

2009

Ken Claypoole v. Neil G. Skougard, Boyd Ross, Winward Electric Service and Michael Wood : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David Bert Havas; Attorneys for Plaintiff/Appellant.

Joseph E. Minnock; Morgan, Minnock, Rice and James; Attorneys for Defendants/Appellees.

Recommended Citation

Brief of Appellee, *Claypoole v. Skougard and Ross*, No. 20090390 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/1656

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

KEN CLAYPOOLE,

Plaintiff-Appellant,

vs.

NEIL G. SKOUGARD and BOYD ROSS
and WINWARD ELECTRIC SERVICE,
INC., and MICHAEL WOOD,

Defendants-Appellees.

Case No. 20090390 CA

BRIEF OF APPELLEES WINWARD ELECTRIC AND MICHAEL WOOD

Appeal from the Second Judicial District Court for Davis County
The Honorable Rodney S. Page, District Judge

David Bert Havas
DAVIS BERT HAVAS P.C.
533 26th Street, Suite 100
Ogden, UT 84401

Joseph E. Minnock
MORGAN, MINNOCK, RICE & JAMES
Kearns Building, Eighth Floor
136 South Main Street
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Appellant Ken
Claypoole

Attorneys for Defendants/Appellees
Winward Electric Service, Inc., and
Michael Wood

FILED
UTAH APPELLATE COURTS
SEP 17 2009

IN THE UTAH COURT OF APPEALS

KEN CLAYPOOLE,

Plaintiff-Appellant,

vs.

NEIL G. SKOUGARD and BOYD ROSS
and WINWARD ELECTRIC SERVICE,
INC., and MICHAEL WOOD,

Defendants-Appellees.

Case No. 20090390 CA

BRIEF OF APPELLEES WINWARD ELECTRIC AND MICHAEL WOOD

Appeal from the Second Judicial District Court for Davis County
The Honorable Rodney S. Page, District Judge

David Bert Havas
DAVIS BERT HAVAS P.C.
533 26th Street, Suite 100
Ogden, UT 84401

Joseph E. Minnock
MORGAN, MINNOCK, RICE & JAMES
Kearns Building, Eighth Floor
136 South Main Street
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Appellant Ken
Claypoole

Attorneys for Defendants/Appellees
Winward Electric Service, Inc., and
Michael Wood

TABLE OF CONTENTS

TABLE OF CONTENTS	<u>i</u>
TABLE OF AUTHORITIES	<u>ii</u>
STATEMENT OF JURISDICTION	<u>1</u>
STATEMENT OF THE ISSUES	<u>1</u>
STATEMENT OF THE CASE	<u>1</u>
STATEMENT OF FACTS	<u>2</u>
SUMMARY OF THE ARGUMENT	<u>6</u>
ARGUMENT	<u>8</u>
I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONDUCTING VOIR DIRE	<u>8</u>
A. MR. CLAYPOOLE WAIVED ANY OBJECTIONS TO VOIR DIRE.	<u>8</u>
B. THE TRIAL COURT DID NOT ERR IN CONDUCTING VOIR DIRE QUESTIONING.	<u>15</u>
C. THE TRIAL COURT PROPERLY CONDUCTED VOIR DIRE WITH RESPECT TO TORT REFORM.	<u>20</u>
II THE TRIAL COURT DID NOT ERR IN PERMITTING REFERENCE TO SETTLEMENT NEGOTIATIONS IN AN ANOTHER CLAIM	<u>22</u>
III. THE TRIAL COURT DID NOT ERR WITH RESPECT TO THE SPECIAL VERDICT	<u>34</u>
CONCLUSION	<u>40</u>
STATEMENT REGARDING ADDENDUM	<u>40</u>

TABLE OF AUTHORITIES

CASES

<i>438 Main Street v. Easy Heat, Inc.</i> , 2004 UT 72, 99 P.3d 801.	<u>35</u>
<i>Barrett v. Peterson</i> , 868 P.2d 96 (Utah Ct. App. 1993)	<u>9, 18-20</u>
<i>Bee v. Anheuser-Busch, Inc.</i> , 2009 UT App 35, 204 P.3d 204	<u>9</u>
<i>Boyle v. Christensen</i> , –P.3d–, 2009 UT App. 241 (September 3, 2009)	<u>11, 12</u>
<i>Broadcort Capital Corp. v. Summa Medical Corp.</i> , 972 F.2d 1183 (10 th Cir. 1992)	<u>25</u>
<i>Covey v. Covey</i> , 80 P.3d 553 (Utah Ct. App. 2003)	<u>30</u>
<i>Dahlgren v. First Nat. Bank of Holdredge</i> , 553 P.3d 681 (8 th Cir. 2008)	<u>26</u>
<i>Erickson v. Wasatch Manor, Inc.</i> , 802 P.2d 1323 (Utah Ct. App. 1990)	<u>31</u>
<i>Evans v. Doty</i> , 824 P.2d 460 (Utah Ct.App. 1991)	<u>10</u>
<i>Glacier Land Co. v. Claudia Klawe & Assoc., Inc.</i> , 154 P.3d 852 (Utah Ct. App. 2006)	<u>30</u>
<i>Gorostieta v. Parkinson</i> , 17 P.3d 1110 (Utah 2000)	<u>24</u>
<i>Hooker v. State</i> , 716 So.2d 1104 (Miss. 1998)	<u>17</u>
<i>In Re Michael D</i> , 713 N.E.2d 724 (Ill.Ct.App. 1999)	<u>29</u>
<i>In Re Pahl</i> , 2007 UT App 389, 174 P.3d 642	<u>31</u>
<i>Jensen v. IHC Hospital</i> , 82 P.3d 1076 (Utah 2003)	<u>24</u>
<i>Lewis v. Emory Univ.</i> , 509 S.E.2d 635 (Ga.Ct.App. 1999)	<u>26, 27</u>

<i>Mule Hide Products v. White</i> , 40 P.3d 1155 (Utah Ct. App. 2002)	<u>31</u>
<i>People v. Tafoya</i> , 164 P.3d 590 (Cal. 2007)	<u>17</u>
<i>People v. Tafoya</i> , 164 P.3d 590 (Cal. 2007)	<u>17</u>
<i>Rasmussen v. Sharapata</i> , 895 P.2d 391 (Utah Ct. App. 1995)	<u>13, 14</u>
<i>Ratliff v. Schiber Truck Co., Inc.</i> , 150 F.3d 949 (8 th Cir. 1998)	<u>27, 28</u>
<i>State v. Burk</i> , 839 P.2d 880 (Utah Ct. App. 1992)	<u>37</u>
<i>State v. James</i> , 819 P.2d 781 (Utah 1991)	<u>15</u>
<i>State v. King</i> , 2006 UT 3, 131 P.3d 202	<u>9</u>
<i>State v. Long</i> , 721 P.2d 483 (Utah 1986)	<u>15</u>
<i>State v. Malmrose</i> , 649 P.2d 56 (Utah 1982)	<u>15</u>
<i>State v. Mead</i> , 27 P.3d 1115 (Utah 2001)	<u>16, 17</u>
<i>State v. Ontiveros</i> , 835 P.2d 201 (Utah Ct. App. 1992)	<u>15</u>
<i>Stevenett v. Wal-Mart Stores, Inc.</i> , 977 P.2d 508 (Utah Ct. App. 1990)	<u>32</u>
<i>Sunstar, Inc. v. Alberto-Culver Company, Inc.</i> , 2004 WL 1899927 (N.D.Ill., August 23, 2004)	<u>26</u>
<i>United States v. Tomero</i> , 486 F.Supp.2d 320 (S.D.N.Y. 2007)	<u>17</u>
<i>Vodusek v. Bayliner Marine Corp.</i> , 71 F.3d 148 (4 th Cir. 1995)	<u>28, 29</u>
<i>Wipf v. Kowalski</i> , 519 F.3d 380 (7 th Cir. 2008)	<u>29</u>

STATUTES

UTAH CODE ANN. § 78A-4-103(2)(j)(2006) 1

OTHER AUTHORITIES

UTAH R.CIV.P. 47(a) 16

STATEMENT OF JURISDICTION

This court has jurisdiction over this matter pursuant to UTAH CODE ANN. § 78A-4-103(2)(j)(2006).

STATEMENT OF THE ISSUES

We are not dissatisfied with Mr. Claypoole's Statement of the Issues.

STATEMENT OF THE CASE

This case arises from a pair of automobile accidents which occurred on a snowy day in February 7, 2001, in Layton, Utah. Mr. Claypoole was driving down 1200 West in Layton, Utah, when he stopped his vehicle to avoid hitting a motorist who was sliding in front of him. Mr. Claypoole was then rear-ended by Neil Skougard at a speed of between three and eight miles an hour. After Mr. Claypoole and Mr. Skougard pulled their vehicles to the side of the road, Michael Wood collided with the side of Mr. Claypoole's vehicle. Mr. Claypoole described the first impact with Mr. Skougard as "far harder" than the impact with Mr. Wood.

Mr. Claypoole had also been involved in an automobile accident in January 2000. While traveling in Nevada, Mr. Claypoole had stopped for another accident when he was struck by David Alston at 65 miles per hour. In October 2000, Mr. Claypoole had surgery to repair neck damage stemming from that accident. In

addition to these accidents, Mr. Claypoole had reported a ten- to 35-year history of low back pain to various physicians.

In January, 2006, Mr. Claypoole underwent low back surgery in Sacramento, California, and severe surgical complications nearly resulted in his death and have left him with leg problems and continuing low back pain.

By the time of trial, Mr. Alston had settled all claims related to the January 2000 accident and Mr. Skougard had settled all claims relating to his collision of February 7, 2001. The remaining issue to be tried was whether Mr. Claypoole suffered any injuries from the collision with Michael Wood's vehicle on February 7, 2001. The jury concluded that Mr. Claypoole suffered no injuries in his collision with Michael Wood. (R. 1417)

STATEMENT OF FACTS

1. Ken Claypoole was 52 years old at the time of the accidents in February, 2001.
2. On January 2, 2000, Ken Claypoole was involved in an accident in the State of Nevada. Another motorist, David Alston, lost control of his vehicle on slick roads and struck Mr. Claypoole's vehicle at approximately 65 miles per hour. (R. 1623, p. 339).

3. Mr. Claypoole suffered injuries to his neck and low back in that accident. (R. 1623, p. 335).
4. In October 2000, Mr. Claypoole had surgery on his neck due to injuries suffered in the January 2000, accident. (R. 1623, p. 370).
5. On February 7, 2001, Mr. Claypoole was driving southbound on 1200 West in Layton, Utah, when another motorist in front of him started to lose control due to snow on the roads. (R.1623, p. 343).
6. Mr. Claypoole brought his vehicle to a stop and was rear-ended by Neil Skougard. (R. 1623, p. 346).
7. Mr. Claypoole's expert witnesses estimated the speed of Mr. Skougard's vehicle at impact as between three and eight miles per hour. (R. 1622, p. 282).
8. The motorists moved their vehicles to the side of the road and waited for law enforcement to arrive. (R. 1623, p. 348).
9. Shortly thereafter, a vehicle driven by Michael Wood was sliding to a stop and struck Mr. Claypoole's vehicle. (R. 1623, p. 351). Whether Mr. Wood merely sideswiped Mr. Claypoole's vehicle or impacted the rear of his vehicle was a subject of considerable debate at trial.

10. Mr. Claypoole testified in his deposition and at trial that the first impact involving Mr. Skougard was “far harder” than the second impact with Mr. Wood. (R. 1623, pp. 357-58).
11. The defense biomechanical engineering expert witness, Dr. Wilson Hayes, testified that based on all the evidence and specifically Mr. Claypoole’s testimony that his vehicle did not move during the impact with Mr. Wood, the injury potential for the second accident was next to zero. (R. 1623, p. 488).
12. In January, 2006, Mr. Claypoole had surgery on his low back by Dr. Elvert Nelson. (R. 1621, p. 172-73).
13. Dr. Nelson’s operative report indicates that the surgery was needed because Mr. Claypoole had a ten year history of low back pain and had recently lifted a heavy object causing him pain so severe he was unable even to ambulate to the bathroom. (R. 1621, p. 173).
14. Mr. Claypoole never mentioned to Dr. Nelson the automobile accidents of February 7, 2001, as a potential cause of his low back pain. (*Id*). Rather, this was information learned from Mr. Claypoole’s counsel six months after the surgery. (R. 1621, p. 174).

15. At trial, the court conducted the initial voir dire of the jury panel. (R. 1621, pp. 3-38). Included in this examination were questions relating to the potential jurors' exposure and reaction to tort reform initiatives and the plaintiff's right to seek damages in a court of law. (R. 1621, pp. 32-34).
16. During a sidebar conference, Mr. Claypoole's counsel asked the court to inquire of the panel regarding their willingness to apply the "preponderance of the evidence" standard. (R. 1621, p. 37). The court did so. *Id.*
17. The court then invited counsel to examine the jurors. Mr. Claypoole's counsel asked two questions and then reported he had no further questions. (R. 1621, p. 40).
18. During the trial, Mr. Claypoole called two of his closest friends, Sam Turner and Fred Wasilewski. Both testified that Mr. Claypoole had returned to health from the injuries suffered in the January 2000, accident prior to the February 7, 2001, collisions. Both further attributed all Mr. Claypoole's present difficulties to the 2001 accidents. (R. 1621, pp. 58-115).

19. On May 8, 2002, Mr. Claypoole's counsel wrote a letter to the insurer for David Alston outlining the injuries suffered in the January 2000, Nevada accident. Although this letter was written after the February 7, 2001, accidents, Mr. Claypoole claimed the January 2000, accident had reduced him to a sedentary lifestyle:

Prior to this crash, Mr. Claypoole enjoyed playing tennis and golf, and spending time with his granddaughter, however, due to the debilitating nature of his injuries he can no longer enjoy these activities and is reduced to a sedentary lifestyle.

(R. 1621, p. 114).

20. This letter was also provided to and relied upon by Mr. Claypoole's retained biomechanical engineer, Dr. John Jurist. (R. 1621, p. 313-315).
21. The jury concluded that Mr. Claypoole did not suffer any injuries from the impact between Mr. Wood's and Mr. Claypoole's vehicles. (R. 1417).

SUMMARY OF THE ARGUMENT

I. Voir Dire. The trial court did not abuse its considerable discretion in the conduct of voir dire. The trial court properly conducted voir dire in accordance with Rule 47 of the Utah Rules of Civil Procedure and there was no requirement that the

court employ a jury questionnaire when requested by Mr. Claypoole. Moreover, the trial court adequately inquired of the jury panel regarding their exposure and response to tort reform campaigns. Finally, Mr. Claypoole waived any challenge to the conduct of voir dire by failing to make a contemporaneous objection to the conduct of voir dire at trial.

II. Admission of Evidence. The trial court did not abuse its wide discretion by admitting statements made by Mr. Claypoole's counsel during settlement negotiations relating to a prior claim. Rule 408 of the Utah Rules of Evidence does not bar admission of settlement information relating to a claim other than the one being litigated. Moreover, Mr. Claypoole injected the information into the trial by providing it to his expert witness and asking him to rely on it in the formation of his opinions. Mr. Claypoole has failed to show that any alleged error in the admission of this evidence was harmful, nor has he provided this court with the entire transcript of the trial and, therefore, this court has no ability to make such a determination on its own.

III. Special Verdict. The special verdict form was not confusing. The introductory paragraph of the form, which requested that the jury resolve certain questions by a preponderance of the evidence, was consistent with the jury instructions used by the court and the voir dire questions employed by the court and

Mr. Claypoole's counsel. The jury was well instructed as to the burden of proof and the meaning of "preponderance of the evidence." The issue was also waived by Mr. Claypoole as there was not a proper objection made at the time the special verdict was discussed.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONDUCTING VOIR DIRE

A. MR. CLAYPOOLE WAIVED ANY OBJECTIONS TO VOIR DIRE.

Mr. Claypoole claims the trial court erred in conducting voir dire by: (1) failing to use Mr. Claypoole's requested jury questionnaire; (2) failing to allow attorney conducted voir dire; (3) failing to ask all questions in his written requested voir dire; and (4) asking "broad questions in regard to tort reform." Mr. Claypoole only raised an objection to the first of these alleged errors and he is barred from raising the other issues on appeal.

The Utah Supreme Court has long held that a party may not appeal a trial court's actions unless a contemporaneous objection was made before the lower court:

We have consistently held that a defendant who fails to preserve an objection at trial will not be able to raise that objection on appeal unless he is able to demonstrate either plain error or exceptional circumstances.

See State v. Cram, 2002 UT 37, ¶ 9, 46 P.3d 230; *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996). This rule is designed to (1) ensure that the trial court has “an opportunity to address the claimed error, and if appropriate, correct it,” and (2) inhibit a defendant from “forego [ing] ... an objection with the strategy of enhancing the defendant's chances of acquittal and then, if that strategy fails, ... claiming on appeal that the [c]ourt should reverse.” *Cram*, 2002 UT 37, ¶ 10, 46 P.3d 230 (internal quotation marks omitted). Stated another way, under our preservation rule, “defendants are ... not entitled to both the benefit of not objecting at trial and the benefit of objecting on appeal.” *Id.* ¶ 10.

State v. King, 2006 UT 3, ¶ 13, 131 P.3d 202, 205 (ellipses in original). In *King*, the Utah Supreme Court was asked to consider whether a contemporaneous objection was required with respect to alleged errors in voir dire. The court held an objection was necessary to preserve the matter for appeal:

In summary, because of counsel's advantaged position and the relative ease with which any claim of bias can be remedied during the selection process, we hold that, just as with the trial process itself, the jury selection process is subject to the procedural safeguards of the adversarial system of justice. We accordingly hold that objections to the trial court's conduct during voir dire are not exempt from the preservation rule.

Id. ¶ 18, 131 P.3d at 206. Indeed, in each of the Utah appellate cases involving inquiry into tort reform, the plaintiffs' counsel objected to the failure to ask such questions. *See Barrett v. Peterson*, 868 P.2d 96, 97 (Utah Ct. App. 1993)(“*Over appellant's objection*, the trial judge refused to ask the jurors any of appellant's submitted questions specifically directed at the issue of tort reform.”); *Bee v.*

Anheuser-Busch, Inc., 2009 UT App 35, 204 P.3d 204 (“Bee asserts that he again raised the issue of the tort reform questions during a sidebar held off the record at the close of voir dire but that *the trial court rejected his request* to question the potential jurors on the issue.”); *Evans v. Doty*, 824 P.2d 460, 463 (Utah Ct.App. 1991)(“At the conclusion of the two-hour voir dire, the judge impaneled the jury *over plaintiff’s objections.*”)

In our case, Mr. Claypoole did make a motion to use a jury questionnaire prior to trial and this motion was denied. (R. 1308). However, Mr. Claypoole made no other objections to either the manner or conduct of voir dire. For instance, Mr. Claypoole claims he requested attorney-conducted voir dire and only moved the trial court to employ a jury questionnaire when that request was denied. We have searched the record and can find no reference to a request by Mr. Claypoole for attorney-conducted voir dire, nor an objection to the trial court’s decision to initially conduct voir dire before permitting additional questions by counsel. (In his brief, Mr. Claypoole provides no citation to the record demonstrating a contemporaneous objection or even a request for attorney-conducted voir dire.)

Next, Mr. Claypoole claims that after refusing to use a jury questionnaire, the trial court erred by refusing to ask all the questions included in Mr. Claypoole’s

written request for voir dire. During trial, however, no objection was raised regarding the failure to ask all requested voir dire questions.

This court's decision earlier this month in *Boyle v. Christensen*, –P.3d–, 2009 UT App. 241 (September 3, 2009), is dispositive on this issue. There, as here, the trial court refused to submit a questionnaire and did not ask all the questions requested by the parties prior to trial:

As trial approached, Mr. Boyle submitted a proposed jury questionnaire that included specific questions intended to elicit jurors' views regarding damages and tort reform. Christensen also submitted proposed voir dire questions, and the district court edited and combined the parties' proposed questions into a single set of voir dire questions that did not contain the exact questions posed by either party. The district court conducted voir dire using its own questions without objection from either party. At the close of voir dire, both Mr. Boyle and Christensen passed the jury for cause.

Id. ¶ 4. As here, the plaintiff claimed the mere submission of voir dire questions prior to trial was sufficient to preserve an issue for appeal. This court held that the plaintiff's failure to object to the questioning waived the right of appeal:

Mr. Boyle argues on appeal that his mere submission of specific jury questions relating to damages and tort reform preserves for appeal his claim that the voir dire questions the district court actually posed were inadequate. We disagree. "[I]n order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." 438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 (alterations in original) (internal quotation marks omitted). Here, the district court attempted to reconcile the parties' proposed jury questions into a single set of voir

dire questions that addressed each party's concerns. If Mr. Boyle believed that the district court's modification of his questions constituted error on the part of the district court, it was his obligation to bring this alleged error to the district court's attention. His failure to do so constitutes a waiver of the issue as one for appeal.

Id. ¶ 12.

This case presents a more compelling case that Mr. Claypoole waived his right to appeal alleged deficiencies in the voir dire than *Boyle*. Unlike *Boyle*, Mr. Claypoole's counsel was permitted to pose any additional questions to the jury panel he felt relevant. Mr. Claypoole's counsel posed two questions to the panel before announcing that he had no further inquiries:

Mr. Havas, other questions you wish to ask?

MR. HAVAS: Yes, Your Honor, just following up on that, on the preponderance, some people think preponderance essentially is we, the plaintiff, Mr. Claypoole, has just a little bit of a burden to show that the burden that we're going to show you, that we're a little bit more right than wrong. Some people disagree with that, think that's unfair to the defense that we only have to show a little bit more right than wrong. Is there anyone of you that is in a camp where the people feel that that is not fair? Or on the other hand, is there anyone that feels that that is fair burden for us to only have to prove a little bit more right than wrong? Thank you.

Another question that I would like to have answered is to make sure that the harms or the losses that we're going to be asking you about, can only be compensated by award of money. That's the way our system is and that the money must solely be decided on the basis of the harms and losses that we're claiming that the defense caused. Is there anyone here that feels that that is unfair or is there anyone here that is all right that? Is there anyone here that feels that that is okay to —

THE COURT: Let's ask it another way. Ladies and gentlemen, are there any of you that feel that it would be unfair to award a money judgment as far as payment for damage in a case such as this? Thank you. Anything further Mr. Havas?

MR. HAVAS: Yes Your Honor. They neglected to indicate to you that one of the defendant is a company called Winward Electric Supply Company Incorporated and I'd like to know if anyone is familiar with Winward Electric Supply Company Incorporated.

THE COURT: Ms. Sorensen?

MS. SORENSEN: I'm just familiar in that I do bookkeeping for a contractor that has used them and just pay bills. I don't know them personally.

MR. HAVAS: All right, and is this contractor that you're doing work for, you still do work for them today?

MS. SORENSEN: Yes.

MR. HAVAS: Does this contractor still use Windward Electric Supply Company that you know of?

MS. SORENSEN: I usually don't know until I do the bills but he has used them in the last six months.

MR. HAVAS: You have not had any relationship —

MS. SORENSEN: I don't have any personal contact with them.

MR. HAVAS: Is there anyone else that has had any contact with Winward Electric Supply Co? *I think that's all the questions I have.*

(R. 1621, pp. 38-40). In his brief, Mr. Claypoole fails to identify what questions he believes should have been posed to the panel prior to exercise of peremptory challenges. Perhaps more importantly, he fails to explain why his own counsel failed to ask these questions when provided the opportunity to do so.

A similar circumstance existed in *Rasmussen v. Sharapata*, 895 P.2d 391 (Utah Ct. App. 1995). There, the trial court inquired during voir dire regarding tort reform. After the jury was impaneled, but before evidence began, one juror, Bascomb,

revealed he recalled reading an article on tort reform in *Reader's Digest*. After examination of Juror Bascomb, which included questioning from plaintiff's counsel, the trial court denied plaintiff's motion for a mistrial. On appeal, plaintiff argued she was denied the opportunity to fully examine Bascomb as to his potential biases. In rejecting this argument, this Court stated:

Finally, Rasmussen's complaint that the trial court did not allow her to "formulate and ask questions that could reveal bias on Mr. Branscomb's part" is without merit. The transcript shows the court invited counsel from both sides to question Branscomb. The court said nothing to limit the form or substance of counsels' questions. After the two questions Rasmussen's counsel chose to ask, he did not say he wished to pose further questions. Thus, he did not present the trial court an opportunity to rule on this issue and we will not address it further on appeal. *See Broberg v. Hess*, 782 P.2d 198, 201 (Utah App.1989).

Id. at 395.

In our case, there is no suggestion that counsel was barred from asking additional questions, nor that he was precluded from asking questions relating to tort reform or any other subject of interest. Mr. Claypoole's counsel simply asked no further questions and it must be assumed he had gathered all the information he deemed essential to an effective exercise of his peremptory challenges.

Mr. Claypoole contends that the trial court asked "broad questions in regard to tort reform" and complains the manner in which the questions were posed denied him an intelligent exercise of peremptory challenges. No where in the record does Mr.

Claypoole object to the manner in which any question was posed nor did Mr. Claypoole ask more incisive questions when given the opportunity to do so.

Mr. Claypoole has waived any objection to the conduct of voir dire. Mr. Claypoole did not object to the trial court's failure to ask additional questions relating to tort reform, nor did Mr. Claypoole's counsel avail himself of the opportunity of asking such questions when given the opportunity to do so.

B. THE TRIAL COURT DID NOT ERR IN CONDUCTING VOIR DIRE QUESTIONING.

Even assuming the issue has been preserved for appeal, the trial court did not abuse its discretion in the conduct of voir dire. This court has held that “[t]he manner and method of voir dire lies within the sound discretion of the trial court.” *State v. James*, 819 P.2d 781, 797 (Utah 1991). Thus, we review only for an abuse of discretion.” *State v. Ontiveros*, 835 P.2d 201, 204-05 (Utah Ct. App. 1992). The Utah Supreme Court has also held that “[t]raditionally, the trial court is given considerable latitude as to the manner and form of conducting the voir dire examination and is only restricted in that discretion from committing prejudicial error.” *State v. Malmrose*, 649 P.2d 56, 60 (Utah 1982)(*overruled on other grounds State v. Long*, 721 P.2d 483 (Utah 1986)).

Here, the trial court did not abuse its discretion by refusing to use a jury questionnaire. Rather than using a jury questionnaire, the trial court conducted voir dire in accordance with Rule 47 of the Utah Rules of Civil Procedure, which provides:

(a) Examination of jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors *or may itself conduct the examination*. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper. Prior to examining the jurors, the court may make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

UTAH R.CIV.P. 47(a)(emphasis added). The trial court conducted much of the examination but also permitted Mr. Claypoole's counsel to ask the jury panel any questions he deemed necessary for an effective exercise of his peremptory challenges.

There is no support for Mr. Claypoole's contention that the trial court was *required* to use a jury questionnaire. The Utah Supreme Court recently considered the use of jury questionnaires in *State v. Mead*, 27 P.3d 1115 (Utah 2001). There, the defendant sought to use a jury questionnaire to explore potential jurors' exposure to pre-trial publicity:

Mead first argues the trial court abused its discretion by not using a jury questionnaire and/or individual, in camera voir dire to determine jurors'

potential biases and prejudices stemming from exposure to prior media coverage of the criminal case and related civil suit in federal court. We disagree.

Id. at 1123. The Utah Supreme Court concluded that the trial court did not abuse its discretion in refusing to use a jury questionnaire:

While it may be advisable for a trial court to use a jury questionnaire in certain situations, the trial court has “considerable latitude as to the manner and form of conducting the voir dire examination.” *State v. Malmrose*, 649 P.2d 56, 60 (Utah 1982). We cannot say the court abused its discretion in the instant case. Indeed, as the questions asked in voir dire were substantially similar to those requested in the proposed jury questionnaire, even were we to assume the trial court erred in failing to use the proposed jury questionnaire, Mead has demonstrated no harm.

Id. at 1124.

The holding in *Mead* is consistent with the case law in other jurisdictions. *See, e.g., People v. Tafoya*, 164 P.3d 590 (Cal. 2007)(“Whether the prospective jurors are required to complete a written questionnaire is a matter within the trial court's discretion.”); *Hooker v. State*, 716 So.2d 1104, 1115 (Miss. 1998)(“Our case law does not indicate that a defendant in a criminal case has an absolute right to submit a jury questionnaire.”); *United States v. Tomero*, 486 F.Supp.2d 320, 324 (S.D.N.Y. 2007)(“Whether to use a jury questionnaire is within the discretion of the Court.”)

We have found no case law from any jurisdiction holding that a trial court *must* use a jury questionnaire when requested by a party, even in a death penalty case.

Indeed, such a ruling would effectively abrogate Rule 47 of the Utah Rules of Civil Procedure which allows the trial court to directly question the panel, allow the attorneys to do so, or, as here, employ some combination of both methods.

The trial court also did not abuse its discretion by refusing to allow the attorneys to conduct the voir dire. This issue was dealt with conclusively in *Barrett v. Peterson*, 868 P.2d 96, 97 (Utah Ct. App. 1993). There, this court specifically addressed and rejected a similar argument:

Appellant argues that the trial court committed reversible error by refusing to allow counsel either to personally conduct voir dire or to supplement voir dire with his proposed questions. Appellant relies on *Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210 (1988), in which the Nevada Supreme Court held that “[a] complete denial of attorney-conducted voir dire cannot be construed as a reasonable restriction and therefore the trial judge committed reversible error.” *Id.* 752 P.2d at 213. While this may be the law in Nevada, Utah courts, according to long-standing custom, usually conduct voir dire themselves. *See Ostler v. Albina Transfer Co.*, 781 P.2d 445, 447 (Utah App. 1989) (trial judge has considerable discretion in directing manner and form of voir dire examination). Utah Rule of Civil Procedure 47(a) specifically invests trial judges with the discretion to either allow or disallow direct voir dire questioning by counsel. Rule 47(a) provides:

The court *may* permit the parties or their attorneys to conduct the examination of prospective jurors *or* may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper *or shall itself* submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper.

Utah R.Civ.P. 47(a) (emphasis added). The rule directs that if the trial court itself conducts voir dire, it must allow additional inquiry, either by the court or by the parties, “as is material and proper.” *Id.* This language gives the trial court discretion in determining whether questions submitted by counsel are material to the case at hand, and whether such questions are proper for jury voir dire. While the trial court is obliged to conduct voir dire so as to allow counsel to intelligently exercise peremptory challenges, Rule 47(a) does not require that all of counsel's submitted questions be asked, nor that they be asked in the exact form as submitted by counsel, much less does it require that counsel pose the questions. In the end, it is which questions are asked that matters-not who asks them.

Id. at 101 n.6. As *Barrett* demonstrates, the trial court could reasonably have refused to allow counsel for Mr. Claypoole to ask *any* questions. The fact the trial court permitted counsel to pose questions directly to the panel was an appropriate exercise of the court’s discretion. Mr. Claypoole has provided no argument for *Barrett* to be overturned and, therefore, the jury’s verdict should be sustained.

The *Barrett* decision also resolves Mr. Claypoole’s claim that the trial court should have asked *all* of his requested voir dire. Mr. Claypoole submitted 46 separate questions he wanted to be posed to the jury. (R. 1383). As this court held in *Barrett*, “Rule 47(a) does not require that all of counsel's submitted questions be asked.” *Id.* It was quite apparent that Mr. Claypoole did not view these 46 questions as critical to his exercise of peremptory challenges. After all, when given the opportunity to question the jury panel directly, Mr. Claypoole’s counsel asked only two of the 46

submitted questions and did not object to the court's failure to pose the remaining inquiries.

C. THE TRIAL COURT PROPERLY CONDUCTED VOIR DIRE WITH RESPECT TO TORT REFORM.

In *Barrett v. Peterson*, 868 P.2d 96, 97 (Utah Ct. App. 1993), the Utah Court of Appeals held that a trial court must ask, when requested by plaintiff, whether any juror had been exposed to tort reform advertising or information:

Thus, concluded the *Evans* court, the trial court should have asked the potential jurors some of the plaintiff's questions concerning their exposure to tort reform material, not just questions concerning whether they, in their personal opinion, had been biased by any such exposure. *Id.*

In light of the pervasive dissemination of tort-reform information, and the corresponding potential for general exposure to such information by potential jurors, a plaintiff is entitled to know *which* potential jurors, if any, have been so exposed. *See id.* Plaintiff is entitled to such information absent any particular showing of specific campaigns, advertisements, or literature offered for the purpose of showing potential prejudice. *See id.* Failure to ask such questions ignores the plaintiff's "need to gather information to assist in exercising ... peremptory challenges." *Id.*

Id. at 101. In this case, the trial court specifically asked questions regarding a plaintiff's right to seek damages for a wrong and exposure to tort reform literature:

THE COURT: Let me just ask the next question that comes along then. First of all you need to understand that in our system of law that when we feel we've been damaged by another or that we have a dispute that we can't resolve, we have a right to come to court and have a jury of our peers resolve those things and recover damages that may have been

caused as a result of that situation. Are there any of you who disagree with that right that we have? Response is negative. Are there any of you who could not award to Mr. Claypoole the full extent of any damage that was supported by the evidence? Response is negative.

(R. 1621, p. 34). The trial court further asked:

THE COURT: Oh, that we excused. Oh, that's right, here it is in my notes. All right. We've taken care of that. The next questions I have to ask you have to do with the philosophy behind kind of what we're doing here today and so I'd like to ask you whether or not any of you have reads any articles or seen any programs or documentaries on TV about lawsuits and crises that may have arisen as a result of excessive jury verdicts. Do any of you recall anything about that that you've seen or heard or that you remember? Ms. Adams, anything you can recall specifically?

MS. ADAMS: Just basic programs on TV like CSI and stuff, that's all.

(R. 1621, p. 32) Finally, the court asked about whether any jurors felt there was a lawsuit crisis in the United States:

THE COURT: The criminal kinds of things. All right. The next thing I'd like to ask you, do any of you hold the opinion that in this country today there's a lawsuit crisis caused by excessive jury verdicts? Do any of you hold that kind of an attitude? Ms. Sorensen?

MS. SORENSEN: I do.

THE COURT: You can tell us a little bit about that.

MS. SORENSEN: I think, do you want me to tell you? I think there's too much —

THE COURT: Well, let me phrase it in this sense, I'm certain we're all concerned about things that we have that we observe in our society. The question becomes as you sit here as a juror in regards to the plaintiff here, Mr. Claypoole and these other individuals as defendant, what we are looking for is a juror that would be able to look at the facts as they're presented during the course of the trial and render a fair judgment without prejudgement or predilection to go in a certain direction or do

a certain thing. For instance, are you feelings such that you could not award to Mr. Claypoole a judgment of damages if you felt it was supported by the evidence? Would you be able to do that?

MS. SORENSEN: I would be able to.

(R. 1621, pp. 32-33). These questions were adequate to explore any exposure to tort reform advertisements and the effect such exposure may have had on the potential jurors. As set forth above, Mr. Claypoole's counsel did not object to the nature of this examination or request additional questions be posed on the issue. Moreover, Mr. Claypoole's counsel did not pose any questions regarding tort reform when given the opportunity to directly examine the potential jurors. Thus, we must presume the trial court's questioning complied with the holding of *Barrett*.

II.

THE TRIAL COURT DID NOT ERR IN PERMITTING REFERENCE TO SETTLEMENT NEGOTIATIONS IN AN ANOTHER CLAIM

As set forth in the Statement of Facts, Mr. Claypoole was involved in an automobile accident on January 4, 2000, in Nevada. He later brought an action against David Alston, the driver of other vehicle involved in that collision. On May 8, 2002, Mr. Claypoole's counsel sent a letter to Mr. Alston's insurer regarding the January 2000, accident. In that letter, Mr. Havas represented:

Prior to this crash, Mr. Claypoole enjoyed playing tennis and golf, and spending time with his granddaughter, however, due to the debilitating nature of his injuries he can no longer enjoy these activities and is reduced to a sedentary lifestyle.

(R. 1621, p. 114). As part of preparations for trial in our case, Mr. Claypoole's counsel provided this letter to Dr. John Jurist, his biomechanical engineering expert witness, for consideration and review in the formulation of his opinions.

At trial, Mr. Claypoole denied that his sedentary lifestyle was the direct result of injuries suffered in the January 2000 accident. Rather, he claimed all his disabilities stemmed from injuries suffered in the February 7, 2001, collisions. Mr. Claypoole called two of his closest friends, Sam Turner and Fred Wasilewski, to testify that he had made a full recovery after the January 2000 accident and suffered a significant decline in physical functioning after February 7, 2001. The trial court concluded that the letter from Mr. Havas to Mr. Alston's insurer could be used to impeach the testimony of Mr. Claypoole's friends that all his injuries stemmed from the February 7, 2001, accidents:

THE COURT: First of all, I would reserve ruling on the issue but I will allow counsel to cross examine the witnesses relative to the fact that in settlement of the prior accident which the jury has already heard about, that it was represented that certain things sought as a result of that accident. So you can cross examine the witnesses as far as that indication is made in the letter.

(R. 1621, p. 80-81).

The Utah Supreme Court has held:

“The admissibility of an item of evidence is a legal question.” *Jensen v. Intermountain Power Agency*, 1999 UT 10, ¶ 12, 977 P.2d 474. However, the trial court has a great deal of discretion in determining whether to admit or exclude evidence, and its ruling will not be overturned unless there is an abuse of discretion. *See id.* at ¶¶ 12, 14; *State v. Pena*, 869 P.2d 932, 938 (Utah 1994); *State v. Sutton*, 707 P.2d 681, 684 (Utah 1985).

Gorostieta v. Parkinson, 17 P.3d 1110, 1114 (Utah 2000). Stated differently, this court will not reverse the verdict unless the trial court’s decision to admit evidence “was beyond the limits of reasonability.” *Jensen v. IHC Hospital*, 82 P.3d 1076, 1089 (Utah 2003).

The trial court did not abuse its discretion by permitting the defense to cross-examine factual witnesses using the May 8, 2002, letter. Although no Utah appellate authority exists, case law from other jurisdictions universally holds that Rule 408 does not bar the admission of settlement-related information in cases unrelated to the claim being tried. For instance, the Tenth Circuit Court of Appeals has stated:

Rule 408 only bars admission of evidence relating to settlement discussions if that evidence is offered to prove “liability for or invalidity of the claim or its amount.” Here, the evidence related to an entirely different claim—the evidence was not admitted to prove the validity or amount of the “claim under negotiation.” *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 277 (8th Cir.1983); *see also* 2 Jack Weinstein & Margaret Berger, *Weinstein's Evidence* ¶ 408, at 408-32 to 33 (1991) (“Where the settlement negotiations and terms explain and are a part of another dispute they must often be admitted if the trier is to understand the

case.”). Thus, Rule 408 did not bar this evidence because it related to settlement discussions that involved a different claim than the one at issue in the current trial.

Broadcort Capital Corp. v. Summa Medical Corp., 972 F.2d 1183, 1194 (10th Cir.

1992). One federal district court has summarized the case law as follows:

Rule 408 forbids admission of evidence from compromises or compromise negotiations “to prove liability for or invalidity of *the claim* or its amount.” Fed.R.Evid. 408 (emphasis added). The Tenth Circuit has noted that “[r]ead literally, the rule does not appear to cover compromises and compromise offers that do not involve the dispute that is the subject of the suit, even if one of the parties to the suit was also a party to the compromise.” *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1363 (10th Cir.1987). Substantial authority supports Alberto's contention that Rule 408 only bars evidence of settlement negotiations to prove the validity or amount of the claim under negotiation. “Rule 408 does not require the exclusion of evidence regarding the settlement of a claim different from the one litigated.” *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 770 (10th Cir.1997); *see also Broadcort Capital Corp. v. Summa Med. Corp.*, 972 F.2d 1183, 1194 (10th Cir.1992). The Sixth Circuit Court of Appeals has explained that the “general principle” is that “Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, not some other claim.” *Uforma/Shelby Business Forms, Inc. v. NLRB*, 111 F.3d 1284, 1293-94 (6th Cir.1997) (*quoting* 23 Wright & Graham, Federal Practice & Procedure: Evidence § 5314 n.25). Notwithstanding Rule 408, settlement evidence regarding a claim or dispute different from the one being litigated has been held admissible in numerous other cases. *See Wyatt v. Security Inn Food & Beverage*, 819 F.2d 69, 71 (4th Cir.1987); *Vulcan Hart Corp. v. National Labor Relations Bd.*, 718 F.2d 269, 277 (8th Cir.1983); *Herman v. City of Allentown*, 985 F.Supp. 569, 577 (E.D.Pa.1997); *United States v. McCorkle*, 1994 WL 329679, at *2 (N.D.Ill. July 7, 1994) (“[]Rule 408 does not bar settlement information in one case from admissibility in another case.”).

Sunstar, Inc. v. Alberto-Culver Company, Inc., 2004 WL 1899927, *29 (N.D.Ill., August 23, 2004). *See, also, Dahlgren v. First Nat. Bank of Holdredge*, 553 P.3d 681, 699-700 (8th Cir. 2008). The trial court's ruling was consistent with this authority and did not constitute an "abuse of discretion."

Although Mr. Claypoole complains that the defense should not have been allowed to impeach Mr. Turner and Mr. Wasilewski using this information, he ignores the fact that the jury was going to hear the contents of the letter during the testimony of Dr. John Jurist, his biomechanical engineering expert witness. As set forth above, Mr. Claypoole provided the letter to Dr. Jurist for review in preparation of his expert conclusions and the trial court ruled that "[c]ertainly it will come in with Dr. Jurist but certainly any information relative to insurance has to be redacted." (R. 1621, p. 81).

Mr. Claypoole does not claim in his brief that the trial court erred in permitting the examination of Dr. Jurist with respect to this letter and, specifically, the paragraph attributing Mr. Claypoole's physical disabilities to his January 2000 accident. This is understandable because the law is abundantly clear that a party may examine an expert witness on any materials provided for his review and consideration. The Georgia Court of Appeals' decision in *Lewis v. Emory Univ.*, 509 S.E.2d 635 (Ga.Ct.App. 1999), is instructive. There, counsel for Emory University sent to

counsel for Mr. Lewis an information summary of the case. The memorandum included the notation:

“As we also discussed, this will confirm that this summary is being provided *only* for informational purposes, and should litigation ensue, it will *not* be used by either party for any purpose, whether as direct evidence, impeachment, for cross-examination, etc.”

Id. at 819. Emory University later provided the summary to its own expert who read the document. In holding that plaintiff’s counsel could properly cross-examine the expert regarding the summary, the Georgia Court of Appeals held:

“The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him.” And as the Supreme Court has written: “a party who relies upon a witness’ opinion may not withhold from the jury the facts that are relied upon in forming the opinion, [cits.]. Furthermore, a jury is entitled to know all of the facts upon which the witness’ opinion rests and the facts may be brought out on cross-examination. [Cits.]”

By giving the letter to its expert, Emory violated the agreement between the parties not to use it in the litigation. No valid ground is presented to show that it did not waive the agreement by so doing. Reliance on the report by Emory’s expert requires allowing Lewis to cross-examine Ornato using the letter. The deposition reveals that Emory’s argument that Lewis attempted to use the letter in a prejudicial manner is without merit.

Id. at 643-44. In *Ratliff v. Schiber Truck Co., Inc.*, 150 F.3d 949 (8th Cir. 1998), the decedent was killed in a collision with defendant’s truck. At trial, the defendant cross-examined plaintiff’s expert regarding the conclusions of the investigating

patrolman. In concluding the trial court did not err in permitting this examination, the Eighth Circuit Court of Appeals stated:

Appellants also assert as an additional basis for a new trial, that the district court erred in allowing counsel to cross-examine Mr. Oldham as to Sergeant Gray's report. Appellants argue that because Sergeant Gray did not testify at trial, discussion of the report he created was impermissible hearsay.

Generally, a trial court has broad discretion in the matter of regulating cross examination, and the exercise of such discretion will not be reversed absent an abuse of that discretion. *Palmer v. Krueger*, 897 F.2d 1529 (10th Cir.1990). Once expert testimony has been admitted, the rules of evidence then place “the full burden of exploration of facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination.” *Newell Puerto Rico, Ltd. v. Rubbermaid Inc.*, 20 F.3d 15, 20 (1st Cir.1994). It is thus the burden of opposing counsel to explore and expose any weaknesses in the underpinnings of the expert's opinion. *Id.* at 21 (citation omitted).

* * *

We believe that the district court did not err by permitting counsel to cross-examine Mr. Oldham concerning the report of Sergeant Gray. Mr. Oldham admitted that he had read the report prior to submitting his own report. Therefore counsel was free to cross-examine the expert as to all documents he reviewed in establishing his opinion.

Id. at 955. Similarly, in *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995), the family of a man who died from burns received when his boat exploded sued the boat's manufacturer. At trial, the defendant examined plaintiff's expert with the deposition of other non-testifying experts. In concluding this was appropriate, the Fourth Circuit Court of Appeals held:

We believe that the district court acted within its discretion in permitting such cross-examination of Halsey. Once Halsey testified that he had read and rejected the other experts' out-of-court opinions on the source of the fire, defendants were free to explore the basis for that disagreement and to attempt to discredit Halsey's conclusion.

Id. at 157. *See, also, Wipf v. Kowalski*, 519 F.3d 380, 386 (7th Cir. 2008)(“As a general rule, there is certainly nothing problematic about asking an expert about materials he has read that relate to an issue at trial.”); *In Re Michael D*, 713 N.E.2d 724 (Ill.Ct.App. 1999)(“Documents relied upon by a witness in preparing his or her testimony are appropriate materials for cross-examination.”)

In our case, Mr. Claypoole injected the settlement letter into the case by providing it to Dr. Jurist and asking him to consider and rely upon it in formulating his opinions. Having done so, Mr. Claypoole cannot complain when the defense used the letter to cross-examine Dr. Jurist on the grounds for his opinions.

The paragraph from Mr. Havas’ letter was properly admitted by the trial court. With respect to the impeachment of Mr. Turner and Mr. Wasilewski, it was properly admitted because the letter was not related to the present case and, therefore, Rule 408 does not apply. The letter was also properly admitted to impeach Dr. Jurist because he relied upon it in reaching his opinions. In neither case did the trial court abuse its considerable discretion in admitting the evidence.

The trial court's admission of this evidence should also be affirmed because Mr. Claypoole has not demonstrated that any alleged error was harmful. This court has held that "on appeal, the appellant has the burden of demonstrating an error was prejudicial-that there is a reasonable likelihood that the error affected the outcome of the proceedings." *Covey v. Covey*, 80 P.3d 553, 559 (Utah Ct. App. 2003). In making this determination, this court has held that it must examine the complete record:

We note that "[t]he determination of whether there is a reasonable likelihood of a more favorable outcome is based upon a review of the record." *Id.* at 1274. "This review requires the appellate court to determine from the record what evidence would have been before the jury absent the trial court's error." *Id.* "When evidence is erroneously admitted, it is possible for a reviewing court to excise the offending evidence and evaluate the remaining uncontested evidence so as to determine whether the properly admitted evidence is such that the prevailing party would have prevailed anyway." *Berrett v. Denver & Rio Grande W. R.R. Co.*, 830 P.2d 291, 297 n. 10 (Utah Ct.App.1992).

Glacier Land Co. v. Claudia Klawe & Assoc., Inc., 154 P.3d 852, 866 (Utah Ct. App. 2006).

Here, Mr. Claypoole has not attempted in his brief to demonstrate that any harm from this alleged error. His entire argument relating to Mr. Havas' letter consists of two and one-half pages and includes no discussion of how the jury would have reached a different result had the letter been excluded from evidence. This court has held that a "reviewing court is entitled to have the issues clearly defined with

pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.” *In Re Pahl*, 2007 UT App 389, ¶ 17, 174 P.3d 642, 647. Mr. Claypoole, by not including any argument showing that the alleged error was harmful, cannot meet the burden of proof and the trial court’s judgment should be affirmed.

Moreover, even if Mr. Claypoole wanted to show harmful error, he has not provided the complete record to this court and, therefore, could not bear his burden of showing that the alleged errors were harmful. As set forth in the Statement of Facts, the jury concluded that Mr. Claypoole did not suffer any injuries in the collision between Mr. Wood’s vehicle and Mr. Claypoole’s vehicle. The question is whether the exclusion of the evidence challenged by Mr. Claypoole would have altered that result.

In making this determination, this court has held that a review must be made of all evidence presented at trial. For instance, this court has held that “even where error is found, reversal is appropriate only in those cases where, *after review of all the evidence presented at trial*, it appears that ‘absent the error, there is a reasonable likelihood that a different result would have been reached.’” *Mule Hide Products v. White*, 40 P.3d 1155, (Utah Ct. App. 2002)(emphasis added). *See, also, Erickson v. Wasatch Manor, Inc.*, 802 P.2d 1323, 1325 (Utah Ct. App. 1990)(“A substantial right

of a party is affected if, *viewing the evidence as a whole*, there is a reasonable likelihood a different result would have been reached absent the error.”)(emphasis added); *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508, 511 (Utah Ct. App. 1990)(“[E]ven where error is found, reversal is appropriate only in those cases where, *after review of all of the evidence presented at trial*, it appears that ‘absent the error, there is a reasonable likelihood that a different result would have been reached.’”)(emphasis added).

Mr. Claypoole has not provided this court with “all of the evidence presented at trial.” Rather, he has supplied the trial testimony of only one (Mr. Claypoole) of the four witnesses to the accident. The testimony of the other witnesses, Michael Wood, Neil Skougard and John Fitzgerald, has not been provided. Mr. Claypoole has not provided the trial testimony of Dr. James Rees, the physician who treated him both before and after this accident, and Dr. Bryson Smith, another physician who was treating Mr. Claypoole for injuries suffered in the January 2000, accident and saw him after the accidents of February 7, 2001. Mr. Claypoole has not provided the testimony from Dr. Michael Flaningham, who first treated Mr. Claypoole in June 2003, when he moved to Sacramento, California. Nor has Mr. Claypoole provided the testimony of Dr. Joel Dall, the defense expert witness.

The only evidence Mr. Claypoole has provided relating to his medical condition is his own trial testimony and the testimony of Dr. Elvert Nelson, the surgeon who first treated Mr. Claypoole three and one-half years after the accident. The great weight of the testimony relating to the severity of the accident and Mr. Claypoole's treatment before and after the accident have not been provided by Mr. Claypoole.

Mr. Claypoole knew of his obligation to provide the entire trial transcript to this court. After Mr. Claypoole designated only a portion of the transcript, Winward Electric moved the trial court pursuant to Rule 11(e)(3) of the Utah Rules of Appellate Procedure to designate the remainder of the evidence at trial. (R. 1505). In response to this motion, Mr. Claypoole acknowledged that "[i]f the plaintiff has failed to designate a relevant part of the record to be transcribed then the plaintiff assumes the risk of that omission." (R. 1531-32).

In denying Winward Electric's motion, the trial court reminded Mr. Claypoole of the need to designate the entire trial testimony on appeal:

Under the law, it is appellant's burden to show on appeal that the court has committed error and that the error was prejudicial to the appellant. To show prejudice, the appellant must show from the entire record that there is a reasonable likelihood that the error affected the outcome of the proceeding. If the appellant cannot show that from the entire record then the appeal fails. The appellant suffers the consequence if the record is incomplete.

(R. 1614). Despite the clear authority from the court and the trial court's admonition that the entire record would be necessary, Mr. Claypoole has failed to include most of the trial testimony. Therefore, it is impossible to determine whether the omission of the evidence claimed to have been erroneously admitted would have changed the outcome at trial. Mr. Claypoole tacitly admits this by failing to even argue the admission was harmful.

Based upon Mr. Claypoole's failure to make any argument that the admission of the May 8, 2002, letter was harmful and his failure to supply the complete record to this court, the trial court's verdict should be affirmed.

III.

THE TRIAL COURT DID NOT ERR WITH RESPECT TO THE SPECIAL VERDICT

Mr. Claypoole contends the special verdict completed by the jury was confusing because it used the terms "preponderance of the evidence" in the introductory paragraph of the form. The special verdict provided as follows:

MEMBERS OF THE JURY:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "Yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No." Also, any damages assessed must be proven by a preponderance of the evidence.

(R. 1417). Mr. Claypoole contends that the phrase “more likely than not” was more clear and should have been used. During the jury instruction conference, the law clerk for Mr. Claypoole’s counsel expressed the following “question”:

MR. WILDING: My only other question was, on the initial paragraph on the jury verdict form it’s talking about if something preponderates or not and there’s also language in one of the jury instructions before where it talks about more likely than not and I know if I gave it to my wife, she’d give it back to me. She wouldn’t know what it meant.

(R. 1621, p. 517).

The Utah Supreme Court has discussed the necessity of a proper and timely objection as follows:

“[I]n order to preserve an issue for appeal [,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968 (citing *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998)). This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. *Badger*, 966 P.2d at 847. For a trial court to be afforded an opportunity to correct the error “(1) the issue must be raised in a timely fashion[,], (2) the issue must be specifically raised[,], and (3) the challenging party must introduce supporting evidence or relevant legal authority.” *Brookside*, 2002 UT 48 at ¶ 14, 48 P.3d 968 (quoting *Badger*, 966 P.2d at 847).

438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801.

Here, we have a number of concerns with the preservation of this issue for appeal. First, we note that at the time of this trial, Mr. Wilding was not licensed to

practice law in Utah, but rather was serving as Mr. Havas' law clerk. We question whether an objection made by a law clerk, without being ratified or affirmed by counsel for the party, is sufficient to preserve the objection for appeal. Our research has located no case law in Utah or any other jurisdiction resolving the issue. We do believe, however, that the failure of Mr. Claypoole's counsel to share the concerns raised by Mr. Wilding likely persuaded the trial court to conclude there was no formal "objection" requiring either a ruling or a more detailed consideration of the issue.

Second, we note that Mr. Wilding's comments are not couched as an objection. Rather, he raised a "question" without offering a legal analysis of the issue or an alternative which could be used to alleviate the alleged problem with the language used in the special verdict. Indeed, while in his brief Mr. Claypoole focuses on the need for "plain language" and contends that the special verdict was "confusing," neither of these points were specifically raised in Mr. Wilding's comments on the special verdict. In expressing the concern that his wife would "give it back to me," Mr. Wilding does not indicate whether he believes the special verdict is confusing standing alone, in conjunction with the instructions, or that the instructions conflict with the special verdict. While Mr. Wilding may "question" the special verdict, Mr. Claypoole never presented an alternative or requested that the trial court rule on a specific issue.

Turning to the merits of the special verdict, this Court has held that “[i]n the absence of the appearance of something persuasive to the contrary, we assume that the jurors were conscientious in performing to their duty, and that they followed the instructions of the court.’ *State v. Hodges*, 30 Utah 2d 367, 517 P.2d 1322, 1324 (1974).” *State v. Burk*, 839 P.2d 880, 883 (Utah Ct. App. 1992). Here, as set forth below, the trial court twice instructed the jury that the phrase “preponderance of the evidence” meant “enough evidence to convince you that is *more likely than not* that the facts are as he claims.” (R. 1621, p. 51, R. 1623, p. 525). Thus, we must presume that if the jury was confused as to the phrase “preponderance of the evidence” in the introductory paragraph of the special verdict, it would have referred back to the instructions and discovered its legal meaning.

Indeed, the failure to use preponderance of the evidence in the special verdict would have resulted in even more confusion for the jury since the burden was explained in those terms from the outset of trial. At the close of voir dire, Mr. Claypoole’s counsel asked the trial court to explain to the jury the meaning of the phrase “preponderance of the evidence:”

THE COURT: Counsel have asked that I just take a moment with you, ladies and gentlemen, and I’ll explain this in more detail as we go through the trial for those who are selected but you need to understand that as Ms. Thompson has indicated, there are really two types of cases that we handle. One is a criminal case and one is a civil case. This is a

civil case. In criminal cases the burden of proof, that means that any proof, any evidence in the case has to be proved beyond a reasonable doubt. In civil cases the standard is the preponderance of the evidence, that is what weighs the most. In this kind of case we're talking about preponderance of the evidence and we'll talk about that later on as we instruct in the law that applies to the case. You need to understand that this is the kind of case that the burden of proof is that of a preponderance of the evidence; that is, what evidence is most believable, more believable, not beyond a reasonable doubt. So with that, do you all of you understand that to be the standard in this particular case? Would any of you have any difficulty applying that standard to this case?

(R. 1621, pp. 37-38). Apparently wishing further satisfaction that the jury was aware of the meaning of preponderance of the evidence, Mr. Claypoole's counsel immediately asked:

Mr. Havas, other questions you wish to ask?

MR. HAVAS: Yes, Your Honor, just following up on that, on the preponderance, some people think preponderance essentially is we, the plaintiff, Mr. Claypoole, has just a little bit of a burden to show that the burden that we're going to show you, that we're a little bit more right than wrong. Some people disagree with that, think that's unfair to the defense that we only have to show a little bit more right than wrong. Is there anyone of you that is in a camp where the people feel that that is not fair? Or on the other hand, is there anyone that feels that that is fair burden for us to only have to prove a little bit more right than wrong?

(R. 1621, p. 38). After the jury was impaneled, the trial court provided introductory instructions, without objection from Mr. Claypoole, regarding "preponderance of the evidence":

In a civil case, the plaintiff has the burden of proving his claims by a preponderance of the evidence. That means that he must present enough

evidence to convince you that is more likely than not that the facts are as he claims. I will instruct you about the burden of proof again at the conclusion of the case.

(R. 1621, p. 51). True to its word, the trial court instructed the jury as follow at the close of evidence, again without objection from Mr. Claypoole:

When I tell you that a party has the burden of proof or that a party must prove something or a preponderance of the evidence I mean that the party must persuade you by the evidence presented in court that the fact is more likely to be true than not true. You may have heard that in a criminal case proof must be beyond a reasonable doubt but I emphasize to you that this is not a criminal case. In a civil case such as this one, a different level of proof applies, proof by a preponderance of the evidence. Another way of saying this is proof by greater weight of evidence, however slight. Weighing the evidence does not mean counting the number of witnesses nor the amount of testimony. Rather, it means evaluating the persuasive character of the evidence. In weighing the evidence you should consider all of the evidence that applies to a fact no matter which party has presented it. The weight to be given to each piece of evidence is for you to decide.

After weighing all the evidence, if you decide that a fact is more likely true than not, then you must find that that fact has been proved. On the other hand, if you decide that the evidence regarding a fact is evenly balanced then you must find that the fact has not been proved and the party has therefore failed to meet its burden of proof to establish that fact.

(R. 1623, p. 525). Based upon this record, it would have been far more confusing to substitute “more likely than not” for “preponderance of the evidence” when Mr. Havas’ remarks and all the trial court’s instructions were couched in the latter terms.

(R. 1623, p. 525). Based upon this record, it would have been far more confusing to substitute “more likely than not” for “preponderance of the evidence” when Mr. Havas’ remarks and all the trial court’s instructions were couched in the latter terms.

CONCLUSION

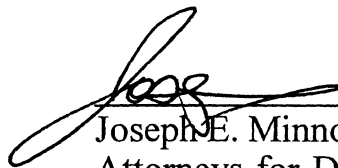
Based upon the foregoing, Michael Wood and Winward Electric respectfully request that the trial court’s judgment be affirmed.

STATEMENT REGARDING ADDENDUM

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, no addendum is necessary as all rulings and controlling statutory citations are set forth verbatim in the brief.

DATED this 15th day of September, 2009.

MORGAN, MINNOCK, RICE & JAMES

A handwritten signature in black ink, appearing to read "Joe Minnock", is written over a horizontal line.

Joseph E. Minnock
Attorneys for Defendants Winward Electric
Service, Inc., and Michael Wood

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of September, 2009, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEES** to be mailed via first-class mail to the following:

David Bert Havas
533 26th Street, Suite 100
Ogden, UT 84401

A handwritten signature in cursive script, reading "Stephanie Anderson", is written over a horizontal line.