental Answer to Interrogatories and the date of trial.

DATED this 13th day of November, 1996.

RICHARDS, BRANDT, MILLER
& NELSON

Handwritten signatures of Lynn S. Davies and Christian W. Nelson, written over a horizontal line.

LYNN S. DAVIES
CHRISTIAN W. NELSON
Attorneys for Defendant

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

--oo0oo--

LAINA ROUNDY and THOR)	
ROUNDY,)	
)	
Plaintiffs,)	Civil No. 940906068 CV
)	Judge David S. Young
vs.)	
)	
NEIL STALEY and TRAVIS)	
STALEY,)	
)	
Defendants.)	
_____)	

REPORTER'S TRANSCRIPT

MAY 9, 1997

BEFORE THE HONORABLE DAVID S. YOUNG

CERTIFIED COPY

REPORTED BY TIFFANY WALTERS, CSR, RPR

0013

1 about that yesterday. Based on his experience as a
2 police officer, he was able to conclude from those
3 things something about the speed, plus the fact that
4 he will testify that the man sped up to beat the
5 light. That's an important underlying basis.

6 THE COURT: I'll let that fact in, but the
7 condition of the light, he can't testify to that.

8 MR. COLLINS: I understand, and I'll just
9 try to lay the foundation with him.

10 MR. DAVIES: I guess I would just alert the
11 Court that when we get to that, I would anticipate
12 probably asking to conduct some voir dire examination
13 to determine whether he has the foundation or not.

14 MR. COLLINS: Can I ask you something while
15 we're here?

16 THE COURT: Yes.

17 MR. COLLINS: You may have a different
18 understanding about the concept of a rebuttal witness
19 than mine, but he and I had a little discussion. We
20 need your help. We need a ruling on this. He
21 mentioned in his disclosure all possible witnesses,
22 yet a name of Ron Gunnerson, that is a person that I
23 have never heard of and my client has never heard of,
24 and we asked for rebuttal, possible rebuttal
25 witnesses.

1 My understanding of a rebuttal witness is,
2 typically, someone that the Plaintiff brings up to
3 rebut something that the Defendants' -- of the
4 Defendants' case. Sometimes, I guess the term
5 applies probably if there is a surprise in the
6 Plaintiffs' cause. I asked Mr. Davies to tell me who
7 Mr. Gunnerson was and what was he was going to say.
8 Mr. Davies refused to tell me that, that it might
9 underline the effectiveness of the witness in this
10 case.

11 We don't have any surprises in our lawsuit,
12 Your Honor. Ms. Roundy has been deposed twice. Mr.
13 Davies knows full well what our position is in this
14 case on damages, and I have the feeling that Mr.
15 Gunnerson is some kind of a surprise, perhaps a
16 surveillance video person, and if Mr. Davies knows or
17 has reason to believe that he's going to use him,
18 based on what he thinks he's going to put out in this
19 case, I don't think it's fair. I think I'm entitled
20 to know that.

21 **THE COURT:** Mr. Davies?

22 **MR. DAVIES:** I have two points, Your
23 Honor. First of all, in this matter, the Court did
24 not ever require us to disclose witnesses to one
25 another or exhibits. We've done so voluntarily, and

1 I think everything's been disclosed, except for
2 matters pertaining to Mr. Gunnerson, but that was
3 voluntarily. I don't think it was required in this
4 case, and we didn't do it for that reason. Also, I
5 should point out that the rebuttal witness that Mr.
6 Collins mentioned was someone I have never heard of
7 before.

8 MR. COLLINS: I could tell you who he is if
9 I haven't already. Excuse me, Your Honor. I didn't
10 mean to interrupt.

11 THE COURT: I'm faced with a rule here of
12 whether I have -- if there hasn't been an obligation
13 to disclose, whether I have the right to obligate you
14 now to disclose.

15 MR. COLLINS: There have been
16 interrogatories, Your Honor, asking who your
17 witnesses are going to be. In fact, I remember an
18 exchange I had with Mr. Davies a couple of weeks ago
19 where I asked him who his witnesses were going to be,
20 give me a list of who you're going to call and then
21 we'll tell you, and I did that, and I haven't heard.
22 That may be in the realm of courtesy or truthfulness,
23 but if I ask him, he's got an obligation to disclose
24 it.

25 THE COURT: I'll hear you further, but if

1 that's the way that it has been asked, I will require
2 you to respond.

3 **MR. DAVIES:** And let me respond to that as
4 well, Your Honor. It's my position, and so far it's
5 worked on all the cases I've handled, that when
6 someone asked me in interrogatories who my witnesses
7 are going to be, I typically say -- usually that
8 question comes very early in the case, and I say, I
9 don't know yet, and we will tell you when the Judge
10 tells us to tell you. If you ask a scheduling order
11 in this case, and you get a scheduling order, we'll
12 comply with the scheduling order, and that's our
13 response.

14 It's my view that if someone doesn't like
15 that response, which is based on an objection, it's
16 their obligation to go before the Court on a motion
17 to compel and get a response from us. But if they
18 let it go, and they take no further action in
19 response to that objection, then that's it. We get
20 here at court, and we are not bound by anything
21 because we objected, and that's what happened here.
22 We objected. We made no response. The Court did not
23 set a scheduling order for disclosure of witnesses,
24 but voluntarily, we've provided information to the
25 extent that we thought appropriate. Now, with regard

1 to --

2 **THE COURT:** Let me tell you what my
3 attitude is, Mr. Davies. My attitude is that,
4 voluntarily, your obligations to disclose exceed the
5 mandated obligations by the Court.

6 **MR. DAVIES:** And we indicated in our
7 disclosure that the following would be our witnesses,
8 plus any necessary rebuttal witnesses. Let me
9 address the specific issue here. It's this, if I
10 tell Mr. Collins exactly who this witness is, and if
11 I give him further information about that, I think it
12 will completely eviscerate the effectiveness of the
13 witness's testimony for a very legitimate reason.
14 That's why I called it rebuttal, because that
15 witness's testimony would only be necessary for when
16 the Plaintiff gets on the stand, when she testifies
17 and lies. And if she lies, that is a surprise, and I
18 need to rebut with this witness. If she tells the
19 truth, I guess that testimony may not be necessary.

20 **MR. COLLINS:** Your Honor --

21 **MR. DAVIES:** As soon as I tell him who this
22 is and what we have, it changes the testimony. She's
23 going to change her testimony. I guarantee it.

24 **MR. COLLINS:** Your Honor, that's not how
25 the rule works. In Rule 26(a) of the Utah Rules of

1 Civil Procedure, it provides an ongoing obligation to
2 parties to provide information responsive to
3 interrogatories as they learn them. If they didn't
4 know he was going to use this guy early on, he still
5 had an obligation. It doesn't work that way under
6 the rules or under customary appropriate behavior.

7 **THE COURT:** Well, let's just assume that
8 they have. Let's assume the other side of the
9 equation here for just a minute. Let's assume that a
10 witness gets on the stand and lies about something,
11 does the other party have the right to call an
12 undisclosed witness to rebut the lie? And I would
13 say the answer to that is probably yes.

14 **MR. COLLINS:** And I think so, Your Honor,
15 and I considered handling it that way, but I decided
16 to say his name just so we didn't have a problem in
17 case one of the jurors knew him or in case the Court
18 didn't agree with me about that.

19 **THE COURT:** And so you would agree with the
20 "yes" on that, wouldn't you?

21 **MR. COLLINS:** If somebody is going to say
22 something that's totally unexpected, this concept of
23 lying, I don't know how that fits, Your Honor. It
24 depends on how you characterize that. If they know
25 essentially what our testimony is going to be in this

1 case from taking my client's deposition twice, and I
2 have a feeling this has to do with certain
3 activities.

4 If they think they've got something on her,
5 they know what she's going to say from the
6 depositions. We're entitled, as a matter of fair
7 play, to know what they've got. There's no surprises
8 on our case. If there was a surprise, if they
9 thought there was going to be something, something
10 unexpected, a surprise to them, something radically
11 different from what discovery had disclosed, that
12 would be one thing.

13 **THE COURT:** I'm not sure if that applies if
14 it's just a surprise. Let's suppose that in
15 discovery -- not to use this case. I know nothing
16 about the discovery, but let's suppose that there's
17 somebody with a back injury who claims they can't
18 play tennis or water-ski anymore, and let's suppose
19 that they get on the stand and they testify that they
20 can't play tennis and water-ski.

21 Now, you know in advance that they're going
22 to testify to that, because they've done it in a
23 deposition. And so in rebuttal, does the other party
24 have the opportunity to investigate and find that,
25 indeed, they both played tennis and water-skied, and

1 they have films of it after the injury? Now, do they
2 have to disclose that?

3 MR. COLLINS: Sure, they do.

4 MR. DAVIES: I don't think so.

5 MR. COLLINS: Judge, if they know it's
6 coming, and they know the essence of what the
7 Plaintiffs' testimony is going to be, if there's been
8 a court order on exhibits or on witnesses that they
9 reasonably think that they will or may use or if
10 there's interrogatories asking those same questions,
11 why should that be any different from any other area
12 that we deal with?

13 THE COURT: Because what it does is, the
14 party knows whether they've water-skied or played
15 tennis in the hypothetical that I've used, and they
16 know whether they've been asked if they have after
17 the injury, and they've testified, I have not, I
18 cannot, the injury precludes it. Now, what can be
19 more dramatic than to show testimony that that is a
20 lie, because the party knew when they said it in the
21 deposition that it was a lie, and they knew
22 thereafter that it was a lie when they testified in
23 trial, and now the other party has the right to show
24 the witness to be what the witness is.

25 MR. COLLINS: There's no exception to the

1 rules for drama, Your Honor, should it be dramatic,
2 but it doesn't mean that you don't have to disclose
3 it if you know it's coming.

4 MR. DAVIES: This is an odd discussion.
5 Maybe Ms. Roundy will say that she can't remember
6 playing tennis more than three or four times, you
7 know, and maybe she's trying to play tennis, and
8 maybe they're going to have her where she was playing
9 tennis, and maybe they're going to try to blow that
10 up into a lie. I don't think there's going to be any
11 black-and-white stuff here on her saying that she
12 absolutely flat can't do something and act like she
13 doesn't have a problem, make her look like she
14 doesn't have a problem in the world. It could be
15 just a question of degree that's going to be made
16 into something different.

17 THE COURT: Well, Mr. Davies, do you --

18 MR. DAVIES: One final thought, Your Honor,
19 and that is, I don't know what difference it makes to
20 Mr. Collins. What are they going to do with this,
21 anyway?

22 THE COURT: The only difference --

23 MR. COLLINS: I want to see it.

24 THE COURT: I don't have any idea what it
25 is. I don't have any idea who the witness -- I don't

1 know what any witness's testimony is, but to me, it
2 seems to me that if they call that witness as a
3 rebuttal witness, depending on what develops in the
4 direct case, they can do that, and they can call a
5 stranger. If she says, take the hypothetical of
6 that, I never water-skied after the injury. If
7 somebody testifies to that and says, Yeah, we went to
8 Lake Powell three weeks ago and she water-skied or he
9 water-skied, I saw him do it. That's a rebuttal
10 witness. The disclosure of the witness is called
11 principally to impeach the credibility of the witness
12 who has testified that they couldn't water-ski, so
13 the Court finds that the disclosure of the testimony
14 for the rebuttal witness need not be made by the
15 defense. And that if the witness is called to
16 testify later on, based upon other testimony needing
17 to be rebutted, that that can be presented at that
18 time. And if you have an objection about that before
19 the witness is called, we may deal with that.

20 **MR. COLLINS:** I apologize. Does that apply
21 to documentary evidence as well, photographs,
22 videotapes, whatever else they might have?

23 **THE COURT:** Sure. They can present their
24 rebuttal case as they wish.

25 **MR. COLLINS:** One last thing, but let's

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DEFENDANT.

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)
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)
)
) CASE NO. 940906068
)
) JUDGE DAVID S. YOUNG
)
)
)

1 WE HOPE WE KNOW WHAT IT TAKES TO CONVINCE A
2 JURY TO FIND THE TRUTH IN THE CASE, AND I HOPE WE'VE
3 HELPED YOU BY THE PRESENTATION OF THE APPROPRIATE
4 EVIDENCE, SO THAT YOU CAN DO THAT.

5 BUT WE NEVER KNOW, NOR SHOULD WE TRY TO
6 GUESS WHAT YOU ARE THINKING AND WHAT'S IMPORTANT TO
7 YOU. I SUPPOSE THAT YOU COULD FIND FOR THE
8 PLAINTIFF, AND YOU COULD DO THAT IN THIS WAY: YOU
9 COULD CONSIDER ALL THE EVIDENCE THAT SHE PERSONALLY
10 PRESENTED.

11 AND ONLY THE MOST FAVORABLE EVIDENCE THAT
12 SHE PRESENTED, DISREGARDING THE INCONSISTENT
13 EVIDENCE THAT SHE GAVE. AND IGNORE EVERYTHING ELSE,
14 ALL THE OTHER TESTIMONY AND ALL THE OTHER EVIDENCE
15 THAT CAME IN FROM ALL THE OTHER WITNESSES. AND THEN
16 YOU COULD FIND TO THE PLAINTIFF.

17 BUT THAT'S NOT HOW THIS WORKS. AND THAT'S
18 NOT THE WAY IT SHOULD WORK. I GET THE IMPRESSION
19 FROM MR. COLLINS' STATEMENTS THAT PERHAPS HE THINKS
20 THAT I HAVE GONE TOO FAR IN THE WAY THAT I HAVE
21 PRESENTED THIS CASE, AND THAT I HAVE BEEN TOO
22 AGGRESSIVE, AND THAT PERHAPS YOU WILL HOLD THAT
23 AGAINST MY CLIENT. THE JUDGE TOLD YOU THAT THE
24 LAWYERS ARE NOT ON TRIAL. HOPEFULLY, I HAVEN'T
25 OFFENDED YOU IN ANY WAY BY BEING TOO AGGRESSIVE. I

1 HOPE YOU WON'T HOLD THAT AGAINST MY CLIENT.

2 I THINK SOMETHING THAT'S BEEN LOST IN THE
3 CASE SO FAR IS THE FACT THAT IT IS ABOUT JUSTICE.
4 AND JUSTICE, AS YOU APPLY IT IN FINDING THE FACTS ON
5 THIS CASE, PERTAINS TO BOTH PLAINTIFF AND THE
6 DEFENDANT. SO FAR, YOU'VE HEARD ABOUT ALL IN THIS
7 CASE IS ABOUT THE PLAINTIFF, THE ONE PARTY. BUT WE
8 HAVE TWO PARTIES IN THIS CASE. THE OTHER PARTY IS
9 TRAVIS STALEY.

10 AND IT'S OUR POSITION THAT THE CLAIMS THAT
11 ARE BEING MADE IN THIS CASE AND THE WAY THEY HAVE
12 BEEN PURSUED IS NOT FAIR, IS NOT RIGHT. AND IT'S
13 NOT REAL. ONE OF THE JURY INSTRUCTIONS THAT YOU
14 HEARD, I THINK IT'S NUMBER 11, WAS THAT IF YOU FEEL
15 ANY WITNESS HAS TESTIFIED -- WILLFULLY TESTIFIED
16 FALSELY TO ANY MATERIAL MATTER, YOU MAY DISREGARD
17 THE ENTIRE TESTIMONY OF THAT WITNESS, EXCEPT AS THAT
18 WITNESS MAY HAVE BEEN CORROBORATED BY OTHER CREDIBLE
19 EVIDENCE.

20 THIS CASE HAS TO DO EXACTLY AND PRECISELY
21 WITH THE CREDIBILITY OF THE PLAINTIFF. ALL SHE HAS
22 TO PROVE ANY PART OF HER CASE, WHETHER IT'S THE
23 LIABILITY OR HOW THE ACCIDENT OCCURRED, OR THE FACT
24 THAT SHE'S CLAIMING THE INJURIES SHE'S CLAIMING, IS
25 ALL BASED COMPLETELY ON HER OWN SAY SO.

1 SO, AS I POINTED OUT BEFORE IN OPENING, THE
2 PLAINTIFF HAS THE BURDEN OF PROOF. ESPECIALLY ON
3 THIS POINT OF PROVING THAT TRAVIS IS GUILTY OF
4 NEGLIGENCE. I DON'T WANT TO SUGGEST WE NEED TO WIN
5 THIS ON A TECHNICALITY, BUT WHAT IT MEANS IS THAT IF
6 YOU EITHER THINK THAT IT'S CLEAR FROM THE EVIDENCE
7 THAT WHAT TRAVIS DID WAS APPROPRIATE, BASED ON THE
8 BULK OF THE TESTIMONY AND THE WITNESSES, THEN HE
9 WINS.

10 OR IF YOU CAN'T REALLY TELL, THEN THE LAW
11 SAYS YOU CAN'T HOLD A PERSON RESPONSIBLE FOR AN
12 ACCIDENT IF THE JURY OR OTHER PEOPLE COULDN'T REALLY
13 TELL WHO WAS AT FAULT. BECAUSE THAT'S THE LAW.
14 IT'S NOT ALLOWED. SO THAT'S JUSTICE.

15 SO IT'S OUR POSITION THAT IT'S PRETTY CLEAR
16 THAT TRAVIS WAS OKAY. IF YOU CAN'T TELL, THEN THEY
17 ALSO HAVE FAIL, BECAUSE THAT'S JUSTICE. ALL RIGHT.

18 NOW LET'S TALK FOR A MINUTE ABOUT
19 PLAINTIFF'S INJURIES. AND THIS GOES -- THE
20 DISCUSSION I WANT TO HAVE WITH YOU FOR A MINUTE HERE
21 GOES TO NOT ONLY WHAT INJURIES THE PLAINTIFF HAS,
22 BUT ALSO TO THE WHOLE ISSUE OF HER CREDIBILITY IN
23 THIS CASE.

24 WHETHER IT HAS TO DO WITH THE ACCIDENT
25 THAT OCCURRED ITSELF OR HER INJURIES OR HER MEDICAL

1 TREATMENT OR WHATEVER, BECAUSE AS I READ FROM THE
2 INSTRUCTIONS EARLIER, IF YOU FIND THAT SHE'S
3 WILFULLY TESTIFIED FALSELY, YOU CAN THROW OUT ALL OF
4 HER TESTIMONY, AND ALL THE EVIDENCE SHE PROVIDED.

5 WELL, THIS IS HARSH, BUT THAT APPEARS
6 TO BE PRETTY WELL WHAT SHE'S DONE HERE. IMAGINE, IF
7 YOU WILL, HOW HARD IT IS FOR PEOPLE INVOLVED IN THE
8 DEFENSE OF A CASE LIKE THIS, WHO ARE TRYING TO
9 PROVE-- OR WHO HAVE TRY TO DEFEND THEMSELVES AGAINST
10 CLAIMES SUCH AS THOSE MADE HERE, HOW HARD IT IS TO
11 COME UP WITH INFORMATION. ESPECIALLY WHEN YOU'RE
12 TALKING ABOUT SOMEBODY'S INJURIES.

13 NOW, IT WOULD BE HE VERY EASY INDEED
14 FOR US TO JUST SIT BACK AND LET THE PLAINTIFF COME
15 IN AND TELL YOU, "I'M HURT, I HAVE THESE SYMPTOMS, I
16 CAN'T PLAY TENNIS, I CAN'T DO THIS, I CAN'T HOLD A
17 BABY, I CAN'T DO THAT." AND FOR US TO JUST SIT
18 THERE AND SAY, "PLEASE DON'T BELIEVE HER. WE DON'T
19 HAVE ANYTHING TO SHOW YOU, BUT PLEASE DON'T BELIEVE
20 HER."

21 THIS CASE IS A FICTION THAT HAS BEEN
22 CREATED BY THE PLAINTIFF IN HER HUSBAND. AND WE
23 HAVE TO DO SOMETHING TO TRY TO COMBAT THAT. NOW, I
24 KNOW THAT CERTAIN JURORS ARE SOMEWHAT CONCERNED OR
25 EVEN OFFENDED ABOUT THE IDEA OF SURVEILLANCE BEING

1 SHE COULDN'T PLAY TENNIS. WELL, SHE SAYS, THERE'S
2 PLAYING TENNIS AND THERE'S PLAYING TENNIS. THERE'S
3 PLAYING TENNIS, VERSUS PLAYING COMPETITIVELY. SHE'S
4 A MOVING TARGET THE WHOLE TIME. HOW DO WE PIN HER
5 DOWN ON ANY OF THIS? EITHER SHE CAN PLAY TENNIS OR
6 NOT.

7 SHE PROBABLY THOUGHT THAT MAYBE WE'D
8 CAUGHT HER PLAYING TENNIS ON THE VIDEO TAPE. WHO
9 KNOWS? SHE'S BOTHERED ABOUT WHAT WE MIGHT HAVE
10 CAUGHT HER DOING, SO SHE CHANGES HER STORY ON
11 EVERYTHING. SHE COMES IN HERE AND SAYS, "I CAN LIFT
12 MY ARM LIKE THIS." IS THAT THE SAME AS IN OCTOBER?
13 SHE SAID HER CONDITION HAS NOT CHANGED, THAT IT WAS
14 THE SAME IN OCTOBER, WHEN SHE SAID, "I CAN'T USE MY
15 ARM."

16 WELL, IT'S BEEN THE SAME WAY ALL THE
17 WAY THROUGH THIS. I MEAN, ONE TIME IT'S ONE THING
18 AND ANOTHER TIME IT'S SOMETHING ELSE. THERE IS
19 ALWAYS AN EXPLANATION FOR EVERYTHING.

20 SHE ALSO EXPLAINS EVERYTHING AWAY, OR
21 TRIES TO. HEAVEN HELP US, HOW ARE WE EVER GOING TO
22 PROVE ANYTHING MORE THAN WHAT WE'VE BEEN ABLE TO
23 PROVE TO YOU SO FAR? SHE LOOKS NATURAL ON THE TAPE.
24 SHE CLAIMS SOMETHING A LOT DIFFERENT THAN THAT. YOU
25 CAN'T LET SOMEBODY GET AWAY WITH THAT. IT'S AN

1 ABUSE OF THE SYSTEM. SO THERE IS NO WAY YOU CAN
2 BELIEVE HER. HER WHOLE CASE, OR WHAT SHE HAS TO SEE
3 IN HER OWN TESTIMONY. AND YOU CAN'T BELIEVE HER.

4 MR. DAVIES: 30 MINUTES, MR. DAVIES.

5 MR. COLLINS: OKAY. SO IT WILL JUST BE
6 ANOTHER MINUTE OR TWO, AND I'LL WRAP THIS UP.

7 WHEN YOU ANSWER THE SPECIAL VERDICT FORM,
8 IT'S CERTAINLY WITHIN YOUR PROVINCE TO ANSWER THE
9 WAY YOU NEED TO. BUT WE HAVE TALKED ABOUT TRAVIS
10 STALEY NOT BEING NEGLIGENT. OR IF YOU DON'T KNOW,
11 AND THAT ALSO MEANS HE'S NOT THE PROXIMATE CAUSE OF
12 THE INJURIES THE PLAINTIFF AS CLAIMED. WELL, AT
13 THIS POINT IN TIME IT'S PRETTY IMPOSSIBLE TO BELIEVE
14 THAT SHE HAS THIS ARRAY OF INJURIES SHE CLAIMING.

15 SO NOTHING THAT TRAVIS STALEY DOES HAS
16 CAUSED INJURIES TO HER, BECAUSE SHE DOESN'T HAVE
17 THOSE ARRAY OF INJURIES. WAS THIS NEGLIGENCE?
18 WELL, SHE MADE THE LEFT HAND TURN IN FRONT OF A
19 VEHICLE THAT WAS SO CLOSE AS TO CONSTITUTE AN
20 IMMEDIATE HAZARD. SHE WAS NEGLIGENT.

21 WHAT ARE THE SPECIAL DAMAGES AND GENERAL
22 DAMAGES? I JUST WANT TO COMMENT ON THIS BRIEFLY.
23 THE PLAINTIFF IN THIS CASE HAS A BIG SMORGASBORD OF
24 CLAIMS, IF YOU WILL.

25 THEY ARE TAKING THAT SMORGASBORD AND

INSTRUCTION NO. 11

If you believe any witness has willfully testified falsely as to any material matter, you may disregard the entire testimony of that witness, except as that witness may have been corroborated by other credible evidence.

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INSTRUCTION NO. 17

If you find that the defendant was negligent, you must decide if the plaintiff was also negligent. If the plaintiff was negligent⁺ and the plaintiff's negligence was a proximate cause of the plaintiff's own injuries, the plaintiff's negligence must be compared to the negligence of the defendant.

A plaintiff whose negligence is less than 50 percent of the total negligence causing the plaintiff's injuries may still recover compensation, but the amount will be reduced by the percentage of the plaintiff's negligence. If the plaintiff's negligence is equal to or greater than the negligence of the defendant, then the plaintiff will recover nothing.