

1979

Jerald L. Kilpack v. LaMark Wignall and David Wignall : Brief of Appellants

Utah Supreme Court

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JERALD L. ...
and as ...
Jess Allred

vs.

LaMARK WIGNALL and DAVID ...

Defendants and
Respondents.

BRIEF OF APPELLANTS

Appeal From Judgment of the Fourth
District Court for Utah County
Honorable Allen B. Sorensen, District

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IN THE SUPREME COURT OF THE STATE OF UTAH

JERALD L. KILPACK, individually)
and as Guardian ad litem for)
Jess Allred Kilpack, a minor,)

Plaintiff and)
Appellant,)

Case No. 16175

vs.)

LaMARK WIGNALL and DAVID WIGNALL,)

Defendants and)
Respondents.)

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

On June 21, 1976, Defendants LaMark Wignall and David Wignall took five small children, including Jess Allred Kilpack, then barely age 7, to a hayfield, where Defendants commenced gathering hay bales. Jess Allred Kilpack was permitted to climb out the cab of the truck down onto the running board and to ride there, watching two slightly older boys jump off and on the running board for 15 or 20 minutes. Jess Kilpack then attempted to jump off the running board onto a bale of hay, but slipped and was run over by the rear dual wheels of the truck, thereby suffering near fatal, extensive, permanent injuries. On November 15, 1976, the father of Jess Kilpack brought suit in

Utah County against Defendants, seeking recovery for his son's injuries and recovery of medical expenses.

DISPOSITION IN LOWER COURT

On March 6, 1978, trial was commenced before a Utah County jury, the Honorable Allen B. Sorensen presiding. Plaintiff's counsel attempted to voir dire the jury as to several matters, and after the testimony of the first witness was completed, Defendants' counsel moved for a mistrial on the basis of part of the attempted voir dire, and the Court granted the motion. The case was tried before a second jury on October 2, 3 and 4, 1978. At the close of the evidence, Plaintiff moved the Court for a directed verdict on the liability issues. The trial Court denied the motion and denied a motion made by Defendants for a directed verdict on the liability issues in Defendants' favor. The case was submitted to the jury at noon on October 4, 1978, and after returning from lunch, the jury announced it had reached a verdict. The jury answered the first interrogatory of the special verdict, which inquired as to whether the Defendants, or either of them, were negligent, "No", and did not answer the balance of the questions, except for a portion of a damage interrogatory. The Court entered a judgment on the verdict "no cause of action" and later denied Plaintiff's Motions for Judgment Notwithstanding the Verdict and for a New Trial.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the "no cause of action"

verdict and reversal of the lower court's denial of Plaintiff's Motion for Judgment Notwithstanding the Verdict and Motion for a New Trial, and a new trial on the issue of damages on proper instructions, and a determination by this Court that the questions asked, and the other questions sought to be asked of the first jury were proper inquiries, and should have been allowed by the lower court.

STATEMENT OF FACTS

Resolution of the legal issues of Defendants' negligence and any negligence of the injured minor child requires a review of the evidence on those issues, for the purpose of determining whether reasonable persons could reach different conclusions.

The following statement of facts will first recap the evidence on the negligence issues, witness by witness:

Four witnesses testified concerning the facts and circumstances of the accident: Joel Kilpack, age 9 at the time, one of the other children that accompanied Defendants to the hayfield, Jess Kilpack, then age 7, the injured child, and each of the Defendants.

The record on appeal contains two partial transcripts. The transcript which contains the testimony of the two children from the time they arrived at the hayfield with Defendants to the time of the accident, and the entire testimony of each of the Defendants, is contained in the 90-page partial transcript which has been marked by the Court Clerk Number 143. It is to this

transcript that the below references pertaining to the testimony of the two children and Defendants' testimony are made.

Joel Kilpack testified that Defendants and the five children rode to the field in a red flatbed haytruck (owned by Defendant LaMark Wignall) and that when the truck arrived at the hayfield, the three youngest children, Jess Kilpack, age 7, Debbie Wilson, age 6, and Dennis Wilson, age 5, got in the cab of the truck with Defendant David Wignall, and that he (Joel Kilpack) and Danny Wilson, both age 9, jumped on the running board on the passenger side of the truck after it started, and were thereafter off and on the running board two or three times as the truck proceeded through the hayfield before the accident occurred. (Tr. 3-5, 22, 25) Joel testified that after he and Danny Wilson had mounted the running board of the moving truck they took turns holding on to the brace which held the outside mirror frame on the passenger side of the truck, and would jump back and forth between the running board and bales of hay as they passed a short distance from the running board. (Tr. 4-5) He stated that the hay bales were about two feet out from the running board and that the tops of the bales were about six inches lower than the running board. (Tr. 13-14) After playing on the running board for a while in the manner mentioned, and then jumping off and running to arrange hay bales, Joel Kilpack and Danny Wilson returned and jumped on the running board, but found that the running board was then crowded because Jess Kilpack and Dennis

Wilson were then riding on the running board, so Joel and Danny Wilson actually boosted Dennis Wilson, age 5, back through the passenger window into the cab. (Tr. 5-6; Ex. 4 and 5)

Joel further testified that Danny Wilson slipped off the running board as the truck was moving along and that Jess had to help him clamber back on the running board because he was dragging along as the truck moved. (Tr. 5-6, 10; Ex. 6)

Joel Kilpack further testified that he heard no instructions, comments, or warnings at all as he and Danny jumped off and on the running board, played on the running board, boosted the 5-year old child back up from the running board into the cab of the moving truck, and that as he rode and played on the running board he could plainly see Defendant LaMark Wignall in the back of the truck, moving to place hay bales, and Defendant David Wignall driving the truck. (Tr. 9-10, 22)

Joel explained that the truck was moving at about 5 miles per hour all the time, and that the truck was making noise, and that there was additional noise from the ferris wheel loader as the truck proceeded through the field. (Tr. 12, 23)

He explained that he had never before been out in the hayfield or riding the truck, but that he had no feeling of danger and felt his activities were fun. (Tr. 16, 24)

He said that the truck had been in the hayfield 10 or 15 minutes gathering hay bales at the time Jess Kilpack was run over. (Tr. 14)

Jess Kilpack testified that he recalled no instructions as to where he was to ride when the truck arrived at the field, but

that he joined Debbie and Dennis Wilson in the cab (Tr. 29) After the truck started down through the field, he saw Joel Kilpack and Danny Wilson on the running board, and jumping back and forth holding on to the mirror and that he crawled out of the window down onto the running board while the truck was moving, and that he recalled no instructions or admonishments from either of the Defendants about his crawling out of the window. (Tr. 29) He testified that Dennis Wilson, the 5-year old, then crawled out of the window and that Joel Kilpack and Danny Wilson then pushed him back into the cab, but that nothing was said about that procedure by either of the Defendants, and that after he watched Joel and Danny Wilson straightening bales he jumped off the running board onto a bale and slipped under the wheels of the partially loaded haytruck. (Tr. 29-30) He estimated that he rode the running board for 6 to 10 minutes before he jumped and slipped under the wheels. (Tr. 30-31) On cross-examination, he said that he had been out on the running board about 4 minutes before he jumped and fell under the wheels. (Tr. 34) Exhibit "8", a photograph, illustrates the manner in which Jess Kilpack attempted to jump from the running board onto a bale of hay when he slipped under the wheels. (Tr. 33; Ex. 8) Jess Kilpack testified that nothing was said to him and he could recall nothing being said to Joel Kilpack or Danny Wilson about their riding on the running board, nor when the 5-year old was pushed back up into the cab (Tr. 33-34) He also testified that the truck was traveling approximately 5 miles

per hour before and at the time he jumped off and was crushed under the rear dual wheels, and that the truck had been in continuous motion from the time it started down through the hayfield. (Tr. 39) He had never before ridden on the running board of any moving vehicle and did not know it was dangerous to do so. (Tr. 41) When asked on cross-examination why he jumped off the running board, he stated: " Cause I was going to go play with Joel and Danny, straightening the bales." (Tr. 42) Jess testified that he could see David Wignall driving the truck while riding the running board, and that nothing had been said to him by Joel or Danny about jumping off and that he recalled nothing being said by either of the Defendants about his activities. (Tr. 44) He did recall on cross-examination that someone told him to get into the cab after the truck arrived at the field. (Tr. 46)

Defendant David Wignall is the son of Defendant LaMark Wignall and the oldest of six children. He was 20 years of age at the time of the accident. (Tr. 49-50)

David Wignall described the equipment and features of the flatbed 1964 Dodge ton-and-a-half truck used in the hay bale gathering operation. It had a flat bed with sides, but was not enclosed in back, and had a running board only on the passenger side and outside mirrors; however, the glass was broken out of the mirror on the passenger side, but the frame was still attached to the truck. (Tr. 53-54; Ex. 1, 3, 4, 5, and 8) David Wignall heard one of the children ask Defendant LaMark Wignall whether the

children could go when the parties were at the Wignall farm house prior to leaving in the truck for the field: "One of the kids asked Dad if they could go, and he said something like, 'I don't care', or something like that." (Tr. 55) David Wignall further testified that neither he nor Defendant LaMark Wignall advised or informed anyone at the house, including the older sisters of some of the five children, or anyone else, of the children's desire to be taken to the field and the Defendants willingness to take them; that Defendant LaMark Wignall drove the truck to the field, where a ferris wheel bale loader was attached, and that he then proceeded to drive the truck while Defendant LaMark Wignall took a position in the back of the truck to receive and stack the bales; and that he could not remember whether anything at all was said to the children at that time respecting what they should do or what positions they should take. (Tr. 55-56) Defendant David Wignall further testified that the truck had come back and forth in the field, changing directions one or more times prior to the accident; that it was necessary for him to maneuver the truck to some extent in a zigzag fashion so that the bales could feed into the ferris wheel loader; that he observed and watched the operation of the bale loader by using the mirror on the driver's side of the truck, and that at the time he was somewhat in a hurry to get in the hay and was aware that he had the five children along, including Jess Kilpack, from the time the truck was driven from the house to the field (Tr. 56-58)

David Wignall testified that he did observe the activities of the 9-year old boys jumping up and riding on the running board and then off again. (Tr. 58-59) When asked whether he also observed the 9-year old children jumping back and forth between the bales and the running board, Defendant David Wignall stated: "No, I didn't. I couldn't tell if they was hopping. From what I could tell they were just sticking their foot out and kind of kicking the bale." David Wignall admitted that he was able to observe a portion of the children's bodies above the bottom of the open passenger window, to wit, probably from their shoulders on up, and that he recalled that all three of the smaller children, Debbie, age 6, Jess, age 7, and Dennis, age 5, crawled out of the window and David did say something to them about getting back in, to-wit: "I told them to get back in the cab." (Tr. 60) This instruction, however, was not given until after the children were already out, and thereafter two of the children got back in but Jess Kilpack stayed out on the running board, and that after the truck started down the field, the only time he stopped the truck was not for the children to get back in the cab, but for the bales getting stuck up in the ferris wheel, and that he stopped the truck only once or twice the whole time the truck was in the field prior to the accident. (Tr. 60-61) Defendant David Wignall said nothing at all to the three small children other than just to get back in, and made no effort to enforce it, and said nothing at all to the two 9-year old children about jumping back and forth on and off the

running board all the while the truck was proceeding, and that except for one or two stops for hay bale jam ups, he drove five miles an hour. (Tr. 61) Defendant David Wignall testified that the bales were arriving at the Ferris Wheel "every five or ten seconds" (his deposition) or "between ten to fifteen seconds" (his testimony at trial). (Tr. 62-63). Defendant David Wignall admitted that he could see Jess Kilpack riding out on the running board prior to the time he jumped and that it was "probably about fifteen minutes or so" after the children went out the window onto the running board to the time of the accident, and that only a total of approximately twenty minutes of elapsed time expired from the time the truck started in the hay field until the time of the accident. (Tr. 63-64) During his deposition, Defendant David Wignall testified that it was Jess Kilpack who first crawled out the window. (Tr. 64) David Wignall admitted that he regarded the five children as being a kind of a nuisance out on the hay bale gathering operation. (Tr. 65)

During David Wignall's examination by his own counsel, he further described that it was necessary for the truck to vary from a straight course to go out and gather a hay bale; that it was necessary for him to look out the window on the driver's side to see that the bale was lined up properly; and that the attention he was required to devote to the picking up of the hay bales was "almost absolute"; that he thought Joel Kilpack may have been out on a prior trip; that Danny Wilson had been out on a prior trip,

but on prior trips none of the children were permitted to ride on the running board; and that there were many times when he had enough time to look to the right to see what the kids were doing on the running board, and that what he saw looking to the right "most of the time was just Danny and Joel were out standing there. I don't know, talking and from what I could see, kicking the bales as they would go by". (Tr. 65-67) Further, in answer to questions propounded by his own counsel, David Wignall stated that at the time Jess Kilpack was run over, between a quarter and a half load of hay had been gathered; that it took forty-five minutes to an hour to get a full load; that the bales would get stuck probably three or four times requiring stopping the truck momentarily for each full load; that the bales of hay passing the truck on the passenger side would vary in distance from the truck from right against the running board to probably three or four feet away; and that the top of the bales of hay relative to the level of the running board on the passenger side would probably be about even or a couple of inches either way. (Tr. 67, 69-70)

Defendant LaMark Wignall testified that he has a B.S. Degree in Education from B.Y.U., taught school, primarily the 5th grade, but had had occasion to teach children in the 4th grade as well and that his duties in the grade school included at times supervision of children on the playground and other areas and that he was aware of the nature and propensity and capabilities of children six, seven, eight and nine years old. (Tr. 73-74)

He stated that he was the owner of the 1974 Dodge Ton & one-half truck and he described a few differences in the equipment on the truck as depicted in the illustrative photographs from the equipment on the truck at the time of the accident. In this regard, the photographs depict a tail gate, also a black portion above the sides of the truck and glass in the outside mirror on the right-hand side, which items were not present on the truck at the time Jess Kilpack was run over. (Tr. 74-75; Exhibits 1,3-6,8)

LaMark Wignall testified that neither of the two Kilpack children had been out in the field on any prior load; that he had no discussion with any of the children's mothers prior to taking the children to the hay field and no discussions with two older girls at the home about taking the smaller children to the hay field and that he was asked for and granted permission to the children to go to the field. (Tr. 75-77) As to instructions given the children at the time the truck arrived in the field, Defendant LaMark Wignall stated:

"When we stopped the truck in the field and the Ferris Wheel was being hooked up I told them that they could not ride in the back, since hay would be coming in there and that they would either have to get in the cab or clear out away from the truck into the field". (Tr. 77)

Defendant LaMark Wignall said that the Ferris Wheel loader was capable of being raised and lowered in height from the back of the truck without requiring the operator to get down on the ground and that he would walk back and forth taking the bales

from the Ferris Wheel loader and stacking them first either along the side or up at the front. (Tr. 78) He stated that he noticed the two older boys out away from the truck some distance into the field when the truck first started, but that he did not observe anything further respecting the activities of the two nine-year olds. (Tr. 78-79)

As to the activities of the three smaller children climbing down onto the running board, Defendant LaMark Wignall testified as follows in his deposition and admitted his answers were correctly given when examined about the same subject matter at trial:

Question: "You noticed some activity of the kids getting outside of the truck. One or more of the three I guess?"

Answer: "Yes."

Question: "What did you observe in that regard? Where were they and what were they doing?"

Answer: "I seem to remember that some of them were climbing out of the window on to the running board of the truck. The height of the bed and my activity was with the hay -- I wasn't paying attention to what the children were doing. I was occupied with the hay, and the height of the truck made it difficult for me to see them."

Q: "Do you recall giving that answer at that time?"

A: "Yes."

Q: "Was that answer correctly given?"

A: "It was correct when given, I guess."

Q: "Okay. With reference to that activity, your noticing the kids down there on the running board, did you given them any instructions or take any action at that time?"

A: "No, I don't think so." (Tr. 80)

LaMark Wignall said the truck was about one-fourth loaded at the time the child was run over and that the truck had been in the field about twenty minutes before the accident and would have been traveling at a speed of between five to eight miles an hour. (Tr. 81) Defendant LaMark Wignall further admitted that he had experience with his own six children not hearing or not seeming to hear instructions and had had experience on play grounds seeing children's interests and activities and being around activities appearing fun and exciting and was aware of children's interests in being along and participating in anything that looks exciting. (Tr. 82)

Upon cross examination by Defendant's own counsel, Defendant LaMark Wignall recalled his explanation in his deposition that as he placed hay bales on the truck and because of the height of the bed, it was difficult for him to see what was going on on the running board, (Tr. 85), and that his observation relative to the activities of the children getting down on the running board would have been made closer to the beginning of operations rather than just before the child was run over. (Tr. 86-87) On redirect LaMark Wignall testified as follows:

Q: "Wasn't it of assistance to have those hay bales straightened around to where they could

feed directly into the baler?"

A: "The straighter they were the better, yes."

Q: "You were aware that Danny had been out earlier doing that and the boys were running ahead to do this, were you not? The olders ones?"

A: "Danny had been out on prior loads. They weren't running ahead of the truck, however."

Q: "On prior loads?"

A: "At any time. They were off to the side, off in the field, straightening up, making rows."

Q: "Yes. Ahead of the truck in the sense that after they straightened the bales, the truck would come along and pick them up?"

A: "Yes."

Q: "Whether or not it was difficult to see the activity of the children, you did see the children, some activity, on the running board, did you not?"

A: "Yes, I noticed they were on the running board."

Q: "That was before the accident?"

A: "Yes."

Q: "When its noisy, when children are noisy or the machine is noisy, then its necessary to really yell to get their attention if they are in a hazardous position, isn't it?"

A: "Say it again, please."

Q: "When its noisy, background noise, you have to raise your voice at children?"

A: "Yes."

Q: "Have you done that commonly?"

A: "I have done it." (Tr. 87-88)

The foregoing testimony was the evidence respecting the negligence issues.

The facts relative to the issue of misconduct of the jury are as follows:

The trial court's instruction number 9 directed the jury to return a special verdict in the form of written answers to special written questions. In the last sentence of instruction 9, the court instructed:

"It is your duty to answer each question, clearly, frankly and honestly and in accordance with the evidence in the case." (R. 54) (Emphasis added)

The form of verdict contains six written questions.

(R. 44-45)

The jury answered only question number 1 and part of question 6. Question 6 was as follows:

"(6) Without regard to any of the previous questions, and your answers thereto, state the amount of damages sustained by the Plaintiffs as a result of the occurrence."

"Special damages sustained
by Plaintiff Jerald Kilpack \$ _____

General damages sustained
by Plaintiff Jess Kilpack \$ _____"

(R.45)

The court's instruction number 10 instructed the jury that it should determine such amounts of money as would reasonably compensate the Plaintiffs for injuries and losses resulting from the occurrence, including the reasonable expense of necessary

medical care received and the reasonable expense of necessary medical care, hospitalization and treatment reasonably certain to be needed in the future which the court defined as special damages. Instruction number 10 further directed the jury that general damages consisted on pain, suffering, disabilities or disfigurements and any accompanying mental anguish suffered by the Plaintiff Jess Kilpack to date and those reasonably certain to be experienced in the future. (R. 55)

It was stipulated that the Plaintiff Jerald Kilpack had incurred \$4,738.63 in medical expense for the treatment of Jess Kilpack to the time of trial and it was further stipulated that if questioned concerning the matter, the Plaintiff Jerald L. Kilpack would testify that \$856.00 had been incurred in necessary travel expense in obtaining medical treatment for a total of \$5,594.63 -- the exact sum set forth by the jury as special damages in response to the first part of question 6 above quoted. (R. 35, 45) No figure was inserted in the blank for general damages.

Four doctors testified at trial regarding the need for continued medical treatment for Jess Kilpack, three for the Plaintiff and one for the Defendant. The three doctors who testified for Plaintiff consisted of Doctor Duane E. Davis, a Urologist, Dr. Robert H. Lamb, an Orthopedic Surgeon, and Dr. Dennis D. Thoen, a Neurologist. Dr. George W. Middleton, a Urologist, testified for Defendant.

A portion of the testimony of each doctor regarding the

nature and extent of the child's permanent injuries and his need for continued medical treatment is contained in a forty-page partial transcript which the Clerk has identified as page 142 of the record. The below references to the Transcript refer to such portion of the record.

Dr. Duane E. Davis, the physician who performed the emergency operation on the child just after the accident (Exhibit 14) and to whom the child has been returned periodically for treatment, testified that the child has a scar or stricture in the urethra at the point where it was severed in the accident which must be stretched periodically and that the stricture was a permanent condition. (Tr. 13,15) Dr. Davis testified the child would have to undergo urethral dilations at at least three month intervals for the time being and that his present office costs of such procedure was \$16.50; that such cost was expected to increase; that substantial medical risks were associated with the necessity of undergoing periodic urethral dilation; and that the child had at least a fifty percent chance of ultimately requiring an operation known as urethroplasty to reconstruct the stricture area, a procedure costing from \$800.00 to \$1,000.00. (Tr. 19-24)

Dr. Davis explained that even after urethroplasty, the medical risks and problems remained the same, since urethroplasty was essentially a procedure of substituting a "better" scar for one that had become too difficult to treat by means of dilation. (Tr. 22-25)

Dr. Robert H. Lamb testified that the child was "certainly likely" to develop traumatic arthritis in his left sacroiliac joint and associated problems in his lower lumbar area from which he would suffer pain and that from an orthopedic and neuromuscular standpoint, the child had a 30% permanent partial disability insofar as his orthopedic and neuromuscular injury was concerned, which he would carry irrespective of the application of available medical procedures in an effort to minimize the child's permanent problems arising from the effects of the crush injury to his pelvis. (Tr. 26-27)

Dr. Dennis D. Thoen testified that the child's condition was such that he was not going to get any more neurological return and that the child's musculature would have to try to compensate for permanent orthopedic and neurological difficulties. (Tr. 28-29)

Dr. Thoen further testified that there was a strong probability that the child would have difficulty with his genital/urinary system in terms of achieving erections later in life, that the child already had developed a scoliosis which would require orthopedic attention and associated and related problems giving the child a condition about the spinal cord called spinal stenosis which has very devastating physical effects on its victims. (Tr. 30-33)

Defendant's medical expert, Dr. George Middleton, a urologist testified that the odds were that the child would have continuing stricture disease; that he thought it unreasonable that

that the child should be dilated every three months for sixty years and that he would prefer to try to repair the stricture by means of urethroplasty (Tr. 34-35)

When asked his opinion as to the probability the child would have to undergo urethroplasty, Dr. Middleton stated: "judging by the fact that he has been dilated every three months, its almost a certainty." (Tr. 35)

The facts relative to the voir dire issues are as follows:

After the first jury was questioned by the court, Plaintiff's counsel approached the bench concerning other questions in written form which Plaintiff desired to have the court propound to the jury. (Tr. 2-3) The trial court declined to itself ask any of the questions, except that the court did ask a question which it evidently deemed sufficient to cover the issue of whether the jurors were associated with or owned stock in any casualty insurance company, to wit: "Do any of you own any stock in any corporate enterprise?" (Tr. 2)

As to the other questions Plaintiff wanted the court to put to the jury, the court required counsel for Plaintiff to state the question in front of the jury so that the court could decide whether or not it would be put to the panel. (Tr. 3) The court then permitted Plaintiff's counsel to ask the court to

instruct the jury that sometimes insurance exists and sometimes it does not exist in personal injury actions and to inquire of the jurors as a group whether any juror owned stock in any casualty insurance company or is in the business or has previously been in the business of soliciting for the sale of insurance or had previously been in the business of adjusting claims or had otherwise in the past or present been an officer, employee or member of an insurance company. (Tr. 3) The court inquired whether any juror would answer the question yes, and one juror indicated ownership of some stock in a National Variable Life company. The court did not follow up on the matter, but required Plaintiff's counsel to ask the court to inquire of the jury as to other matters, most of which requests the court denied, to wit: inquiry as to the jurors acquaintance or non-acquaintance from their background and experience with the conduct and characteristics of young children; inquiry concerning ability of individual jurors based on their background in assessing injuries to a child; inquiry as to jurors personal philosophy or feelings against the fault system and in awarding monetary compensation if liability is found; inquiry concerning distaste of jurors for medical evidence concerning the injuries to the child. (Tr. 4-5) The court did grant counsel's request to inquire of the jury as to their personal involvement in farming operations and ascertained that only three of the jurors had no farming experience, but the court would not permit any further inquiry and in particular refused

Plaintiff's request to ask the jurors whether their farming experiences would give them a problem in properly listening to and evaluating Plaintiff's case where Defendants were engaged in farming operations at the time. The court refused to inquire of the jury on that matter, preferring instead to simply tell the jury they could answer the following with a yes or no answer:

"Do any of you have any reason why you feel you cannot on this case listen to the evidence, the law as I state it to you at the conclusion of the evidence, and based solely on that evidence and that law and nothing else, render(ing) a fair and just verdict as between the parties?" (Tr. 6-7)

Of course no juror responded in the affirmative.

The court did ask the jurors whether any had been sued or had brought suit because of injuries and one juror responded that she had been involved in a law suit with doctors and simply did not like doctors. The court said "would that fact cause you to be predisposed to find for or against either party without regard to the evidence and the law?" The juror did not directly respond to that, but only stated "well, there were Provo doctors I imagine these are Payson ones". And the court thereafter cut off further inquiry. (Tr. 7-8)

After Joel Kilpack testified, counsel for the Defendants made a motion for a mistrial on the ground Plaintiff had injected the matter of insurance by asking whether any of the jurors were stockholders in a casualty insurance company. (Tr. 9) The court granted the motion, stating: "Mr. Cook, I have been down this road

so many times it gives me a sick feeling in the diaphragm." (Tr.10)

ARGUMENT

POINT I

NEITHER SUBSTANTIAL EVIDENCE NOR REASONABLE
INFERENCES SUPPORT THE JURY'S VERDICT
THAT NEITHER DEFENDANT WAS NEGLIGENT

The trial court instructed the jury that negligence was a failure of a person to do something a reasonably careful person would do or the act of a person in doing something a reasonably careful person would not do measured by all the circumstances then existing, (R. 48); that it was the duty of a driver of a motor vehicle to use reasonable care under the circumstances in driving the vehicle to avoid danger to himself and others and to observe and be aware of the conditions at the time and place and under the circumstances then existing and in the same instruction further instructed the jury that:

"In this connection it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person. One dealing with children must anticipate the ordinary behavior of children. The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, they often are thoughtless and impulsive, imposes a duty to exercise a degree of vigilance and caution commensurate with such circumstances in dealing with children." (R.51)

Plaintiff submits that the trial court should have taken judicial notice of the hazard to small children of permitting them to ride on the running board of the hay truck bouncing through an open field immediately ahead of the rear dual wheels of that

truck and permitting some of them to jump back and forth, crawl in and out the window and drag along, hanging onto the truck. See Butler vs. Sports Haven International, 563 P.2d 1245 (Utah 1977), in which this Court held judicial notice should be taken of the hazard to small children of an open swimming pool. The trial court should have granted Plaintiff's motion for a directed verdict on the issue of the liability of the Defendants because reasonable persons, conscientiously and deliberately applying the law could not conclude that Defendants exercised reasonable care i.e. greater than ordinary caution for the protection and safety of the five small children and reasonably exercised a degree of vigilance and caution commensurate with the circumstances when they took five small children out with them to the hay field knowing full well their attention would be directed to gathering hay bales; that the truck and bale loader would be noisy; that the children had not been out to the hay field before and had no experience, except for one older boy who had not been on the running board before anyway, and then permitted children of the age of 5, 6 and 7 years to actually crawl out the window of the moving truck and down on the running board and observe them in that perilous position and do absolutely nothing to prevent the inevitable from occurring.

Submitting the issue of Defendant's negligence to the jury under the circumstances was tantamount to inviting them to speculate that farmers have special privileges above all. Perhaps

most of the members of the jury were closely associated with farmers or visualized themselves in busy farming operations where it would be inconvenient to be bothered with taking thought about the physical welfare of small inexperienced, excited children.

Knowingly permitting them to play on the outside of a moving farm truck for a good ten or fifteen minutes before one of them was crushed was grossly negligent.

Plaintiff submits that not even "a mere scintilla" of evidence arises from the testimony, which is undisputed in its material particulars, which could in reason be argued to support the proposition that the Defendants did in fact use reasonable care under the circumstances and did exercise that greater degree of caution for the protection and safety of a young child required by law. The jury's verdict of no negligence cannot be sustained. The trial court judgment of no cause of action and its refusal to grant judgment on the liability issues notwithstanding the verdict must be reversed even under the rigorous standards for review of the jury's verdict set forth in the cases of McCloud vs. Baum, 569 P.2d 1125 (Utah 1977); Koer vs. Mayfair Markets, 431 P.2d 566 (Utah Helman vs. Sacred Heart Hospital, 62 Wash.2d 136, 381 P.2d 605 cited in Hyland vs. St. Marks Hospital, 427 P.2d 736 (Utah 1967) (dissenting opinion of Justice Callister).

POINT II

NO SUBSTANTIAL EVIDENCE NOR REASONABLE INFERENCES
EXIST UPON WHICH THE JURY COULD REASONABLY FIND
JESS KILPACK GUILTY OF CONTRIBUTORY NEGLIGENCE

Plaintiff's primary point is that under no reasonable view of the evidence could the jury have found the small excited 7-year old child guilty of contributory negligence so the trial court should not have submitted the issue of the child's contributory negligence to the jury and that upon retrial, the sole issue which should be submitted to the jury is the issue of damages.

If this Court does not so hold, then Plaintiff urges the Court to direct the lower court to instruct the jury, upon retrial:

1) That the law presumes the child incapable of contributory negligence, a presumption Defendants must overcome by reasonable evidence to the contrary, and,

2) That Defendants had a legal duty to observe extra care for the child's safety once they knew he was in a position of obvious peril on the running board outside Defendant's moving hay truck.

As to Plaintiff's primary point, Plaintiff submits that a jury could not reasonably find the little seven-year old child acted unreasonably for a seven-year old who had never been out on a hay truck before, who had never ridden outside a truck before, who had received no instructions, direction or warning about the matter, and who watched an older brother and older cousin for some time before trying to follow them.

The only reasonable, common sense conclusion that can be arrived at from the evidence is that the little seven-year old boy did exactly what would be expected of a younger brother anxious

to help and do as his older brother and cousin were doing. No 7-year old child would have had any appreciation at all of the fact that the dual wheels of the truck were following just a few feet behind and extending as far out as that running board. No 7-year old would have any idea that if he fell while climbing out or riding or after jumping he would be run over by the trucks rear dual tires as it manuvered and rolled through the field. Such things were totally out of his experience and could not in reason be expected to be in the child's mind. It was a brand new experience for him. He could see how his older brother and cousin were participating and helping by arranging hay bales. The child was only 2½ months beyond the protection of a conclusive presumption of his incapability of contributory negligence discussed below. He was small, very young, totally inexperienced, and without instruction. As to the latter, David Wignall testified that all he did was to say once to the children that they should get back in the cab, but that was after the 7-year old was already on the running board of the noisy truck and obviously totally insufficient for he knew Jess did not get back in but rode back out there for another ten minutes or so. Nothing could be plainer than that the child did not hear any such instruction and nothing is more common in the life of adults commonly dealing with young children than the experience of having those young children not hear instructions when their attention is diverted elsewhere especially in a new exciting circumstance.

The conduct of the child was not unreasonable for a small excited 7-year old child under totally new circumstances as a matter of law.

In all events, if this Court does not limit retrial to the issue of damages, Plaintiff is entitled to have the jury properly instructed respecting defendant's contributory negligence defense.

Jess Kilpack was born April 1, 1969 (see first page of exhibit 14) and was just 2½ months beyond the age of seven on June 21, 1976 when he was crushed beneath the wheels of Defendant's partially loaded ton and a half hay truck.

In Nelson vs. Arrowhead Freight Lines, 99 Utah 129, 104 P.2d 255 (1940) this Court held:

- 1) Ordinarily a child under seven years of age is conclusively presumed not guilty of contributory negligence.
- 2) Between the ages of seven and fourteen in the absence of a showing to the contrary, an infant is assumed not to have the same consciousness of danger and the same judgment in avoiding it as an adult, so that, where the infant is between seven and fourteen years of age, defendant has the burden of rebutting a legal presumption of incapability of contributory negligence.

Contrary to Nelson, the trial court refused to instruct the jury that the injured child was presumed incapable of contributory negligence. (R. 86) Instead, the trial court merely instructed the jury that Defendants had the burden of persuading

The trial court further refused to instruct the jury that when a child is known to be in a situation of danger, there is a duty to observe extra caution for his safety. (R. 88) Such an instruction was requested under the authority of Rivas vs. Pacific Finance Company, 16 Utah 2d 183, 397 P.2d 990 (1964), because Defendant David Wignall admitted he saw the 7-year old crawl out the window of the moving truck down onto the running board and so knew he was out there. (R. 143 - Tr. 58-61) Defendant LaMark Wignall also admitted seeing the children crawl down onto the running board and knew they were there. (R. 143 - Tr. 79-80, 88)

In Rivas, this Court specifically held:

" . . . When a child is known to be in a situation of possible danger, there is a duty to observe extra caution for his safety."

Rivas vs. Pacific Finance Company, 16 Utah 2d 183, 397 P.2d 990, 991 (1964).

The lower court also erred in instructing the jury in effect that the child had an absolute duty to watch out for himself:

"A person in or about a moving motor vehicle must make reasonable use of his faculties for his own protection. He is required to keep a proper lookout for his own safety and to use that degree of care which a reasonable, careful person would exercise measured by all the circumstances then existing. He does not have a duty, however, to look for danger when there is no reason to apprehend any." (R. 52) (emphasis added)

There was no justification for hanging that absolute requirement around the neck of the 7-year old child, contrary to his actual duty (which the lower court did include in a different instruction. (R. 52))

To summarize, if the defense of contributory negligence remains in the case for retrial, Plaintiff is entitled to have the jury instructed that:

1) The child is presumed incapable of contributory negligence, and

2) When the child was observed to be in a hazardous position, Defendants incurred a duty to exercise extra caution for his safety, and the lower court should not instruct the jury that the child had an absolute duty to watch out for himself on the moving vehicle, contrary to the child's actual duty to exercise only the same care as would be expected of children the same age, intelligence and experience in similar circumstances.

POINT III

IRREGULARITY IN THE PROCEEDINGS OF THE JURY, MIS- CONDUCT OF THE JURY, INADEQUATE DAMAGES, INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT AND ERROR IN LAW MANDATE THE GRANTING OF A NEW TRIAL

Rule 59(a), Utah Rules of Civil Procedure, provides that the court may grant a party a new trial on all or part of the issues for certain causes, including irregularity in the proceedings of the jury, misconduct of the jury, inadequate damages, insufficiency of the evidence to justify the verdict and error in law. Rule 59(a), Utah Rules of Civil Procedure.

The trial court erred in denying Plaintiff's motion for a new trial. Plaintiff was and is entitled to a new trial on the damage issue for the following reasons:

1. Irregularity in the proceedings of the jury. The

court's first stock instruction directed the jury to follow the law and to determine the facts, not arbitrarily but with sincere judgment and sound discretion. (R. 46) Following closing arguments, the case was submitted to the jury at approximately 11:55 a.m., Wednesday, October 4, 1978. The jury announced that it had arrived at a verdict approximately one hour to one hour fifteen minutes later at the conclusion of the jury's lunch period. (R. 34) It is manifest from the incompleeted special verdict and the short time over the noon hour during which the jury "deliberated" that the jury could not have sincerely and conscientiously considered the case and followed the court's instructions, erroneous though some of them were, but instead rapidly and arbitrarily determined the Defendants would not be liable, quite regardless of the evidence.

2. Misconduct of the jury. The trial court's instruction 9 told the jury it was its duty to answer written questions:

" . . . Each answer is to be written in the space provided after each question. . .

. . .

It is your duty to answer each question clearly, frankly and honestly and in accordance with the evidence in the case." (R. 54) (Emphasis added)

The form of verdict contained six written questions.

The jury answered only question number 1, ignored questions 2, 3, 4 and 5 and inserted an answer in only part of question 6, which specifically directed the jury, as prefaced, as follows:

"Without regard to any of the previous questions and your answers thereto, state the amount of damages sustained by the Plaintiffs as a result of the occurrence:

Special damage sustained

General damages sustained
by Jess Kilpack

\$ _____ (R. 45)

The jury ignored the preface above quoted, inserted no sum in the blank for general damages and wrote in the blank for special damages only that figure stipulated as the special damages incurred prior to trial increased by the amount of travel expense it was stipulated Jerald Kilpack would testify about if called on the subject. (See R. 35, 45)

Thus the jury totally ignored not only the evidence concerning the permanence, nature and severity of the child's injuries, but the medical evidence given by all four doctors that the child would need continuing urethral dilations and probably urethroplasty and ongoing expensive orthopedic and neuromuscular care. (Tr. 13, 15, 19-24, 25, 26-27, 30-33, 34-35)

It was manifest jury misconduct for the jury to disregard the court's instructions, particularly its instruction as to how to approach the damage question. Had the jury properly applied the court's instructions, it would have been impossible for the jury to have reached its results. Eikelberger vs. Tolotti, 574 P.2d 277 (Nev. 1978); Town of Jackson vs. Shaw, 569 P.2d 1246 (Wyo. 1977).

The jury abused its prerogatives and ignored or misapplied proven facts and the law given to it by the trial court. Lund vs. Phillins Petroleum Co., 10 Utah 2d 276, 351 P.2d 952 (Utah 1960).

3. Inadequate damages appearing to have been given under the influence of passion or prejudice. As stated above, the jury ignored the instructions of the court, struck a line through

the blank for general damages, ignored entirely the extensive testimony describing the child's injuries, the lengthy emergency operation required to save his life and the extensive permanent injuries to his uro-genital system, nerves, bones and musculature, and ignored the testimony given by all doctors that further medical treatment for life would be required. The manifest inadequacy of the jury's damage finding itself bespeaks disregarding of instructions and disregard of the evidence or a misapprehension of the same or shows that the verdict was influenced by passion or prejudice -- perhaps by an assumption that our local farmer should not be charged with responsibility or "such an accident could happen to any of us farmers" or some other such notion. The patent inadequacy of the damage assessment certainly reflects prejudice or bias against the out-of-town Plaintiffs, plainly requiring a new trial under the principle of Saltas vs. Affleck, 99 Utah 381, 105 P.2d 176 (1940).

4. Insufficiency of the evidence to justify the verdict.

The discussion under Point I and the recitation of facts showing Defendants' utter disregard for the welfare of the small children, particularly the Plaintiff, is applicable to this point as well as to the point that Defendants were negligent as a matter of law. A review of the undisputed evidence, particularly the admissions and testimony given by Defendants leads to the inescapable conclusion Defendants did not take garden variety, normal precautions to keep the small children they took to the hay field out of harm's way. They failed to shut down the truck when they observed the children

crawling out the window and down onto the running board and failed to adequately and sufficiently instruction and caution the children on what they could and could not do during the bale gathering operation.

The evidence was plainly insufficient to justify the jury's verdict of no negligence on the part of Defendants. Arbitrariness, abuse or mistake is evident in the jury's verdict and the result reached is clearly offensive to any objective sense of justice. Holmes vs. Nelson, 7 Utah 2d 435, 326 P.2d 722 (Utah 1967); Stack vs. Kearnes, 118 Utah 237, 221 P.2d 594 (Utah 1950) and Hyland vs. St. Marks Hospital, 19 Utah 2d 134, 427 P.2d 736 (Utah 1967).

5. Error in the law. The discussion under Point I is again applicable, requiring a new trial. The court should have determined the issue of Defendants' liability as a matter of law once the evidence was in and it became absolutely clear that reasonable minds could not differ as to the proposition that Defendants absolutely ignored their duty to the small excited children they permitted to accompany them on the hazardous bale gathering operation. It was error in law for the trial court to submit the negligence issues to the jury. So doing merely permitted Defendants to argue to the jury that it could decide that the action was simply one of those unavoidable happenings that should not be blamed on anyone because accidents happen to everyone, quite ignoring the court's instructions as to the legal duties involved and

to further invite the jury to blame the accident on the child's sister or mother or something else absolutely extraneous to the evidence. Leaving that issue open under the facts of this case permitted the jury to in effect disregard the court's instructions number 1 and 2 and to fail to apply instructions number 6 and 8 regarding the respective duty of care of the small, excited, inexperienced children and the heavy duty of care placed on the adults operating the truck and machines. It permitted the jury to accept Defendant's argument that the child should never have been taken to the farm in the first place, or perhaps should have somehow been warned by his parents to anticipate that his Uncle might permit him to go to the hay field but to go in no event, whether or not invited. The evidence was clear that the small seven year old would not have been crushed under the truck's wheels but for Defendant's obvious fault in knowingly allow him to crawl out the window, down on the running board and to ride and play there in a position obviously fraught with peril for a full ten to fifteen minutes without stopping the truck, without warning and without even the protection of admonishment or appropriate instruction. Leaving the fault issue open permitted the jury to speculate that in Utah County at least, rapid gathering of hay bales is more important than life and limb of five small excited children who could be ignored to fend for themselves. Perhaps the jury simply assumed the child's injuries were covered by some form of medical insurance (which is not the case), and thus felt they could rapidly

adjourn after lunch at County expense to go out on the Elk Hunt or to attend to other more pressing duties without really reviewing the instructions or the evidence or the damages.

In all events, the verdict is plainly against the law which requires adults to anticipate the actions of children and to take reasonable precautions under the circumstances to prevent small children in their charge from being hurt in hazardous conditions created by the adults which the child's small size, limited physical ability, non-existence prior experience and limited judgment simply did not permit the children to appreciate and properly or appropriately handle by themselves.

It was manifest error of law for the trial court to deny Plaintiff's motion for a new trial.

POINT IV

THE LOWER COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR A MISTRIAL AND IN DISCHARGING THE FIRST JURY

Defendants' answers to interrogatories disclosed that Defendant LaMark Wignall had in force a Utah Farm Bureau Policy and that coverage under the policy of the Plaintiff's claim was not disputed. (R. 131-132)

This Court has held in accordance with the general rule that prospective jurors may be questioned on voir dire respecting their interest in or connection with liability insurance companies. Balle vs. Smith, 81 Utah 179, 17 P.2d 224 (1932); Saltas vs. Affles, 99 Utah 381, 105 P.2d 176 (1940); and Morrison vs. Perry, 104 Utah 151, 140 P.2d 772 (1943); see also Annot., "Admissibility of

etc., Tending to Show that Defendant in Personal Injury or Death Action Carries Liability Insurance, " 4 ALR 2d 761, 792 (1949).

In Balle vs. Smith, this Court held that plaintiff was entitled to learn whether any juror is interested in or connected with any casualty insurance company which may be interested in the case, either as officer, employee, member or stockholder, but that no impression should be conveyed that there was or was not insurance covering defendant's liability. If the jurors answer the question in the negative, that should be the end of the inquiry. Balle vs. Smith does not discuss the permissible limits of followup questions should a juror answer in the affirmative.

In Saltas vs. Affleck, supra., this Court said:

"Reasonable latitude should be given parties in ascertaining what affiliations jurors have with an interested party. Here the matter should end." Saltas vs. Affleck, 99 Utah 381, 105 P.2d 176, 179 (1940).

The inquiry Plaintiff requested the court to put to the jury in this case certainly did not go beyond permissible limits:

"THE COURT: Do counsel have other questions they wish to put to the jury panel for challenge for cause: Mr. Cook?

MR. COOK: Yes, Your Honor. Perhaps I could --

THE COURT: Do you have any questions you wish me to put to them?

MR. COOK: Yes, Your Honor. May I approach the bench on the question of subject matter for voir dire?

(Whereupon, Mr. Cook approached the bench and handed a document to the Court.)

THE COURT: This is interesting. What questions do you want me to put to the jury panel? This panel was qualified some time ago.

MR. COOK: Yes, I appreciate that.

THE COURT: The questions of their citizenship and their residence and so on have been resolved.

MR. COOK: Yes. Number 3, Your Honor.

THE COURT: Do any of you --

MR. COOK: Through the balance then would be appropriate in my judgment.

THE COURT: Do any of you own any stock in any corporate enterprise?

MELVINA CROPPER: What do you mean by that?

THE COURT: Any General Motors stock?

JUROR CROPPER: Yes, First Security Bank. We own some in Mountain Bell. We own some in J. C. Penney.

THE COURT: That takes care of that, does it not, Mr. Cook?

MR. COOK: No, Your Honor, not the whole subject matter, and this is a proper inquiry.

THE COURT: Will counsel approach the bench?

(Counsel approached the bench and discussion was had off the record.)

I will let you make your record.

Do you have any other questions, Mr. Cook, you want me to ask? You state the question and I will decide whether it's going to be put to the panel or not.

MR. COOK: Thank you, Your Honor. I request the Court to ask the jury the following and to instruct the jury that with respect to pecuniary interest sometimes insurance exists and sometimes it does not exist in personal injury actions, such as this one today. It is therefore customary and often done by the Court to inquire of the jurors as a group whether any juror owns stock in any casualty insurance company or is in the business or has previously been in the business of soliciting for the sale of insurance or has previously been in the business of adjusting claims or has otherwise in the past or present been an officer, employee, or member of an insurance company.

THE COURT: Would any of you answer that question yes?

Yes, Sir?

JUROR ANDREW JOLLY: I don't know if this pertains to it. I own a small amount of stock in NationalVariable Life. I think it's a life insurance company. I don't think it deals with --

THE COURT: Go ahead, Mr. Cook. (R. 142 - Tr. 3-4)

Defendants' motion for a mistrial was based solely on Plaintiff's counsel asking the court to ask the jury the question above quoted. (R. 142 - 9-10)

The lower court refused to follow the practice suggested by Justice Wolfe in his dissenting opinion in Morrison vs. Perry, 104 Utah 151, 140 P.2d 72 (1943) which was that the trial judge himself should announce that sometimes insurance exists and sometimes it does not; that the court makes it a practice to interrogate veniremen en masse as to whether they own stock in or are in the business of soliciting for liability insurance or are in the business of adjusting claims and should further tell the jury that the jury is not to be concerned with the issue of whether or not liability insurance exists. Justice Wolfe further suggested that if an affirmative answer is given as to a juror's connection with a casualty insurer, he should be asked with which company he is affiliated or in which he owns stock and whether the fact of such connection would influence him in reaching a verdict. If not, the subject should not be further pursued

absent special circumstances. Justice Wolfe suggested that counsel should advise the court as to any suggested further questions outside the hearing of the veniremen, but that the court itself should conduct the examination as a part of standard practice and include an admonishment to the jury that its verdict should be rendered without regard to the existence of liability insurance. Morrison vs. Perry, 104 Utah 151, 140 P.2d 772, (1943).

The lower court obviously abused its discretion in granting the mistrial instead of following the procedure outlined by Judge Wolfe in the Morrison vs. Perry case. The lower court forced counsel for Plaintiff to ask the court to ask the question in the presence of the jury, refusing to itself put the question to the jury and to further instruct the jury as indicated proper by the Morrison vs. Perry case.

Plaintiff submits that this Court should now decide that examination of jurors for pecuniary interest in the casualty insurer should be undertaken by the Court in every case where liability insurance exists, including but not limited to cases like the instant case which is not an on highway motor vehicle case, but a case in which the vehicle's insurance applies. Pecuniary interest ought to be recognized as including jurors interest as insureds paying premiums to the defendant's insurer.

It is particularly important that this Court clarify the matter, for reasons beyond the results in the instant case.

First, the question of what insurance company is defending the case is probably in the minds of the jurors anyway, all or most of whom will have driven to court in an automobile upon which insurance is mandated by the Utah Safety Responsibility Act, Section 41-12-1, et. seq. Utah Code Annotated (1953).

Second, this Court can and should take judicial notice that the insurance industry has been hard at work for some years prosecuting a media and legislative campaign designed to permanently implant in the minds of the public, particularly including those members of the public who become jurors, the notion that the tort liability system is grossly at fault, and that premium paying jurors are unwittingly implicated in pulling exorbitant premiums out of the public's pocket and their own pocket via huge awards for unmeritorious cases. See for example the discussion in Juris Doctor, December 1978-January 1979 issue, page 30, describing ads placed by Aetna Life & Casualty describing what the insurance industry claims is a runaway trend toward the granting of excessive unjustified jury awards in accident cases, notwithstanding the money to pay such awards comes from uninvolved parties such as jurors, who of course must themselves pay liability insurance premiums. Judicial notice should further be taken of the apparent effectiveness of the insurance industry's campaign reflected by the fact that it is now defense counsel and not plaintiff's counsel who requests a jury, particularly in Utah County. It is fair to say that the result of permitting nothing to be said about insurance is to invite the jury to assume that had insurance existed,

the case would have been settled, or since the case was not settled, the Plaintiff probably has an unmeritorious case or is unduly greedy, else the case would have settled. The cards are thus unfairly stacked against Plaintiff. This problem is especially accute in a case like this one where the jurors from a rural area will have had farming experience or are related to farmers and all are adults like the Defendants, and certainly if the jury felt that Defendants were without insurance protection, they would sympathize with their problem in paying any monetary award when the jurors themselves could visualize children becoming injured in their own or relatives farming operations.

Since the carrying of liability insurance is in effect mandated by Utah's Safety Responsibility Act, and the jurors all drive to Court in cars carrying that mandatory insurance, and insurance has become so common anyway that the average person serving on a jury is perfectly aware of its existence in many, if not all, situations, and so will be speculating and guessing about it anyway, instruction and inquiry must be made into juror's interests in insurers and they must be told that the liability and damage instructions must be applied whether or not there is insurance, regardless of media coverage of industry propaganda, or their own biases about the matter. Actually, since the fact of insurance coverage is now deemed relevant to the settlement of cases, certainly a case can be made that it is also relevant to the amount of damages which should be awarded. If a defendant is financially

responsible up to \$50,000 or \$100,000, that is a fact of great importance. If the insurance limit is \$50,000, a defendant who negligently causes \$500,000 in damages will usually take out bankruptcy to avoid paying the difference anyway.

In this regard, Plaintiff submits that there is no actual empirical evidence to support the supposition that once a jury gets the idea that Defendant is covered with some kind of insurance, the jury is automatically going to irresponsibly ignore all of the Court's instructions on liability and simply assess damages in the amount of the coverage. Insurance has now been around a long time and is universally known and used. It is demeaning to the jury to suggest it cannot and will not appropriately handle even very specific advice as to the fact and amount of liability insurance coverage.

In any event, if the Court does not decide that the fact and amount of liability insurance with appropriate cautionary explanation and instruction should now be covered as a matter of course, this Court should at least rule that the lower court erred in granting the mistrial where the only question that was asked was whether any of the jurors had a pecuniary or employment interest in a casualty insurance company.

POINT IV

THE SUBJECT MATTER UPON WHICH PLAINTIFF SOUGHT TO
VOIR DIRE THE JURY WAS MATERIAL AND PROPER

Rule 47(a), Utah Rules of Civil Procedure, allows the
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trial court the right to voir dire the jury, but requires the court to permit the parties to supplement the examination by such further inquiry as is material and proper or to itself submit to the prospective jurors such additional questions of the parties or their attorneys as are material and proper.

The lower court proceeded with manifest impatience to require counsel in the presence of the jury to ask the Court to put certain questions to the jury theretofore submitted to the judge in writing and then, manifesting the same impatience, the effect of which was certainly not lost on the jury, refused to make inquiry into the jury's acquaintance with conduct and characteristics of young children, the jury's acquaintance with and ability to assess injuries to a small child; any personal philosophies held by jurors or feelings against the fault system that might give them a problem in following the court's instructions that if liability should be found a reasonable and proper and fair monetary compensation should be awarded; the jury's possible aversion or distaste for description of traumatic injuries; the jurors experience as farmers and whether that would give any of them difficulty in properly evaluating and giving proper consideration to Plaintiff's case where the Defendants were farmers. (R. 142 - Tr. 4-8)

The trial court basically took the position that it was not necessary to allow counsel for Plaintiffs to inquire into any voir dire subject matter long enough to get genuine responses as to juror background matters which would obviously have an effect on the way they viewed the evidence or oral commitments from the jury.

that they would conscientiously listen to the evidence and the instructions and give Plaintiff's case fair consideration regardless of personal experiences a proper voir dire would require them to recognize in their own background which might give them a bias.

The trial court presumed instead that the whole subject matter could be covered rapidly and sufficiently with the following kinds of inquiry.

"Ladies and Gentlemen, you have heard a little bit about what this case is about by way of preliminary proceeding. You have heard no evidence. Do any of you, and I won't press this further than a yes or now answer, do any of you have any reason why you feel that you cannot on this case listen to the evidence, the law as I stated it to you at the conclusion of the evidence, and based solely on that evidence and that law and nothing else, rendering a fair and just verdict as between the parties?

* * *

Have any of you ever brought suit or been sued because of injuries to somebody?"

(Juror Melvina Cropper held up her hand)

"THE COURT: Would that fact cause you to be predisposed to find for or against either party in this case? Mrs. Peterson?

JUROR MARY PETERSON: I don't know if this counts or not, but we have been involved in a law suit over a building with some doctors and I don't like them. Those doctors.

THE COURT: Would that fact cause you to be predisposed to find for or against either party without regard to the evidence and the law?

JUROR PETERSON: Well, they were Provo doctors, I imagine these are Payson ones. (They were not.)

THE COURT: Anything further, Mr. Cook?"
(R. 142 - Tr. 6-8)

The problem with rushing things along in such fashion is that jurors are simply not able to assess and evaluate their own feelings and prejudices in any meaningful manner.

No juror is going to affirmatively answer a question such as "would that fact cause you to be predisposed to find for or against either party without regard to the evidence and the law?"

Then for the Court to exhibit impatience and hostility towards counsel's efforts to make reasonable inquiries which would enable the jurors to come to terms with their feelings and attitudes regarding the subject matter in the case is to tell the jurors counsel is certainly out of line and someone not to be put up with very long, and, inferentially, someone not to be listened to--someone who is perhaps wasting the valuable time of this court, etc., and that is hardly conducive to getting off on the right foot with the jury.

Plaintiff most earnestly therefore requests this Court to hold that "material and proper questioning" consists, as a minimum, in proceeding with enough voir dire in a non-hostile environment to permit counsel for both sides to start the trial with some reasonable confidence that the jury has at least been given a genuine opportunity to do a little soul searching about matters of implied bias and to start hearing the evidence with a genuine commitment to the system of justice, having been properly

encouraged to make a genuine effort to lay aside all hostilities and biases brought to the Courtroom, and genuinely so, as a matter of faithful participation in the proceeding.

It is manifestly impossible for the objective of voir dire to be achieved by inquiring in substance, "do all of you feel you can be fair?" Of course, no one is going to speak up in front of the group and say they cannot be fair. Such pushed, rushed inquiry is simply worse than nothing so far as the intent of Rule 47(a) is concerned.

It was material prejudicial error for the lower court to preclude counsel for Plaintiff from inquiring into the material and proper matters above set forth.

CONCLUSION

The facts, which were largely undisputed, and were not disputed in any material particular, make Defendants negligence clear as a matter of law. It was error for the lower court to submit the issue of Defendants' negligence to the jury.

The undisputed evidence leaves no room for reasonable minds to disagree that Defendants did not meet their burden of proving the seven-year old child contributorily negligent. The defense of negligence should not have been and should not be submitted to the jury. The case should be remanded for a retrial upon the issue of damages only.

If the Court does not decide the new trial should be limited to the issue of damages, Plaintiff is entitled to a new

trial on all issues in any event because:

- 1) The jury was improperly instructed as to the child's duty.
- 2) The jury obviously did not consider or follow the court's instructions on liability.
- 3) The jury failed to follow the court's instructions with respect to answering the damage questions.
- 4) The jury gave manifestly inadequate damages apparently under the influence of passion or prejudice.
- 5) The evidence is not sufficient to justify the no cause of action verdict.


The Court erred in declaring a mistrial and discharging the first jury and in failing to accord Plaintiff proper voir dire upon material and proper matters.

This Court should decide that the subject of insurance should be made a matter of proper jury instruction by the Court in all cases where liability insurance exists.

Upon retrial, the lower Court should be instructed to allow sufficient opportunity for voir dire upon matters of bias without impatience or hostility, and to permit counsel for both sides to inquire as to matters of actual or implied biases held by the jurors appropriately and to obtain genuine oral commitments from the jurors to recognize and deliberately lay aside what unconscious biases they might have affecting the case for the purpose of doing justice in the cause.


RESPECTFULLY SUBMITTED this 26th day of February,

1979.



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Served the foregoing Brief of Appellant by mailing two copies thereof to Stephen G. Morgan, Attorney for Defendants, 345 South State Street, Suite #200, Salt Lake City, Utah 84111 this 26th day of February, 1979.



David S. Cook