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Karen Hillier v. William J. Lamborn : Brief in Opposition to Certiorari

Utah Supreme Court

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DOCKET NO. 870370

IN THE SUPREME COURT OF THE STATE OF UTAH

KAREN HILLIER, :

Plaintiff-Respondent, :

vs. : Certiorari Docket No. 870370

WILLIAM J. LAMBORN, :

Defendant-Appellant. :

BRIEF IN OPPOSITION TO APPELLANT'S
PETITION FOR WRIT OF CERTIORARI

Appellant Lamborn's Petition for Writ of
Certiorari of the Opinion of the Utah Court
of Appeals rendered on August 5, 1987, Rehearing
denied on August 25, 1987.

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QUESTIONS PRESENTED FOR REVIEW

1. Does the decision of the Court of Appeals, (a) that the trial court did not err in refusing to allow evidence concerning plaintiff's failure to wear a seat belt and (b) that the trial court did not abuse its discretion in failing to grant a new trial due to juror use of a dictionary relative to the word "proximate" conflict with a decision of this Court, as required by Rule 43(2) of the Rules of the Utah Supreme Court in order to grant a writ of certiorari.

2. Did the Court of Appeals, (a) in excluding evidence of plaintiffs failure to wear a seat belt and (b) in ruling on juror use of a dictionary relative to the word "proximate" decide an important question of state law which has not been but should be settled by this Court, as required by Rule 43(4) of the Rules of the Utah Supreme Court in order to grant a Writ of Certiorari.

OPINION OF THE COURT OF APPEALS

In Hillier v. Lamborn, 63 Utah Adv. Rep 17 (Ct. App. 8/5/87) 740 P.2d 300 (Utah App. 1987), a copy of which is attached as Exhibit A, the Court of Appeals unaminously held that the trial court did not err 1) in refusing to allow evidence concerning plaintiff's failure to wear a seat belt; 2) in failing to grant a new trial due to a juror's use of a dictionary relative to the word "proximate".

STATEMENT OF GROUNDS FOR JURISDICTION

The defendant's brief in this regard is correct with the following exceptions: a) the Order denying defendant's Petition for Rehearing was dated August 25, 1987, not August 26, 1987 and the Petition for Rehearing was filed by defendant on October 12, 1987, (although apparently docketed on October 9, 1987) and was hand delivered to plaintiff's counsel on October 13, 1987. Based thereon, it may be questionable as to whether defendant has properly complied with the jurisdiction requirements.

STATEMENT OF THE CASE

Plaintiff Karen Hillier brought this negligence action against defendant William J. Lamborn to recover damages for personal injuries sustained in an automobile collision, on or about 11/13/82, near Centerville, Davis County, Utah. The action was tried in the district court to a jury, Honorable Douglas L. Cornaby presiding, on March 2, 5 and 7, 1984. On 3/7/84, the jury returned its special verdict finding defendant 80% and plaintiff 20% negligent in proximately causing the collision. R. 115-117. The jury further determined the total dollar amount of general and special damages sustained by plaintiff as a direct result of the accident was \$272,943.38. Id. After adjustments not relevant to defendant's appeal and reduction for plaintiff's comparative fault, judgment was finally entered against defendant, on or about 3/27/84, in the total amount of \$221,209.41 R. 327-330. On 4/17/84, defendant filed his motion for new trial, or alternatively, for remittitur. R. 367-401. The grounds upon which the motion was based, were virtually

identical to those raised in his brief on appeal. On 4/17/84, following a hearing, the district court denied defendant's motion on each of the grounds asserted. (Exhibit D.) On 5/15/84, defendant filed his notice of appeal. This Court, however, subsequently dismissed the appeal on jurisdictional grounds, although it was later reinstated upon rehearing.

This case was assigned to the Court of appeals which rendered its opinion on 8/5/87, affirming the decision of the trial court and the jury verdict. On 8/25/87, the Court of Appeals denied defendant's Petition for Rehearing. (Exhibit B) Thereafter, on 10/9/87, the Court of Appeals issued a Remittitur, (Exhibit C) and on 10/12/87, defendant filed his Petition for a Writ of Certiorari.

STATEMENT OF FACTS

The facts supported by the record, and undisputed which are relevant to the issues presented for review are as follows:

1. On 11/13/82, at about 8:30 a.m., plaintiff was driving her 1978 Chevrolet south on the frontage road east of I-15 between Farmington and Centerville, at about 45 m.p.h. in a 50 m.p.h. zone (Tr.172-177), when defendnat, who was road hunting for pheasants (Tr.192-193, 208, 377), while driving his 1974 Ford pickup truck south at about 10-12 m.p.h. on the same road entirely on the shoulder of the road completely to the right of the fog line painted on the asphalt (Tr.175-176), when suddenly and without warning or signal, defendant steered his truck into plaintiff's lane directly in front of her, when she was within 4-5 car lengths of passing him (Tr.175-178), which according to

plaintiff's expert witnesses, Frank Grant and David Stephens, did not give plaintiff time to take evasive action to avoid a collision. (Tr.247-248, 301-302) If defendant did not pull in front of plaintiff, she had plenty of room to pass in her own lane without any need to steer her car to the left into the northbound lane of traffic. (Tr.175-176, 185-186)

2. As a result of the impact, plaintiff's car spun around and then rolled over, coming to rest upside down. (Tr.204-205, 351-352) Plaintiff was thrown from the vehicle onto the highway. As a result of the accident, plaintiff suffered serious and permanent injuries and damages. (Tr.33-42, 51-52, 68-72, 83-89, 133-171, 408-420) In ruling on defendant's motion for a new trial or in the alternative a remittitur, the court stated that

"the jury certainly found damages that were within reason of the testimony that was given. They could well have found more than they did and still been within reason. So there is no grounds for the court to grant a remittitur on that." (Exhibit D). Even defendant's counsel admitted in opening statement that plaintiff had been "badly injured in the automobile accident," "no doubt about it." (Tr.24)

3. Defendant did not affirmatively plead the seat belt defense in his answer to plaintiff's complaint.

4. Defendant did not raise the seat belt defense as an issue at the pretrial hearing or in the Pretrial Order. Nothing is mentioned about seat belts or mitigation of damages under "Defendant's Claims," "Contested Issues of Fact" or "Contested Issues of Law." A copy of the Judge's notes at the pretrial

hearing and the Pretrial Order are attached as Exhibits E and F respectively.

5. Defendant raised the seat belt issue for the first time on the second day of trial.

6. Defendant, not plaintiff, first broached the seat belt issue at trial. In defendant's cross-examination of Dr. Robert Jordan, an orthopedic surgeon who treated plaintiff at the emergency room, his counsel qualified the witness as an expert in trauma medicine and asked him, over plaintiff's objection, several questions relating to his opinion whether plaintiff sustained her orthopedic injuries inside her car or outside of it during the rollover. (Tr.74-78) The obvious intent of that line of questioning, of course, was to sensitize the jury to the fact plaintiff was not wearing her seat belt and to force them to consider that some of plaintiff's injuries would not have been sustained but for her failure in that regard.

7. During plaintiff's testimony, her counsel asked her whether her car was equipped with a seat belt and if so, whether she was wearing it at the time of the collision. (Tr.175) Defendant's counsel did not object to these questions on any basis, including any alleged violation of the pretrial order. There is no order in the record, pretrial or otherwise, which prohibits plaintiff from testifying that she was not wearing her seat belt. Later, after the parties had argued their respective positions to the Court on the seat belt defense, and following the court's ruling, defendant's counsel for the first time urged the court to

reconsider its ruling on the basis plaintiff had opened the door to seat belt evidence in her testimony. Specifically, the record discloses:

MR. MOHRMAN: Your honor, if it may please the Court, I forgot to mention one issue that I think I need to get on the record, if you don't mind.

THE COURT: Yes. Go ahead.

MR. MORHMAN: It's also our position that the plaintiff's attorney raised the issue of seat belts in their questioning in their case in chief and, therefore, they are precluded from arguing against us with regard to proper proof on that issue. (Tr.281-282)

8. There is no jury instruction in the record proposed by defendant on the seat belt issue, other than one which simply raises the issue as one of defendant's claims. Tr.173. Defendant's counsel did request "a jury instruction" on the seat belt defense orally one time before the jury retired. Tr.280. No written instruction, however, was submitted.

9. After the jurors retired, one of their number apparently requested the bailiff to supply them with a dictionary. The only evidence in the record which details what the bailiff did in response to the request, and what the jurors did as a result, is set forth in the affidavits of two jurors, to wit, the foreperson of the jury, Kathy O. Davis, who stated that the "extraneous information received provided no new information to the jury," and Frank Arnold, who was the only juror who disagreed with the jury's determination on the issue of comparative fault and its award of general damages. (Tr.614-615) The record does not contain the actual definition of "proximate" the jury read nor does it identify the dictionary used.

10. In any event, the district court's first instruction to the jury admonished jurors as follows:

"it is your duty . . . to follow the law as the Court states it to you, regardless of what you personally believe the law is or ought to be." . . . "[t]he authority thus vested in you is not an arbitrary power, but must be exercised . . . in accordance with rules of law stated to you." (Tr.235)

There is no evidence any juror violated his or her oath to do just that. In the courts eleventh instruction (Exhibit G) the jury was advised as to proximate cause as follows:

"The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred. It is the efficient cause - the one that necessarily sets in operation the factors that accomplish the injury.

ARGUMENT

POINT I

THE DECISION OF THE COURT OF APPEALS THAT THE TRIAL COURT DID NOT ERR IN REFUSING IT TO ALLOW EVIDENCE CONCERNING PLAINTIFF'S FAILURE TO WEAR A SEAT BELT DOES NOT CONFLICT WITH A DECISION OF THIS COURT AS REQUIRED BY RULE 43(2) AND DOES NOT INVOLVE AN IMPORTANT QUESTION OF STATE LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT AS REQUIRED BY RULE 43(4).

Defendant's argument that the Court of Appeals decision is in conflict with Acculog, Inc. v. Peterson, 692 P.2d 728 (Utah 1984) or with § 78-27-37 (1953 as amended) is without merit. Acculog was not a seat belt case. In Acculog, the Supreme Court held that

"where it was found that van had been negligently serviced and that such negligence was proximate cause of fire and damage sustained, plaintiffs' failure to carry fire extinguisher in van was not contributing factor in causing injury, and trial court erred in submitting to jury question of plaintiffs' comparative negligence."

Id. at 728. (Emphasis added.)

The majority opinion analyzed the law in this area as follows:

"A plaintiff cannot be held to be contributorily negligent unless his negligence is causally connected to the plaintiff's injury."

* * *

In other words, where plaintiff's negligent conduct was a contributing factor in causing the injury, comparative negligence becomes a defense for the defendant."

* * *

"We are not concerned in comparative negligence law with the cause of the damage, but with the cause of the injury instead.

The "injury" is sometimes used in the sense of "damage," as including the harm or loss of which compensation is sought, and has been defined as damage resulting from an unlawful act; but in strict legal significance, there is, properly speaking, a material distinction between the two terms in that injury means something done against the right of the party, producing damage, whereas damage is the harm, detriment, or loss sustained by reason of the injury. Clark v. Cassetty, 71 N.M. 89, 376 P.2d 37 (1962). Id. at 730. (Emphasis added.)

(New Mexico rejected the so called seat belt defense in Thomas v. Henson, 102 N.M. 326, 695 P.2d 476 (1985).)

Given the manner in which the court applied the foregoing rule to the facts in Acculog, supra, it stands to reason that unless a plaintiff's failure to wear a seat belt in a case like the present one proximately causes injury (the accident which produced her damages), all evidence with respect thereto should be excluded from the liability determination. In the case at bar, plaintiff's failure to wear a seat belt did not contribute in causing the injury, i.e., the accident.

It should be noted that the majority opinion was written by Justice Howe with Justices Hall and Durham concurring

in the majority opinion and Justice Stewart concurring in the result. Justice Oaks, the only one of the five Justices no longer on the bench, wrote a separate concurring opinion, not concurred in by the other Justices and thus Justice Oaks concurring opinion is simply dicta and not the law of the state of Utah.

In the majority opinion, the court stated as follows:

"The trial court expressed the opinion that there might be a question of mitigation of damages, but that issue is not before us and we decline to address it." Id. at 731. (Emphasis added.)

Since the Supreme Court did not even address the mitigation of damages issue or seat belt defense in the majority opinion in Acculog, supra, there is no way that the decision of the Court of Appeals in the subject case to affirming the trial court's decision to exclude evidence of plaintiff's failure to wear a seat belt (a mitigation of damages sort of defense) could be in conflict with a prior decision of the Supreme Court as required by Rule 43(2) of the Rules of the Utah Supreme Court.

In the subject case, the Court of Appeals held:

"The majority of other jurisdictions have held that evidence of nonuse of seat belt on the issue of mitigation of damages is inadmissible. (cases omitted) We agree with the rationale of those cases and hold similarly that seat belt evidence is inadmissible in this case which arose prior to the inactment of the present Utah Statute." (Exhibit A)

By judicial decision, at least 20 states, have rejected the so-called seat belt defense, including virtually all the Intermountain states (Arizona, Colorado, Idaho, Montana, New Mexico, Oklahoma, Washington and Oregon.) Additionally there are

many states which have abolished the seat belt defense by statute. Only three states have adopted it. (Florida, New York and Wisconsin). The sheer magnitude of the majority is overwhelming. See pages 53-55 of plaintiff's original brief for the case citations and an in depth analysis of the cases which discloses that the cases cited by defendant on pages 10 and 11 of his brief do not stand for the proposition advanced either because 1) they have little or nothing to do with the seat belt defense 2) they are federal cases attempting to predict state law which subsequently proved inaccurate 3) they are appellate cases subsequently overruled by a higher court or 4) the statements in the cases with respect to the seat belt defense are dicta.

The reasons most often found in the cases rejecting the seat belt defense are as follows:

1. As to why they refuse to allow it on issue of comparative negligence, the court's reason: (a) Plaintiff has no statutory or common law duty to wear a seat belt; (b) the failure to wear a seat belt is rarely a proximate cause of a accident; (c) seat belts are not widely used by the public (75% of motorists don't wear them); (d) it is for the legislature to decide, not the courts.

2. As to why they refuse to allow it on the issue of mitigation of damages, the court's reason (a) the duty to mitigate arises after plaintiff has been injured, not before; (b) plaintiff has no duty to anticipate defendant's negligence; (c) defendant would be allowed a windfall by dodging a substantial portion of his liability; and (d) trial complication and jury

confusion--battle of experts, crash helmets, armoured cars, air bags, etc.

At the time of this accident, 11/13/82, Utah had no statute mandating the wearing of seat belts for drivers of motor vehicles. Since this accident, and during the pendency of this appeal, the Utah Legislature enacted in 1986 the "Motor Vehicle Seat Belt Usage Act," Utah Code Ann. §§ 41-6-181 et seq. (1952 and 1986 Supp.). Section 41-6-186 of that act states as follows:

The failure to wear a seat belt does not constitute contributory or comparative negligence, and may not be introduced as evidence in any civil litigation on the issue of injuries or on the issue of mitigation of damages.

Thus, since the Utah legislature has already settled this question on matters arising after the effective date of the statute, there does not exist "an important question of state law which has not been but should be settled by this court" as required by Rule 43(4) of the Rule of the Utah Supreme Court.

This recent legislation is significant for the following additional reasons:

(1) It clearly demonstrates the legislative policy of the State of Utah is not to allow the failure to use seat belts as a factor in determining fault or damages in civil litigation. It does this even in the face of other provisions of the same act which make seat belt usage mandatory. In light of the policy of Utah's seat belt law, it is difficult to comprehend the logic, equity or fairness that would allow the failure to use seat belts

as a factor in determining fault or damage prior to the existence of any such statutory duty;

(2) The prohibition against using evidence of the failure to use seat belts in civil litigation is wholly inconsistent with the position taken by plaintiff as to the common law of the State of Utah at the time this matter went to trial; and

(3) The prohibition against using evidence of failure to use seat belts codified by the Utah State Legislature is strong reason to sustain the decision of the trial court below which, like the legislature, determined that such evidence was inadmissible, especially where there was no statutory duty to wear seat belts at the time of the accident.

In Thomas v. Henson, 102 N.M. 326, 695 P.2d 476 (1985), the New Mexico Supreme Court held as follows:

. . . We believe that the creation of a "seat belt defense" is a matter for the legislature, not for the judiciary.

Thomas, 695 P.2d at 477.

The above holding in Thomas, provides a strong basis for courts to refrain from judicially creating a "seat belt defense," especially where in this case it would have no prospective application now that the Utah Legislature has spoken on this issue.

The Illinois Supreme Court recently found itself in an analogous position. In Clarkson v. Wright, 108 Ill.2d 129, 90 Ill.Dec. 950, 483 N.E.2d 268 (1985), the Illinois Supreme Court addressed the issue of the existence of a "seat belt defense" where the Illinois Legislature, like the Utah Legisla-

ture, had enacted legislation (while the Clarkson case was on appeal) making the use of seat belts mandatory but prohibiting the admission of evidence of failure to use seat belts in civil litigation. The Court overruled several Illinois' appellate level decisions holding that such evidence was admissable. It is significant to note that five of these Illinois Appellate Court decisions were relied on by defendant in this case at pages 25 and 26 of defendant's original brief. Prior to addressing the effect of the Illinois' seat belt legislation passed during the pendency of the Clarkson appeal, the Illinois Supreme Court justified its rejection of the appellate court's decision stating:

We agree with the majority view that failure to use a seat belt was not negligence or contributory negligence which caused the accident out of which plaintiff's injuries arose. At most, the failure to use a seat belt created a condition which possibility may have increased the severity of plaintiff's injuries. (Emphasis added.)

Clarkson, N.E.2d at 269.

The Illinois court went on to explain that:

Once plaintiff suffered an injury, there was, of course, a duty to mitigate the damages in any reasonable way possible. That duty to mitigate damages which arose subsequent to the injury, is, however, clearly distinguishable from any duty which existed prior to the injury here; there was no statutory duty to wear a seat belt and the presence of the seat belt in the automobile did not create the duty to wear it any more than would the presence in the automobile of a protective helmet create a duty to wear that. We find no authority which imposed on plaintiff the duty to anticipate and guard against defendant's negligence. We conclude that the rule followed in the majority of jurisdictions which have considered the question [citations omitted] that evidence of failure to wear a seat belt should not be admitted with respect to either the question of liability or damages is a sound one which should be followed in this jurisdiction.

Clarkson, 483 N.E.2d at 270. (Emphasis added.)

In concluding its decision, the Clarkson court noted that its decision was in full accord with the enactment by the Illinois Legislature of the provision prohibiting the introduction of failure to use seat belts into evidence in civil litigation.

It would be gross error to reject the authority of the overwhelming majority of jurisdictions in this country, including virtually all of the Intermountain and western states, by adopting a rule of law, i.e., the seat belt defense, fraught with unfairness, injustice and significant policy and practical problems, particularly where, as in this case, the defense (a) was not pled; (b) was not framed in the pretrial order; (c) was not embodied in any proposed instruction of defendant; and (d) otherwise was raised for the first time, according to the record, on the second day of trial. Based on the facts in the subject case, defendant would have been precluded from using the seat belt defense even in Florida, a jurisdiction that allows the defense under proper circumstances. In Protective Casualty Insurance Co. v. Killane, 459 So.2d 1037 (Fla 1984), where the defendant (1) did not mention the seat belt defense in his Answer; (2) did not list it in the Pretrial Order; and (3) did not mention it until the 1st day of trial, the court held defendant could not present evidence of plaintiff's failure to wear a seat belt for consideration in assessing plaintiff's damages.

In the subject case, defendant argues that plaintiff's counsel opened the door to such evidence by asking plaintiff if the

her car had seat belts and if she was wearing it at the time of accident. Defendant's position is without merit for three reasons:

(1) It is a well-recognized rule in this state that, "[c]urative admissibility of evidence is a matter within the discretion of the trial court, and we will not reverse that decision absent an abuse of discretion." Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832 at 840; see also, Leger Construction Co. Inc. v. Roberts, Inc., 550 P.2d 212, 214 (Utah 1977).

(2) The record reflects that defendant did not object on the ground of curative admissibility of the seat belt evidence at or before the time the district court made its ruling. (Tr.175) His first objection on that ground, according to the record, was some time after the court had already ruled. (Tr.281-282) As a result, he was precluded from raising the issue on appeal by the clear mandate of Rule 46, U.R.Civ.P. which provides

"[i]t is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and his grounds therefor". . . (The) burden is always on the party objecting to make certain that the record adequately preserves an objection or argument for review in the event of an appeal." (Emphasis added)

(3) Defendant cites no cases in which this Court reversed the district court's determination on curative evidence under circumstances similar to those of the present case. His failure to do so suggests the deference this Court gives to the district court on the issue of curative admissibility. In this case, even assuming arguendo that plaintiff is responsible for opening the door on the issue, which plaintiff denies, the district court's refusal to grant defendant a new trial on this point was not an abuse of discretion for several reasons. Plaintiff only opened the door to the very limited issue of whether she was wearing a

seat belt at the time of the accident. To open the door to that issue is not the same as opening the door to the issues of the legal effect of her failure to wear her seat belt or the causal connection between such failure and some or all of the injuries she sustained. Moreover, even a perfunctory review of the record on the issue clearly indicates plaintiff's counsel only asked the questions in response to defendant's inference on cross examination of Dr. Jordan that she was not wearing a seat belt (Tr.74-78), to show plaintiff had nothing to hide and for the purpose of accurately describing the accident scenario and the mechanics of the injury for the jury. In Nash v. Kamrath, 521 P.2d 161 (Ariz 1974), although the court refused to recognize "that failure to use a seat belt constituted a viable defense," it did affirm the trial court's admission of whether or not plaintiff was "using a seat belt" to show "the mechanics of the injury" and "the circumstances surrounding" the accident. Id. 521 P.2d at 164.

POINT II

THE DECISION OF THE COURT OF APPEALS THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO GRANT A NEW TRIAL DUE TO JUROR USE OF A DICTIONARY RELATIVE TO THE WORD "PROXIMATE" DOES NOT CONFLICT WITH A DECISION OF THIS COURT AS REQUIRED BY RULE 43(2) AND DOES NOT INVOLVE AN IMPORTANT QUESTION OF STATE LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT AS REQUIRED BY RULE 43(4)

In the subject case, the Court of Appeals held:

In this case, the record does not contain the actual definition of "proximate" the jury read nor identify the dictionary used. Without that definition we cannot compare the legal definition of "proximate cause" with the definition of "proximate" examined by the jury. In the absence of that crucial information, we do not find

any basis for finding that substantial rights of defendant were prejudiced by the juror's reference to the dictionary." (Exhibit A)

There is no indication in the record the jury was influenced by the dictionary definition of "proximate" in their deliberations or that their verdict would have been any different but for the definition. There was no prejudice to the defendant by reason of the juror's use of the dictionary. The definition of words in our standard dictionaries is taken as a matter of common knowledge which a juror is supposed to possess. 54 ALR 2d 738, superceded by 31 ALR 4th 623 (1984). Whatever any individual juror may have understood "proximate" to mean it was applied equally to plaintiff and defendant. All jurors agreed unanimously to Questions 1-4 on the Special Verdict concerning negligence and proximate cause.

It should be noted, however, that the critical issue in the subject case was negligence and not proximate cause. There is no record that defendant ever argued proximate cause to the jury. The final arguments were recorded but not transcribed (at the request of defendant's counsel) even though the Designation of Record filed by defendant's counsel ordered the entire transcript to the trial.

In Pulkrabek v. Lampe, 293 P.2d 998 (Kan 1956) where the instruction on proximate cause is extremely similar to the one given in this case, the court held as follows:

Upon careful analysis of the heretofore quoted dictionary definition of the word "proximate" and the trial court's instruction regarding "proximate cause" we find nothing in the term "proximate," as defined, which can

be regarded as inconsistent with the concept of "proximate cause" as set forth in the instructions. It follows we would not be warranted in holding that in and of itself the mere fact the jury read such definition is sufficient to make it affirmatively appear the substantial rights of the appellant were prejudiced by that action. (Emphasis added.)

The court in Pulkrabek rejected plaintiff's contention the jury "might have been influenced" by the dictionary definition, noting that such a showing,

"in our opinion, is not sufficient to comply with the established rule of this jurisdiction that a judgment will not be reversed unless it affirmatively appears the substantial rights of the parties complaining have been prejudiced thereby."

* * *

From the record presented it appears that the trial court, which we pause to note was in much better position to pass on the situation than this court, was convinced that the misconduct of the jury was not such that prejudice therefrom resulted against the appellant. . . [T]his court has always held that an order allowing or denying a motion for a new trial will not be reversed unless abuse of discretion by the trial court is apparent.

Rule 61 of the Utah Rules of Civil Procedure provides that "harmless error" is not a ground for granting a new trial unless it affects "the substantial rights of the parties." The rule concerning use of dictionaries followed by most courts has been stated in an annotation at 31 ALR 4th 623, 627 (1984) as follows:

"Courts appear willing to dismiss a jury's consultation of dictionaries or encyclopedias as harmless error . . . " (Emphasis added.)

In the subject case, it was harmless error; it was not prejudicial; it did not affect the substantial rights of the parties; and it did not prevent either party from having a fair trial.

Judge Cornaby, in ruling on defendant's Motion for a New Trial in the subject case, held as follows concerning the juror's use of the dictionary:

"It was improper, of course, for the bailiff to give the jury the dictionary, even though--and the court recognizes that that is juror misconduct. The court had given a definition of "proximate cause" to the jury, and my guess is, if they had read it carefully they would have probably known what "proximate" meant.

I still have to ask myself the question whether there was a reasonable possibility of prejudice on the part of the jurors by having that dictionary definition of "proximate," and since they already had the definition of "proximate cause" by the court, the court does not believe it falls in that category.

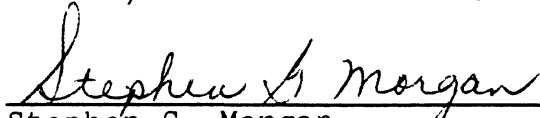
And so, it's not a basis for the court granting a new trial on that basis." (Emphasis added.) (See Exhibit A.)

CONCLUSION

Plaintiff respectfully submits that the decision of the Court of Appeals is correct, and since it is not in conflict with any decision of this Court and does not involve important questions of state law that should be settled by this court, this court should deny defendant's Petition for a Writ of Certiorari. Plaintiff has now waited almost 4 years since the jury awarded her what they and the court determined to be fair and just compensation for her injuries. Plaintiff is naturally frustrated with the appellate process which has taken so long, and now respectfully requests that this matter be brought to an end by this court denying defendant's Petition for a Writ of Certiorari so that justice can be done and plaintiff can finally receive what she was awarded almost 4 years ago.

DATED this 9th day of November, 1987.

MORGAN, SCALLEY & READING


Stephen G. Morgan
Attorney for Plaintiff-
Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing instrument to be hand delivered on the 9th day of November, 1987, to Gary B. Ferguson and Michael K. Mohrman, SCB Tower, Suite 700, 50 South Main Street, Salt Lake City, Utah 84110.

Stephen S Morgan

ADDENDUM

EXHIBIT "A" Hillier v. Lamborn, 740 P.2d 300
(Utah App. 1987)

there is no significant justification for the state to intervene and speedily terminate the unwed father's constitutionally protected parental rights. Since Utah Code Ann. § 78-30-4(3)(c) does not apply in this situation, we need not reach the due process question nor invoke the equitable powers of the court.

My colleagues are concerned that this result leaves no way to extinguish the putative father's parental rights in stepfather adoptions. I believe their rationale is contrary to the underlying legislative policies and the plain reading of the statute. I see nothing wrong with treating the natural father's rights and interests, in the stepchild adoption context, the same way those rights and interests have been treated historically. That is, by use of consent or traditional abandonment procedures. Application of the statute to the facts before us, requiring the filing of a paternity notice even though the mother has kept the child, might not pass constitutional muster. There could be abuse of the system by an unwed mother who, as here, would race to the courthouse with a petition for adoption signed by any petitioner available, solely to terminate the parental rights of a man she wants out of her life and her child's life.



**Karen HILLIER, Plaintiff and
Respondent,**

v.

**William J. LAMBORN, Defendant
and Appellant.**

No. 860030-CA.

Court of Appeals of Utah.

Aug. 5, 1987.

Automobile driver brought action against truck driver to recover damages for personal injury and property damage.

The Davis County District Court, Douglas L. Cornaby, J., found truck driver 80% negligent and automobile driver 20% negligent. Truck driver appealed. The Court of Appeals, Greenwood, J., held that: (1) submission of sudden emergency instruction to jury was in accordance with automobile driver's theory of case and was supported by evidence; (2) seat belt evidence was inadmissible; (3) truck driver was not entitled to new trial; and (4) award of \$221,209.41 in damages was not shockingly excessive.

Affirmed.

1. Trial ⇐203(1)

Trial court has duty to cover theories and points of law of both parties in its instructions, provided there is competent evidence to support them.

2. Automobiles ⇐246(37)

Submission of sudden emergency instruction to jury in personal injury and property damage case was in accordance with automobile driver's theory of the case and was supported by evidence, even though jury ultimately determined that automobile driver was 20% negligent; automobile driver testified that she saw truck some distance south of her, entirely on shoulder of road, moving slowly, automobile driver could not determine what truck driver was doing but assumed he intended to slow truck to a stop and park it, when automobile driver was four or five car lengths from truck driver, he steered his truck into automobile driver's lane directly in front of her and he did not signal before driving onto road.

3. Automobiles ⇐209

Automobile driver was not obviously negligent for failing to move into left lane prior to passing truck, which was moving slowly on shoulder of road; automobile driver was driving on two-lane road and should not necessarily have been expected to cross center line to avoid car driving slowly on shoulder.

4. Automobiles ⇐243(17)

Seat belt evidence was inadmissible in negligence action which arose prior to enactment of current statute which provides that failure to wear seat belt does not constitute contributory or comparative negligence and may not be introduced as evidence in civil litigation on issue of injuries or on issue of mitigation of damages. U.C. A.1953, 41-6-186.

5. Appeal and Error ⇐1069.1

Although jury's request in negligence action for a dictionary to look up the word "proximate" was improper and irregular and proper procedure would have been for jury to report difficulty regarding word to court and for court to instruct jury on definition, defendant was not entitled to a new trial; record did not contain actual definition of "proximate" which jury read or identify dictionary used and in the absence of that crucial information, there was no basis to find substantial rights of defendant were prejudiced.

6. Trial ⇐344

Both plaintiff's and defendant's affidavits from jurors regarding a juror's use of dictionary were admissible under evidentiary rule providing that juror may testify on question whether extraneous prejudicial information was improperly brought to jury's attention or whether any outside influence was improperly brought to bear upon any juror, since a question existed as to whether use of dictionary was prejudicial. Rules of Evid., Rule 606(b).

7. Damages ⇐96, 104

Juries are given wide discretion in assessing damages.

8. Damages ⇐132(1), 137

Jury verdict in favor of automobile driver in the amount of \$221,209.41 in personal injury and property damage action was supported by competent evidence and was not shockingly excessive in light of extensive injuries suffered by automobile driver in collision with truck.

Gary B. Ferguson, Michael K. Mohrman, Richards, Brandt, Miller & Nelson, Salt Lake City, for defendant and appellant.

Stephen G. Morgan, Mark L. Anderson, Salt Lake City, for plaintiff and respondent.

Before GREENWOOD, BENCH and ORME, JJ.

OPINION

GREENWOOD, Judge:

Plaintiff commenced this action against defendant to recover for personal injury and property damage she suffered as a result of an automobile accident with defendant. The jury found defendant 80% negligent, plaintiff 20% negligent and awarded plaintiff \$221,209.41 in damages. Defendant appeals seeking a new trial or a reduction in the damages.

At about 8:30 a.m. on November 13, 1982, plaintiff was driving southbound on I-15 near Farmington, Utah when defendant, who was driving south slowly on the right shoulder of the road, pulled out in front of her causing her to swerve sharply and her car to roll over. Plaintiff was thrown from the vehicle and suffered extensive injuries.

The jury was instructed, over defendant's objection, on the sudden emergency doctrine which states in part that a person who, without negligence on his part, is suddenly confronted with peril is not required to use the same judgment required in calmer moments. The court, however, refused to submit defendant's seat belt instruction to the jury and ruled that defendant would not be allowed to present any evidence regarding seat belts. During jury deliberations one juror requested and received a dictionary from the bailiff for the purpose of defining "proximate" in order to understand "proximate cause." After the jury returned its verdict a judgment was entered. This appeal followed the court's denial of defendant's motion for a new trial or, alternatively, reduction of damages.

On appeal defendant claims the trial court erred in: 1) submitting the sudden

emergency instruction to the jury; 2) disallowing the seat belt instruction and evidence; 3) failing to grant a new trial due to the juror's use of a dictionary to define "proximate"; and 4) denying the motion for a new trial on the basis that the jury verdict was unreasonable and based on passion, prejudice and insufficient evidence.

I

Defendant first contends that the trial court erred in instructing the jury on the sudden emergency doctrine. Defendant argues the sudden emergency instruction was inappropriate because it requires plaintiff to be free of negligence. The instruction stated:

A person, who without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence or the appearance of imminent danger to himself or to others is not expected nor required to use the same judgment and prudence that may be required of him in calmer and more deliberate moments.

In such a situation, his duty is to exercise only the degree of care which an ordinary prudent person would exercise under the same or similar circumstances. If, at that moment, he exercises such care, he does all the law requires of him, even though in the light of after-events, it might appear that a different choice and manner of action would have been better and safer.

Defendant points out that plaintiff was not negligence free because the jury found her 20% negligent. Defendant also claims that plaintiff was necessarily negligent because she failed to move into the left lane when she first saw defendant's truck on the side of the road and a non-negligent person would have changed lanes.

Plaintiff's theory of the case, on the other hand, was that she was not negligent for failing to anticipate defendant's act of pulling out in front of her. She claimed that defendant should have used his signal and looked behind him before pulling out into the right hand lane. Plaintiff asserts that the sudden emergency instruction was

proper because it was consistent with her theory of the case. We agree.

[1] The general rule is that a party is entitled to have his theory of the case submitted to the jury. *Watters v. Querry*, 626 P.2d 455, 458 (Utah 1981). The trial court has a duty to "cover the theories and points of law of both parties in its instructions, provided there is competent evidence to support them." *Black v. McKnight*, 562 P.2d 621, 622 (Utah 1977).

The Utah Supreme Court has examined the appropriateness of submitting a sudden emergency instruction to the jury in several cases. In *Redd v. Airway Motor Coach Lines, Inc.*, 104 Utah 9, 137 P.2d 374 (1943), *Christiansen v. Utah Transit Auth.*, 649 P.2d 42 (Utah 1982) and *Anderson v. Toone*, 671 P.2d 170 (Utah 1983), the Court found no error in the trial court's submission of a sudden emergency instruction.

In *Redd*, the Court found the instruction proper where the jury was not compelled by the evidence to conclude that defendant was driving without due care. *Redd*, 137 P.2d at 378. Similarly, in *Christiansen*, the Court upheld a sudden emergency instruction despite the fact that the jury found both parties partially negligent. The Court reasoned that the instruction was proper because it was supported by some evidence and by one of the parties' theories. *Christensen*, 649 P.2d at 47. Finally, in *Anderson*, the Court found no error where the sudden emergency instruction presented defendant's theory of the case that he had not acted negligently. *Anderson*, 671 P.2d at 174.

[2, 3] In this case, plaintiff testified that she saw defendant's truck some distance south of her, entirely on the shoulder of the road, moving south slowly. She could not determine what defendant was doing but assumed he intended to slow the truck to a stop and park it. (In fact, defendant was "road hunting" for pheasants.) When she was four or five car lengths from him, he steered his truck into plaintiff's lane directly in front of her. It is undisputed that defendant did not signal

before driving onto the road from the shoulder. Plaintiff's theory of the case was that she was not at fault for failing to anticipate defendant's negligence in pulling out in front of her. The trial court's submission of the sudden emergency instruction to the jury was in accordance with plaintiff's theory of the case and was supported by evidence presented at trial. The jury's ultimate determination that plaintiff was 20% negligent does not nullify the propriety of the instruction. Likewise, we reject defendant's contention that plaintiff was obviously negligent for failing to move into the left lane prior to passing defendant. Plaintiff was driving on a two-lane road and should not necessarily be expected to cross the center line to avoid a car driving slowly on the shoulder. The question of plaintiff's negligence was a question of fact for the jury and the trial court could not conclude as a matter of law that plaintiff was negligent.

Defendant cites two Utah cases which he contends are indistinguishable from this case and dictate reversal of the trial court's denial of the motion for a new trial. In *Solt v. Godfrey*, 25 Utah 2d 210, 479 P.2d 474 (1971) and *Keller v. Shelley*, 551 P.2d 513 (Utah 1976), the Court found as a matter of law that the sudden emergency or peril did not arise without fault by the defendants. In *Solt*, defendant, while driving his automobile, hit a two-year, eight month old child who followed a ball into the street. Defendant testified he was driving 30 to 35 miles per hour when he observed the child come upon the roadway 60 to 80 feet in front of him. Defendant applied his brakes but was unable to avoid striking the child. Defendant did not contend that there was any sudden darting and the Court found the sudden emergency instruction improper due to the absence of evidence of a sudden or unexpected situation arising without the fault of defendant. The Court said the defendant saw what he should have seen all the time and was therefore negligent. The Court, in reversing, noted that "[u]nder the evidence given in this case it is difficult to see how the jury could have found for the defendant unless they were misled by some instruc-

tions given by the Court." *Solt*, 479 P.2d at 476.

The case before this Court differs from *Solt* in two important respects. First, in this case, plaintiff contends defendant's act of pulling out in front of her caused a sudden and unexpected situation, whereas in *Solt*, no such claim was made. Second, there is substantial difference between a child chasing a ball into the street and an adult in an automobile pulling out in front of another vehicle without signaling. A young child is reasonably likely to run into a street in front of a car. Conversely, an adult would reasonably be expected to first look behind him and signal before pulling into the road from the shoulder.

Similarly, *Keller* involves a situation where no evidence was submitted to demonstrate a sudden and unexpected situation arising without fault on the part of the plaintiff. *Keller*, 551 P.2d at 514. In *Keller*, defendant, while passing another vehicle, drove into the rear of plaintiff's vehicle. The Court recognized that a driver intending to pass another vehicle must be certain that he can safely pass the other vehicle. When defendant attempted to pass, plaintiff was stopped waiting for traffic to clear so she could make a left turn. The Court found the sudden emergency instruction improper because defendant was clearly negligent. Unlike *Keller*, in this case plaintiff was not undisputably negligent. Therefore, in light of plaintiff's evidence submitted at trial and her theory of the case, the instruction was proper.

II

[4] Defendant's next claim is that the trial court erred in refusing to allow evidence concerning plaintiff's failure to wear a seat belt and by failing to submit an instruction to the jury that nonuse of a seat belt may mitigate damages.

A majority of other jurisdictions have held that evidence of nonuse of a seat belt on the issue of mitigation of damages is inadmissible. *Britton v. Doebring*, 286 Ala. 498, 242 So.2d 666, 671 (1970); *Nash v. Kamrath*, 21 Ariz.App. 530, 521 P.2d 161,

164 (1974); *Fischer v. Moore*, 183 Colo. 392, 517 P.2d 458, 459 (1973); *Lipscomb v. Diamiani*, 226 A.2d 914, 918 (Del.Super. 1967); *McCord v. Green*, 362 A.2d 720, 726 (D.C.1976); *Hampton v. State Highway Comm'n*, 209 Kan. 565, 498 P.2d 236, 248-49 (1972); *Schmitzer v. Misener-Bennett Ford, Inc.*, 135 Mich.App. 350, 354 N.W.2d 336, 340 (1984); *Miller v. Haynes*, 454 S.W.2d 293, 300 (Mo.Ct.App.1970); *Selgado v. Commercial Warehouse Co.*, 88 N.M. 579, 544 P.2d 719, 722 (1975); *Fields v. Volkswagen*, 555 P.2d 48, 62 (Okla.1976). We agree with the rationale of those cases and hold similarly that seat belt evidence is inadmissible in this case which arose prior to enactment of the present Utah statute.¹

III

The third issue raised on appeal is whether the trial court erred in failing to grant a new trial due to the juror's² use of a dictionary. According to affidavits submitted to the court, the jury, during deliberations, asked the bailiff for a dictionary to define "proximate" in order to understand "proximate cause."³ The bailiff complied.

[5] Clearly the jury's request for a dictionary and consideration of "proximate" was improper and irregular. *State v. Donald*, 90 Utah 533, 537, 63 P.2d 246, 248 (1936). The jury was instructed that "it is your duty to follow the law as the court states it to you." The proper procedure would have been for the jury to report the difficulty to the court and for the court to instruct the jury on the definition of "proximate". *Id.* Despite the obvious improper conduct of the jury, such conduct must prejudice the substantial rights of defendant to warrant reversal. *Id.*; Utah R.Civ.P. 61.

In *State v. Donald*, the Utah Supreme Court held, in a forgery case, that a jury's

use of a dictionary to define "utter" did not prejudice the substantial rights of defendant and did not warrant reversal. The Court explained that even if the judge had instructed the jury on the definition of "utter" it would have been the same in substance as the dictionary definition read by the jury.

In this case, the record does not contain the actual definition of "proximate" the jury read nor identify the dictionary used. Without that definition we cannot compare the legal definition of "proximate cause" with the definition of "proximate" examined by the jury. In the absence of that crucial information, we do not find any basis for finding that substantial rights of defendant were prejudiced by the juror's reference to the dictionary.

Plaintiff, who nonetheless saw fit to provide a counteraffidavit designed to diffuse the gravity of the juror's use of the dictionary, claims the trial court erred in considering the affidavit due to the restrictions imposed by Utah R.Civ.P. 59(a)(2). Rule 59(a)(2) states:

Subject to the provisions of Rule 61, a new trial may be granted ... for any of the following causes ... (2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

In several Utah cases, the Utah Supreme Court has interpreted Rule 59(a)(2) and held that the rule authorizes a jury verdict to be impeached by the affidavit of a juror only when the verdict was determined by chance or bribery. *Rosenlof v. Sullivan*, 676 P.2d 372, 375 (Utah 1983); *Groen v. TRI-O-INC.*, 667 P.2d 598, 603 (Utah

1. At the time this case was tried, the legislature had not enacted Utah Code Ann. § 41-6-186 (1987) which provides that "failure to wear a seat belt does not constitute contributory or comparative negligence, and may not be introduced as evidence in any civil litigation on the issue of injuries or on the issue of mitigation of damages."

2. How many jurors used the dictionary is unclear. For simplicity we will refer to one juror.

3. Both plaintiff and defendant submitted affidavits from different jurors regarding the use of the dictionary.

1983); *Smith v. Barnett*, 17 Utah 2d 240, 408 P.2d 709, 710 (1965). The policy behind the narrow interpretation of the law was set forth in *Wheat v. Denver & R.G.W.R. Co.*, 122 Utah 418, 250 P.2d 932 (1952):

To permit litigants to get jurors to sign affidavits or testify to matters discussed in connection with their functions as jurors would open the door to inquiry into all manner of things which a losing litigant might consider improper: misconceptions of evidence or law, offers of settlement, personal experiences, prejudice against litigants or their causes or the classes to which they belong. It would be an interminable and totally impracticable process. Such post mortems would be productive of no end of mischief and render service as a juror unbearable. If jurors were so circumscribed in their deliberations, it is likely that judge and counsel would have to be present in the jury room attempting to monitor and regulate their thought and discussions into approved channels.

Id. 250 P.2d at 937.

Although the Utah Supreme Court has narrowly interpreted 59(a)(2) and limited the circumstances under which jury affidavits may be admitted into evidence, the Court also adopted the Utah Rules of Evidence on April 13, 1983 and made them effective as of September 1, 1983. Under Utah R.Evid. 606(b) "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." The Court's adoption of Rule 606(b) indicates an intent to allow juror affidavits into evidence under the circumstances described in 606(b). In effect, Rule 606(b) provides another exception to the general rule that juror affidavits are inadmissible.

[6] Applying 606(b) to the facts of this case, the dictionary was "extraneous information." Clearly, the judge did not give the dictionary to the jury. Whether it was "prejudicial" was dependent upon the definition examined by the jury. Because a question existed as to whether or not use

of the dictionary was "prejudicial," both affidavits were admissible under 606(b).

IV

[7] Finally, defendant argues that the jury verdict was unreasonable and was based on passion, prejudice and insufficient evidence. Juries are given wide discretion in assessing damages. *Amoss v. Broadbent*, 30 Utah 2d 165, 514 P.2d 1284, 1287 (1973). When a jury determines a question of fact, its verdict will not be disturbed if it is supported by any competent evidence. *Time Commercial Financing Corp. v. Davis*, 657 P.2d 234, 236 (Utah 1982); *Uinta Pipeline Corp. v. White Superior Co.*, 546 P.2d 885, 886 (Utah 1976); *Nelson v. Peterson*, 542 P.2d 1075, 1076 (Utah 1975). Further, this Court will defer to the jury's verdict unless it is "so excessive as to be shocking to one's conscience and to clearly indicate passion, prejudice or corruption." *McAfee v. Ogden Union Ry. & Depot Co.*, 62 Utah 115, 129, 218 P. 98, 104 (1923).

[8] The record indicates that the jury's verdict is supported by competent evidence. Further, the damages awarded are not shockingly excessive in light of the extensive injuries suffered by plaintiff.

Affirmed.

BENCH and ORME, JJ., concur.



Exhibit "B" Utah Court of Appeals' Order Denying
Petition for Rehearing

MORGAN, SCALLEY & READING

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Case No. 860030-CA

Timothy M. Shea
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER DENYING PETITION FOR REHEARING by depositing the same in the United States mail, postage prepaid to the following:

Gary B. Ferguson, Esq.
Michael K. Mohrman, Esq.
Richards, Brandt, Miller & Nelson
CSB Tower, Suite 700
50 South Main, P.O. Box 2465
Salt Lake City, UT 84110

Stephen G. Morgan, Esq.
Mark L. Anderson, Esq.
Attorneys at Law
261 East 300 South, 2nd Floor
Salt Lake City, UT 84111

DATED this 27th day of August, 1987.

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

Karen Bean
Case Management Clerk

Exhibit "C" Utah Court of Appeals' Remittitur

UTAH COURT OF APPEALS

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October 9, 1987

Karen Hillier,
Plaintiff and Respondent,

v.

William J. Lamborn,
Defendant and Appellant.

REMITTITUR

No. 860030-CA
Case No. 34141

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered that the judgment of the trial court be and the same is hereby affirmed.

Issued: August 5, 1987

Record: five volumes, six envelopes

Trial Court: Second District, Davis County

CERTIFICATE OF MAILING

PARTIES:

Gary B. Ferguson, Esq.
Michael K. Mohrman, Esq.
Richards, Brandt, Miller & Nelson
Attorneys for Appellant
CSB Tower, Suite 700
50 South Main, P.O. Box 2465
Salt Lake City, UT 84110

Stephen G. Morgan, Esq.
Mark L. Anderson, Esq.
Attorneys for Respondent
261 East 300 South, 2nd Floor
Salt Lake City, UT 84111

TRIAL COURT:

Davis County Clerk
Michael G. Allphin, Clerk
P.O. Box 618
Farmington, UT 84025

CERTIFICATION:

I hereby certify that on the 9th day of October, 1987, a true and correct copy of the foregoing REMITTITUR was mailed to each of the above parties by depositing the same in the United States mail, postage prepaid or by personally delivering the same.

Karen Bean
Case Management Clerk

Exhibit "D" Partial Transcript of proceedings on
April 17, 1987 (motion for new trial).

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IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR DAVIS COUNTY

STATE OF UTAH

-o0o-

KAREN HILLIER,)	
Plaintiff,)	<u>REPORTER'S PARTIAL</u>
vs.)	<u>TRANSCRIPT OF PROCEEDINGS</u>
WILLIAM J. LAMBORN,)	Civil No. 34141
Defendant.)	

BE IT REMEMBERED, that on Tuesday, April 17, 1984,
the above-entitled matter came on for HEARING ON MOTIONS
in the Second Judicial District Court in and for Davis County,
State of Utah, before the HONORABLE DOUGLAS L CORNABY,
Presiding.

* * * *

A P P E A R A N C E S:

For the Plaintiff:	<u>STEPHEN G. MORGAN</u> <u>MARK L. ANDERSON</u> Attorneys at Law 261 East 300 South, 2nd Floor Salt Lake City, Utah 84111
--------------------	--

For the Defendant:	<u>GARY B. FERGUSON</u> <u>MICHAEL K. MOHRMAN</u> Attorneys at Law CSB Tower, Suite 700 50 South Main Street Salt Lake City, Utah 84110
--------------------	--

1 THE COURT: It was improper, of course, for the
2 bailiff to give the jury the dictionary, even though--and
3 the Court recognizes that that is juror misconduct. The
4 Court had given a definition of proximate cause to the jury,
5 and my guess is, if they had read it carefully they would have
6 probably known what proximate meant.

7 I still have to ask myself the question whether
8 there was a reasonable possibility of prejudice on the part of
9 the jurors by having that dictionary definition of proximate,
10 and since they already had the definition of proximate cause
11 by the Court, the Court does not believe it falls in that
12 category. And so, it's not a basis for the Court granting a
13 new trial on that basis.

14 The Court allowed the unexpected danger instruction.
15 The jury must have believed it through the testimony of the
16 plaintiff as opposed to the testimony of the defendant as to
17 whose version of the facts were correct. If they had done
18 that there is no way they could have arrived at the verdict
19 the way they did. It was a proper instruction. That is not a
20 ground for a new trial.

21 The Court won't even comment on the seat belts.
22 That was ruled on at trial.

23 With regard to the remittitur, the jury certainly
24 found damages that were within reason of the testimony that
25 was given. Could have well found more than they did and still

1 been within reason. So, there is no grounds for the Court to
2 grant a remittitur on that.

3 As to the facts not supporting the verdict, there is
4 no question in the Court's mind that the facts do support the
5 verdict. The jurors just chose to believe the testimony of
6 the plaintiff as opposed to whatever conflicting evidence may
7 have been supported by the experts.

8 And, of course, the Court did exactly the same thing
9 and so, I wouldn't be ~~fo~~^und to say that the jurors were
10 unreasonable in believing it or I would be saying I am un-
11 reasonable in believing it also.

12 But, at any rate, your motion for a new trial is
13 denied and the remittitur is denied.

14 (Whereupon, the proceedings were concluded.)
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COUNTY OF DAVIS

NOTARIAL CERTIFICATE

) ss:
)

I, Nancy H. Davis, do hereby certify that the foregoing transcript consisting of 3 pages of the proceedings held at the time and place herein described, is a complete and accurate transcription of those proceedings requested to be transcribed.

Date: May 14, 1984.

Nancy H. Davis

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Exhibit "E" District court's minute entry

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

JUDGES PRETRIAL CONFERENCE WORK SHEET 1983 NOV 18 AM 10:29

Karen Hillier
Plaintiff
(Stephen Morgan)
Attorney

vs

MICHAEL C. ALPHEIN, CLERK
2ND DISTRICT COURT
✓ Wm. J. Lamborn
BY Robert Ferguson Defendant
(Gary Ferguson)
Attorney

Case No. 34141 Auto accident : Date Nov. 14, 1983

1. Issues: (1) Was D negligent?
(2) Amt. of medical loss? \$25,000. current;
(3) Was P negligent?
(4) Was negligence of either proximate cause?
(5) Comparative negligence.

FILMED

2. Stipulations:

3. Number of Witnesses: Plaintiff 8 Defendant
4. Exchange of Witnesses: (11) P (2) D (2) P's Learned
(14) Dr. Gary Lewis (15) Frank G. Lewis (16) Dr. J. J. Lewis
(17) Dr. G. Lewis (18) Dr. J. J. Lewis (19) Dr. J. J. Lewis
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(98) Dr. J. J. Lewis (99) Dr. J. J. Lewis (100) Dr. J. J. Lewis
5. Amendments to Pleadings:
6. Trial Briefs or Memorandum of Points and Authorities:
7. Trial: Non Jury Jury ✓ Has fee been paid No
8. Jury Instructions supplied to Court 2-16-84 days prior to trial.
9. Length of Trial: 3 days Date of Trial 2-16-84
10. Pre-trial Order prepared by P
11. Pre-trial Order to be prepared within 30 days prior to trial.
12. Discovery to be completed by 2-16-84 ~~days prior to trial.~~
13. List of witnesses and their addresses to be exchanged 30 days prior to trial.
14. Inquire as to the possibility of settlement.

Exhibit "F" District court's Pretrial Order framing issues for
trial

STEPHEN G. MORGAN
MORGAN, SCALLEY & READING
Attorneys for Plaintiff
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Salt Lake City, Utah 84111
Telephone: 531-7870

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DAVIS COUNTY, UTAH

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CLERK OF DISTRICT COURT

BY ab

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY
STATE OF UTAH

KAREN HILLIER,)	
)	PRE-TRIAL ORDER
Plaintiff,)	
vs.)	
)	Civil No. 34141
WILLIAM J. LAMBORN,)	
)	
Defendant.)	

The above matter came before the Court on November 14, 1983, at a pre-trial conference held before the Honorable Douglas L. Cornaby, District Judge, pursuant to Rule 16 of the Utah Rules of Civil Procedure. Stephen G. Morgan appeared as attorney for Plaintiff and Robert G. Gilchrist appeared as attorney for Defendant. It was there ordered that a Pre-Trial Order be filed and signed by counsel for the Plaintiff and Defendant on or before February 1, 1984. The following represents that Pre-Trial Order.

1. JURISDICTION. This is an action to recover damages for personal injuries of Plaintiff. The jurisdiction of the Court is not disputed and is hereby determined by the Court to be present.

2. VENUE. Since the accident occurred in Davis County, State of Utah and both parties reside in Davis County, State of Utah, venue is not disputed and is hereby determined by the Court to be proper.

3. GENERAL NATURE OF THE CLAIMS OF THE PARTIES.

(a) On November 13, 1982, on the frontage road about 1,000 feet North of Chase Lane near Centerville, Davis County, Utah an accident occurred, which plaintiff claims was caused by defendant's negligence in attempting to drive his vehicle in front of plaintiff's vehicle when plaintiff's vehicle was so close she could not avoid a collision. Plaintiff also claims that as a direct and proximate result of defendant's negligence that she sustained injuries and damages.

(b) Defendant's Claims. Defendant claims that there was no negligence on his part and defendant further claims that plaintiff was negligent and that such negligence was the sole proximate cause or a contributing proximate cause of plaintiff's injuries and damages, and further that such negligence was equal to or greater than the negligence, if any, of defendant. Defendant further claims that plaintiff did not suffer the injuries and damages to the extent alleged in her Complaint.

4. UNCONTROVERTED FACTS. The following facts are established by admissions in the pleadings or by stipulation of counsel:

(a) On November 13, 1982, on the frontage road about 1,000 feet North of Chase Lane near Centerville, Davis County, State of Utah, an accident occurred which involved a vehicle driven by plaintiff and a vehicle driven by defendant.

(b) As of December 5, 1983, plaintiff had incurred medical expenses of \$51,345.90 plus an estimated additional medical expense from Dr. Patton as of that date of \$1,200.00, all as a result of the injuries she received in the accident of November 13, 1982 and said expenses are reasonable for the services rendered; however, defendant does not admit liability for said medical expenses.

5. CONTESTED ISSUES OF FACT. The contested issues of fact remaining for decision are:

(a) Was defendant negligent? If so, was such negligence a proximate cause of the accident?

(b) Was plaintiff negligent? If so, was such negligence a proximate cause of the accident?

(c) If both defendant and plaintiff are negligent, what percentage of fault is attributable to defendant and what percentage of fault is attributable to plaintiff?

(d) What amount of damages will fully compensate plaintiff for the injuries and damages suffered as a result of the accident?

6. CONTESTED ISSUES OF LAW. There are no contested issues of law other than those implicit in the foregoing issues of fact.

7. EXHIBITS. The following exhibits have been identified by the parties:

(a) Plaintiff's exhibits.

1. List or summary of medical expenses;

2. List or summary of other special damages for loss of wages and earning capacity and future medical expenses;

3. Hospital records and records of treating physicians, dentists, and other health care providers, including photographs and x-rays;

4. Hardware taken out of plaintiff and photos;

5. Charts, photographs and other documents prepared by investigating officers and accident reconstruction experts

(b) Defendant's exhibits.

1. Charts, photographs and other documents prepared by investigating officers and accident reconstruction experts;

2. Photographs and x-rays of plaintiff.

(c) Exhibits identified will be marked at 8:30 a.m. on the date of trial, March 1, 1984, to the extent possible so as to avoid any unnecessary delay during trial.

(d) Except as otherwise indicated, the exhibits identified are subject to objections, if any, by the opposing party at the trial as to their relevancy and materiality. If other exhibits are to be offered and their necessity reasonably can be anticipated, they will be submitted to opposing counsel at least on day prior to trial.

8. WITNESSES.

(a) Plaintiff's witnesses.

In the absence of reasonable notice to opposing counsel to the contrary, plaintiff may call as witnesses the following persons: (1) Karen Hillier; (2) Kevin Hillier; (3) Don Krambule; (4) June Krambule; (5) Rich Krambule; (6) Dr. Lower; (7) Dr. Patton; (8) Dr. Jordan; (9) Dr. Lockhart; (10) Dr. DeDecker; (11) medical

Records Custodian of University Medical Center; (12) Medical Records Custodian of Lakeview Hospital; (13) Trooper Brent Van Fleet; (14) other investigating officers; (15) Frank Grant; (16) David Stephens; (17) person knowledgeable concerning where pheasant hunting can legally be done; (18) person knowledgeable concerning Karen's employment and the effect which injuries have had on her work; (19) William J. Lamborn as an adverse witness; and (20) person knowledgeable concerning effect which injuries have had on Karen's life.

(b) Defendant's witnesses.

In absence of reasonable notice to opposing counsel to the contrary, Defendant may call as witnesses the following persons: (1) Trooper Brent Van Fleet; (2) Ron Wooley

(c) In the event other witnesses are to be called at the trial, a statement of their names and addresses and the general subject matter of their testimony will be served upon opposing counsel and filed with the Court at least the Monday prior to the Thursday trial date of March 1, 1984. This restriction shall not apply to rebuttal witnesses, the necessity of whose testimony cannot reasonably be anticipated before trial.

9. REQUEST FOR INSTRUCTIONS. This matter is scheduled for a jury trial. Requests for Instructions to the jury shall be submitted to the Court on or before February 16, 1984. Special requests for voir dire examination of the jury shall be submitted to the Court by the afternoon prior to the commencement of trial.

Counsel may supplement requested instructions during trial on matters not reasonably anticipated prior to trial.

10. AMENDMENTS TO PLEADING. There were no requests to amend pleadings.

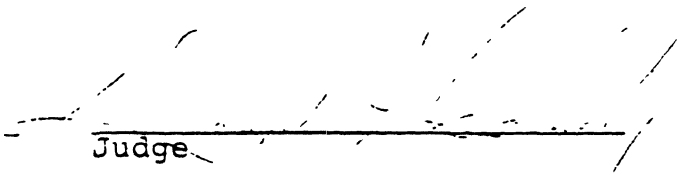
11. DISCOVERY. Discovery is to be completed on or before February 16, 1984.

12. TRIAL SETTING. This case is set for trial with a jury on March 1, 1984 at 9:30 a.m. Estimated length of trial is three (3) days. Counsel shall be present at 8:30 a.m. on the date of trial to mark exhibits and to meet with the Court to handle any necessary matters prior to the commencement of trial at 9:00 a.m.

13. POSSIBILITY OF SETTLEMENT. The possibility of settlement is considered to be fair.

DATED this 2 day of February, 1984.

BY THE COURT:

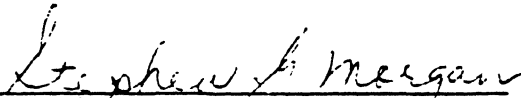


Judge


The foregoing proposed Pre-Trial Order is hereby adopted to the 1st day of February, 1984, prior to execution by the Court.

MORGAN, SCALLEY & READING

RICHARDS, BRANDT, MILLER
NELSON



Stephen G. Morgan
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Gary B. Ferguson
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CSB Tower, 50 South Main
Salt Lake City, Utah 84111

Exhibit "G" District court's Instruction 11 on proximate cause.

INSTRUCTION NO. //

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred. It is the efficient cause - the one that necessarily sets in operation the factors that accomplish the injury.