

1987

# Karen Hillier v. William J. Lamborn : Petition for Writ of Certiorari

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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KAREN HILLIER,

Plaintiff-Respondent,

vs.

WILLIAM J. LAMBORN,

Defendant-Appellant.

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Certiorari Docket No. 870370

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APPELLANT WILLIAM J. LAMBORN'S  
PETITION FOR WRIT OF CERTIORARI

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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 26, 1987.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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KAREN HILLIER,	:	
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Plaintiff-Respondent,	:	
	:	
vs.	:	Certiorari Docket No. _____
	:	
WILLIAM J. LAMBORN,	:	
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Defendant-Appellant.	:	
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES. . . . .	iii
QUESTIONS PRESENTED FOR REVIEW. . . . .	1
OPINION OF THE COURT OF APPEALS . . . . .	1
STATEMENT OF GROUNDS FOR JURISDICTION . . . . .	1
CONTROLLING PROVISIONS. . . . .	2
STATEMENT OF THE CASE . . . . .	2
Nature of the Case . . . . .	2
Statement of Facts . . . . .	3
ARGUMENT. . . . .	5
POINT I	
EVIDENCE OF THE NON-USE OF A SEAT BELT BY THE PLAINTIFF SHOULD HAVE BEEN ALLOWED . . . . .	5
A. <u>It Was an Error in Law to Prohibit                   the Defendant from Introducing Seat                   Belt Testimony and in Failing to Submit                   to the Jury the Defendant's Proffered                   Seat Belt Instruction.</u> . . . . .	6
B. <u>There is a Valid Doctrinal Basis for                   Allowing the Seat Belt Defense in                   Utah</u> . . . . .	11
C. <u>Seat Belt Testimony Should Have Been                   Admitted as Curative Evidence.</u> . . . . .	16
POINT II	
THE JURY'S USE OF EXTRANEOUS EVIDENCE, A DICTIONARY, TO DEFINE THE WORD "PROXIMATE," ENTITLED THE DEFENDANT TO A NEW TRIAL AS A MATTER OF LAW . . . . .	17
CONCLUSION . . . . .	18

APPENDIX . . . . .	20
--------------------	----

- A. Opinion of the Utah Court of Appeals
- B. Order of Denial on Petition for Re-hearing
- C. Copy of Acculog, Inc. v. Peterson, 692 P.2d 728 (Utah 1984)

## TABLE OF AUTHORITIES

### Cases

<u>Acculog, Inc. v. Peterson</u> , 692 P.2d 728 (Utah 1984) . . . .	6,8
<u>Benner v. Interstate Container Corp.</u> , 73 F.R.D. 502 (D. Penn. 1977) . . . . .	10
<u>Bentzler v. Braun</u> , 34 Wis.2d 362 (1967) . . . . .	11
<u>Dean v. Holland</u> , 350 N.Y.S.2d 859 (1973). . . . .	13
<u>Elchorn v. Olsen</u> , 35 N.E.2d 774 (1975). . . . .	10
<u>Fintenot v. Fidelity &amp; Gas Co.</u> , 217 So.2d 702 (La. App. 1969) . . . . .	11
<u>Foley v. City of West Allis</u> , 113 Wis. 2d 475, 335 N.W.2d 824 (1983) . . . . .	10
<u>Glover v. Daniels</u> , 310 F.Supp. 760 (D. Miss. 1970). . . . .	10
<u>Halvorson v. Voeller</u> , 336 N.W.2d 118 (N.D. 1983). . . . .	13
<u>Henderson v. United States</u> , 429 F.2d 588 (10th Cir. 1970). . . . .	10
<u>Hillier v. Lamborn</u> , 740 P.2d 300 (Utah App. 1987) . . . . .	1
<u>Hurnkey v. Cornett Ins. Co.</u> , 72 Wis.2d 170, 240 N.W.2d 382 (1976). . . . .	10
<u>Insurance Co. of North America v. Pasakarnis</u> , 451 So.2d 447 (Flas. 1984). . . . .	10
<u>Kassela v. Stovitsch</u> , 373 N.Y.2d 601 (1972) . . . . .	10
<u>Langford v. Chrysler Motors</u> , 513 F.2d 1121 (1975) . . . . .	10
<u>Latta v. Siefke</u> , 401 N.Y.S.2d 937 (1978). . . . .	10
<u>Noth v. Scheurer</u> , 385 F.Supp. 81 (E.D.N.Y. 1968). . . . .	10
<u>Pritts v. Walter Lowry Trucking Co.</u> , 400 F.Supp. 867 (W.D. Pa. 1975) . . . . .	10
<u>Remington v. Arndt</u> , 28 Con.Supp. 289,259 A.2d 145 (Conn. Super. 1969) . . . . .	10

<u>Sonnier v. Ramsey</u> , 424 S.W.2d 684 (Tex.Civ.App. 1968) . . .	11
<u>Spier v. Barker</u> , 35 N.Y.2d 444, 323 N.E.2d 164 (1974) . . .	10
<u>Thomas v. Goodman</u> , 372 A.2d 378 (1977). . . . .	10
<u>Tom Brown Drilling Co. v. Nieman</u> , 418 S.W.2d 337 (Tex.Civ.App. 1967) . . . . .	11
<u>Uresky v. Fedora</u> , 27 Con.Supp. 498, 245 A.2d 393. . . . .	10
<u>Wilson v. Volkswagon of America, Inc.</u> , 445 F.Supp. 1368 (E.D.Va. 1978) . . . . .	10

#### Rules

Utah Rules of Evidence, Rule 606(b) . . . . .	10, 11, 15
Rules of the Utah Supreme Court, Rule 43. . . . .	5
W. Prosser, The Law of Torts, § 33 (4th Ed. 1971) . . . . .	30
W. Prosser, The Law of Torts, § 65 (4th Ed. 1971) . . . . .	12
Restatement (Second) of Torts, § 433A (1965). . . . .	12,13
Restatement (Second) of Torts, § 465 Comment c (1965). . . . .	7,8,12,13

#### Statutes

Utah Code Ann. § 78-2-2(5) (effective through December 31, 1987). . . . .	1
Utah Code Ann. § 78-27-37 (1953 as amended) . . . . .	2,6,9

### QUESTIONS PRESENTED FOR REVIEW

I. Whether evidence of the non-use of a seat belt by the plaintiff should have been allowed by the trial court.

II. Whether the jury's use of extraneous evidence, a dictionary, to define the word "proximate" was reversible error.

### OPINION OF THE COURT OF APPEALS

Hillier v. Lamborn, 63 Utah Adv. Rep. 17, (Ct. App. 08/05/87), 740 P.2d 300 (Utah App. 1987).

### STATEMENT OF GROUNDS FOR JURISDICTION

On August 5, 1987, the Utah Court of Appeals entered its Opinion affirming the decision of the trial court. Subsequent to that time, the appellant, William J. Lamborn, filed his Petition for Rehearing. An Order Denying the Petition for Rehearing was entered on the 26th day of August, 1987. Subsequent to that time, an Order granting the appellant an extension of time to and including October 9, 1987, was entered on the 25th day of September, 1987. This Court has jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari pursuant to U.C.A. § 78-2-2(5) (effective through December 31, 1987).

### CONTROLLING PROVISIONS

This Court's interpretation of Utah Code Ann. § 78-27-37 (1973) amended by Utah Code Ann. §§ 78-27-37, 38 (1986) may be controlling as to whether this Court should review the Opinion of the Court of Appeals and remand for a new trial:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. As used in this act, "contributory negligence" includes "assumption of the risk."

### STATEMENT OF THE CASE

#### Nature of Case

This was an action for personal injuries and property damage suffered by the plaintiff-respondent, Karen Hillier (hereinafter "Hillier" or "plaintiff"), against defendant-appellant, John Lamborn (hereinafter "Lamborn" or "defendant"). The action arose as a result of an automobile accident which occurred on a frontage road between Farmington and Centerville, Davis County, Utah, in November of 1983. A jury trial was held on the matter and a verdict was entered against the defendant Lamborn which resulted in a total judgment amount of \$221,209.41. The defendant John Lamborn

then appealed from the Judgment. Initially, the appeal was filed in the Supreme Court of the State of Utah, but subsequent to the creation of the Utah Court of Appeals, the case was sent to the Utah Court of Appeals for disposition. On August 5, 1987, the Utah Court of Appeals entered its Opinion affirming the decision of the trial court. The plaintiff then petitioned for a rehearing, which was denied on August 26, 1987. An extension of time until October 9, 1987, for the filing of Lamborn's Petition for Certiorari was granted by this Court.

#### Statement of Facts

The facts of this case pertinent to the defendant's appeal are as follows: (R. stands for record; T. stands for reporter's transcript of proceedings);

1. On March 2, 5, and 7, 1984, a jury trial was held in the Second District Court of Davis County, Judge Douglas J. Cornaby, presiding. (R. 327.)

2. The plaintiff brought suit for injuries she allegedly suffered when involved in an automobile accident with a pickup truck driven by the defendant. (R. 1-10.)

3. The plaintiff sought special damages for the medical and other out-of-pocket expenses she incurred and general damages for her alleged pain and suffering. (R. 1-10.)

4. The major issue during the trial of this matter centered upon the question of liability. To that end, both parties introduced eye witness testimony, expert

testimony, and physical evidence designed to support the respective theories of the case. (T. 1-617.)

5. The defendant introduced a significant amount of evidence that tended to show that the plaintiff negligently contributed to the cause of the accident and consequently was responsible for her injuries. (T. 348-520.)

6. Also, during the course of the trial, the defendant argued that he should be allowed to introduce testimony and other evidence to the effect that the plaintiff was not wearing a seat belt at the time of the accident. The defendant sought to show through expert testimony that as a result of the plaintiff's failure to use an available seat belt, her injuries were far more severe than they would have been otherwise. (R. 208.)

7. Notwithstanding the fact that the plaintiff's attorney first broached the subject of the plaintiff's failure to use an available seat belt by asking her on direct examination whether or not she was wearing a seat belt, in direct contravention to a pretrial order by the judge prohibiting any such evidence, the defendant's counsel was prevented by the court from introducing the above-referenced seat belt testimony. (R. 175.)

8. Also, the defendant's counsel was prohibited from submitting to the jury instructions with regard to the use of seat belts. (T. 595-96.)

9. After the jury had retired for a period of time, one or all of the jurors requested that the bailiff

provide them with a dictionary. Evidently, the jury intended to use and did use the dictionary for the purpose of defining the legal term "proximate" in order to gain a better understanding of the legal term "proximate cause," which had already been provided in the jury instructions submitted to it prior to the time it retired. (R. 399-401.)

10. The jury entered its verdict in an amount in excess of \$200,000.00. A Judgment was prepared and entered in this matter. Subsequently, the defendant filed a Motion for a New Trial, Or in the Alternative, For the Remission of Damages which was denied by the trial court. (R. 367.)

11. An appeal followed that denial. (R. 404.)

12. On August 5, 1987, the Utah Court of Appeals affirmed the Judgment of the trial court. Following that, the defendant's Petition for Rehearing was denied on August 26, 1987. (Appendix "A.")

### ARGUMENT

#### POINT I

#### EVIDENCE OF THE NON-USE OF A SEAT BELT BY THE PLAINTIFF SHOULD HAVE BEEN ALLOWED.

Rule 43(2) and Rule 43(4) of the Rules of the Utah Supreme Court state that review by writ of certiorari may be in order when a panel of the Court of Appeals has decided a question of State law in such a way that it is in conflict with a decision of the Supreme Court or when the Court of Appeals has decided an important question of State law which has not been, but should be, settled by the Supreme Court. In this

case, the issue of whether evidence that a party was not wearing a seat belt should go to the jury was decided by the Court of Appeals. That decision by the Court of Appeals should, because of its importance, be decided by this Court. Further, it appears that the decision of the Court of Appeals may be in conflict with the decision in Acculog, Inc. v. Peterson, 692 P.2d 728 (Utah 1984) and with U.C.A. § 78-27-37 (1953 as amended). Specifically, the concurring Opinion of Justice Oakes sheds significant doubt on the finding of the Court of Appeals.

A. It Was an Error in Law to Prohibit the Defendant From Introducing Seat Belt Testimony and in Failing to Submit to the Jury the Defendant's Proffered Seat Belt Instruction.

The defendant should have been allowed to introduce seat belt testimony under the comparative negligence scheme of the State of Utah. The comparative negligence scheme upon which Utah courts functioned for purposes of this appeal is found within the provisions of Utah Code Ann. § 78-27-37 (1973) amended by Utah Code Ann., §§ 78-27-37, 38 (1986), which states as follows:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed should be diminished in the proportion to the amount of negligence attributable to the person recovering. As used in this act, "contributory negligence" includes "assumption of the risk."

(Emphasis added.) It should be noted that the terms of this statute do not limit the apportionment of negligence to the parties on the basis of the negligence of a party attributable to a particular act or to a particular occurrence, but on the basis of the negligence attributable to the damages caused by a particular party. In other words, the provisions of former Utah Code Ann. § 78-27-37 do not require that the negligence by which the amount of an award will be reduced be the negligence that caused the accident, but rather, the negligence can also be the negligence that contributed to or caused the damages suffered by a plaintiff. Further, this is completely consistent with the Restatement (Second) of Torts, § 465 Comment c, which provides that damages may be apportioned between the defendant and the plaintiff

Where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident, but to be a substantial contributing factor in increasing the harm which ensues.

The defendant cited the above-language to the trial court in a Memorandum in Opposition to the Plaintiff's Motion in Limine to exclude all evidence relating to seat belts. (R. 208, 210.) Basically, with regard to the seat belt testimony, it is the defendant's position that this is really an avoidable consequences problem, a question of fact that should have been submitted to the jury for determination. The defendant intended to show at trial that the plaintiff's failure to wear an available seat belt caused the majority of her injuries.

Justice Oaks in the relatively recent case of Acculog, Inc. v. Peterson, 692 P.2d 728 (Utah 1984), set out guidelines for how district courts should handle the issue of apportionment of damages in cases where the negligence of the recovering plaintiff did not in fact contribute to the cause of the accident but did contribute to the damages incurred. It is also interesting to note that Justice Oaks, as the defendant did, cited the Restatement (Second) of Torts, § 465 Comment c (1975) in support of his position.

In Acculog, the plaintiff's van, equipped with special geological equipment, caught fire and was destroyed on the same day that the defendant Peterson had installed a new fuel filter to correct over-heating in the engine. The plaintiff claimed substantial damages as a result of destruction of the van and the special equipment in the van, as well as lost profits. Evidently, the plaintiff did not carry a fire extinguisher in its van. A special verdict containing five interrogatories was submitted to the jury. Apparently, as a result of the special verdict, the jury determined that the plaintiffs were responsible for the damage to their vehicle because they failed to carry a fire distinguisher, notwithstanding the defendant's evident responsibility for the cause of the fire. The Supreme Court reversed and remanded to the trial court and specifically held that the trial court had committed prejudicial error in submitting to the jury the question of the plaintiff's comparative negligence. However, the court also expressly did not address the issue of

mitigation of damages or what is sometimes called the doctrine of avoidable consequences. However, in the concurring opinion, Justice Oaks, as noted above, set out a scheme for determining how the district court should handle the issue of apportionment of damages at the new trial.

Justice Oaks noted that first the negligence of both the plaintiff and the defendant, which resulted in the actual accident itself, were to be compared in a fashion consistent with former Utah Code Ann. § 78-27-37. The trier of fact was to determine what damages the plaintiff would be allowed to recover, diminished in an amount proportional to the amount of negligence attributable to the plaintiff. In other words, the jury was to determine as to the cause of the accident the respective percentages of negligence on the part of the plaintiff and on the part of the defendant.

Next, Justice Oaks said the jury would need to determine whether or not the plaintiff negligently failed to avoid the damages incurred because of the accident. If the plaintiff negligently failed to avoid such damages, then the plaintiff's award should be reduced by the amount of damages that the plaintiff would not have suffered if the plaintiff had not acted negligently in failing to avoid the consequences of the original accident. This result is reasonable and not contrary to the Utah Comparative Negligence Statute, which in fact would seem to mandate such an approach. Further, the concurrence of Justice Oaks is not in conflict with the

majority opinion which reserved the determination on the avoidable consequences problem until another time.

Evidence of whether or not the defendant was wearing her seat belt should have been admitted during the trial of this matter. Many courts now treat a failure to use seat belts as an avoidable consequences problem, holding that failure to wear an available seat belt, which results in the aggravation of injuries, may result in a reduction of recoverable damages. Insurance Co. of North America v. Pasakarnis, 451 SO.2d 447 (Fla. 1984); Foley v. City of West Allis, 113 Wis. 2d 475, 335 N.W. 2d 824 (1983); Spier v. Barker, 35 N.Y.2d 444, 323 N.E. 2d 164 (1974); Elchorn v. Olsen, 35 N.E. 2d 774 (1975); Wilson v. Volkswagon of America, 445 F.Supp. 1368 (D. Va. 1978); Kassela v. Stovitsch, 373 N.Y. 2d 601 (1972); Pritts v. Walter Lowry Trucking Co., 400 F.Supp. 867 (D. Pa. 1975); Langford v. Chrysler Motors, 513 F.2d 1121 (1975); Henderson v. United States, 429 F.2d 588 (10th Cir. 1970); Uresky v. Fedora, 27 Con. Supp. 498, 245 A.2d 393 (1968); Hurnkey v. Cornett Ins. Co., 72 Wis. 3d 170, 240 N.W. 2d 382 (1976); Glover v. Daniels, 310 F.Supp. 760 (D. Miss. 1970); Thomas v. Goodman, 372 A.2d 378 (1977); Benner v. Interstate Container Corp., 73 F.R.D. 502 (D. Penn. 1977); Latta v. Siefke, 401 N.Y.S. 2d 937 (1978); Noth v. Scheurer, 385 F.Supp. 81 (E.D.N.Y. 1968); Remington v. Arndt, 28 Con. Supp. 289, 259 A.2d 145 (Conn. Super. 1969); Fintenot v. Fidelity & Gas Co., 217 So.2d 702 (La. App. 1969); Sonnier v. Ramsey,

424 S.W. 2d 684 (Tex. Civ. App. 1968) and Tom Brown Drilling Co. v. Nieman, 418 S.W. 2d 337 (Tex. Civ. App. 1967).

Other states which have comparative negligence statutes have allowed the introduction of evidence that indicated that seat belts were available to the injured plaintiff and that there was a causal relationship between the injuries sustained by the plaintiff and the plaintiff's failure to use seat belts. Those courts have also allowed jury instructions with regard to avoidable consequences if seat belts had been worn. See Bentzler v. Braun, 34 Wis. 2d 362 (1967); Spier v. Barker, 35 N.Y.2d 444 (1974); Pritz v. Walter Lawry Trucking Co., 400 F.Supp. 867 (W.D. Penn. 1975); and Wilson v. Volkswagon of American, Inc., 445 F.Supp. 1368 (E.D. Va. 1978).

**B. There is a Valid Doctrinal Basis for Allowing the Seat Belt Defense in Utah.**

Although it may be argued that the seat belt defense does not fit neatly into existing tort doctrine, there is no reasonable basis to exclude it at trial. The Utah Court of Appeals evidently completely ignored this aspect of defendant's argument. In fact, the Court of Appeals devoted only two small paragraphs; one of which consisted of a string cite of cases, some of which are inapposite and not applicable to the question at hand.

Dean Prosser recognized that although evidence relative to the seat belt defense does not necessarily fit

conveniently within traditional tort doctrines, it nevertheless is more reasonable to admit it than to exclude it. He said:

The more difficult problem is presented when the plaintiff's prior conduct is found to have played no part in bringing about an impact or accident, but to have aggravated the ensuing damages. In such cases, [some courts] have apportioned the damages, holding that the plaintiff's recovery will be reduced to the extent that they have been aggravated by his own antecedent negligence. This would seem to be the better view, unless we are to place an entirely artificial emphasis upon the moment of impact, and the pure mechanics of causation.

W. Prosser, Law of Torts, § 65 (4th ed. 1971) (emphasis added). Also, the Restatement (Second) of Torts, adopts a similar view, besides that as presented in § 465, Comment c. In § 433A, apportionment of harm to causes, the Restatement says:

(1) Damages for harm are to be apportioned among two or more causes where

(a) There are distinct harms, or

(b) There is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

Restatement (Second) of Torts, § 433A (1965) (emphasis added).

Explanatory Comment c to the above-quoted section goes on to say:

Such apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm which ensues. There must of course be satisfactory evidence to

support such a finding, and the court may properly refuse to permit the apportionment on the basis of mere speculation.

In the case at hand, the defendant proffered expert testimony as to the consequential damages of plaintiff's failure to wear an available seat belt. Clearly, the defendant met the prerequisites of § 433A and § 465 of the Restatement, as well as the policy requirements of Prosser. The Restatement and Prosser apportionment rule, as stated above, are consistent with what the seat belt defense stands for. Non-use of an available seat belt does not entitle the defendant, as a matter of law, to a reduction of the plaintiff's damages, but the defendant is given the opportunity to demonstrate to the jury's satisfaction that the plaintiff's conduct contributed to the actual damage she suffered. Further, the avoidable consequences doctrine or apportionment rules have been applied in non-seat belt situations. See e.g., Dean v. Holland, 350 N.Y.S. 2d 859 (1973); and Halvorson v. Voeller, 336 N.W. 2d 118 (N.D. 1983).

Also, certain judicial opinions which cite a lack of duty on the part of the plaintiff to wear an available seat belt, because of the fact that common practice indicates that most drivers and passengers do not wear an available seat belt, lack a defensible foundation in logic or in law. Certainly, it is true that absent a mandatory seat belt use law there is no violation of a statutory duty, and consequently, no negligence per se, but that does not vitiate the "reasonable person"

standard of common law negligence. It cannot responsibly be argued that in 1983, the vast majority of motor vehicle occupants did not know the incontrovertible safety value of motor vehicle seat belts.

Parenthetically, the seat belt law currently in force in the State of Utah is probably inapplicable to the case at hand for two reasons: First, it was enacted subsequent to the accident which is the subject matter of this lawsuit, and second, it was not passed by a two-thirds majority of both houses of the Legislature. The seat belt law as currently set out provides that evidence of the failure to use a seat belt may not be utilized in a civil action. The Utah Constitution clearly provides that an amendment to the rules of evidence may only be made by a two-thirds vote of each House. The right to issue a new rule of evidence is reserved to the Supreme Court. (Utah Const. Art. VIII, § 4.) The seat belt act was not passed by a two-thirds majority in either House.

Persons who fail to expend the minimal effort required to engage a seat belt are not acting reasonably and should not be rewarded for their non-feasance. The Wisconsin Supreme Court said as early as 1967 that:

[w]hile we agree with those courts that have concluded that it is not negligence per se to fail to use seat belts where the only statutory standard is one that requires the installation of the seat belts in the vehicle, we nevertheless conclude that there is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate.

. . .

On the basis of [certain accident statistics], it is a matter of common knowledge, an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seat belts.

Bentzler v. Braun, 149 N.W.2d 626, 639, 640 (Wis. 1967).

Also, the common practice of failing to engage an available seat belt is not dispositive on what constitutes reasonable behavior by automobile users. The fact that the majority of people fail to use seat belts does not make that action reasonable. This is especially true when the majority's behavior involves unnecessary risks. Again, Prosser terms such behavior "customary negligence." W. Prosser, Law of Torts, § 33 (4th ed. 1971). The common law standard of reasonableness is not an actual standard, but one to which people ought to aspire. Judge Learned Hand made this clear when he said:

Indeed, in most cases, reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however, persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

C. Seat Belt Testimony Should Have Been Admitted as Curative Evidence.

Prior to the trial of the action, the judge of the trial court instructed both parties to introduce no evidence with regard to seat belts until such time as both parties

had the opportunity to brief the issue, present the briefs to the court and argue the respective positions outside the presence of the jury. However, prior to the time set aside for the argument of the seat belt issue, the attorney for the plaintiff broached the issue.

Utah follows a rule of evidence permitting "curative evidence" to be forwarded by a party when the opposition presents irrelevant or inadmissible evidence. In Leger v. Roberts, 550 P.2d 212 (Utah 1976), the Utah Supreme Court affirmed the admission of otherwise irrelevant evidence, determining:

We see no error in the trial court having admitted the evidence, particularly since one of Leger's witnesses, who appeared to be an expert, opened the matter up and thus made it a legitimate target for cross-examination.

Id. at 215. See also, Millford State Bank v. Westfield Canal & Irrigation Co., 162 P.2d 101 (Utah 1945).

The Utah Court of Appeals did not even address this issue in its Opinion. The defendant vigorously urges the Court to consider this and all other issues relevant to the seat belt argument.

## POINT II

THE JURY'S USE OF EXTRANEOUS EVIDENCE, A DICTIONARY, TO DEFINE THE WORD "PROXIMATE," ENTITLED THE DEFENDANT TO A NEW TRIAL AS A MATTER OF LAW.

As noted in the Statement of Facts, the jury evidently requested the bailiff provide them with a

dictionary. The bailiff did procure and provide the jury with a dictionary for the jury's use. Subsequently, it was learned that the jury used the dictionary to define the term "proximate" in order to understand the legal term "proximate cause." This fact was supported by a juror affidavit. This consideration of extraneous material was clearly an irregularity which required the Court of Appeals to reverse the Judgment of the trial court and remand for a new trial.

The case at hand is a perfect example of the dangers that can be encountered when the jury breaks off on its own to interpret the meaning of legal terms. In this case, the jury used the dictionary to define the term "proximate," a term already defined in the Court's instructions to the jury. Central to any negligence case is the issue of proximate cause. It is a term of art, a term used to express the concept of "legal cause." It is a term used to focus a jury's attention on the consideration of whether the defendant's conduct is "close" enough in the causal chain of events leading to the plaintiff's injuries to warrant the imposition of a legal duty upon the defendant. Any dictionary definition focusing on closeness in time or location is woefully inadequate and inherently misleading. The misleading effect of the dictionary definition is magnified in this case because of the relationship of the plaintiff's and the defendant's conduct in terms of closeness in time and distance. The dictionary definition of "proximate" could lead a reasonable juror to focus unduly on the closeness of time and distance in analyzing

proximate cause and therefore contaminate the deliberative process. This is so notwithstanding any particular juror's affidavit to the contrary, particularly in light of Rule 606(b) of the Utah Rules of Evidence, which precludes affidavit testimony on the question of whether the extraneous material was actually prejudicial.

The actual effect on the jury of looking up the word "proximate" in a dictionary is not discoverable. But, in light of the facts of the case and the law, this Court should conclude it is reasonable that the jury's verdict would be, and in fact was, affected by a layman's definition of a term so weighted with peculiarly legal baggage. Therefore, this Court should grant the defendant's Petition for Writ of Certiorari.

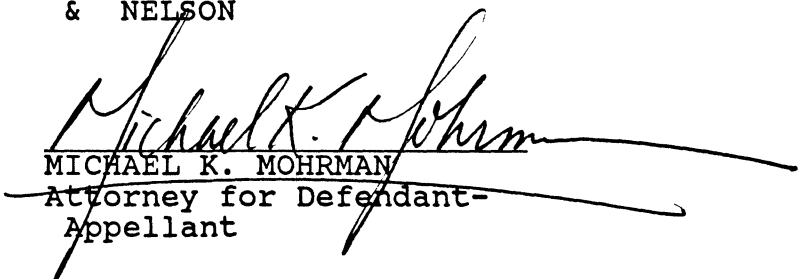
#### CONCLUSION

The Utah Court of Appeals failed to adequately address the seat belt issue and the extraneous evidence issue. The seat belt issue in particular is an extremely important issue that should be decided by this Court as opposed to the Court of Appeals. The issue should be fully and properly briefed to this Court before any decision is made about whether or not seat belt testimony should be admitted and utilized by the trier of fact. The Court of Appeals' decision may in fact be contrary to the decision of this Court in Acculog, and is contrary to former Utah Code Ann. § 78-28-37. Further, as stated above, the question is such an important question of state law that it should be settled by

this Court and none other. Therefore, the defendant-appellant, William J. Lamborn, by and through his counsel, respectfully requests this Court to grant his Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 12 day of October, 1987.

RICHARDS, BRANDT, MILLER  
& NELSON

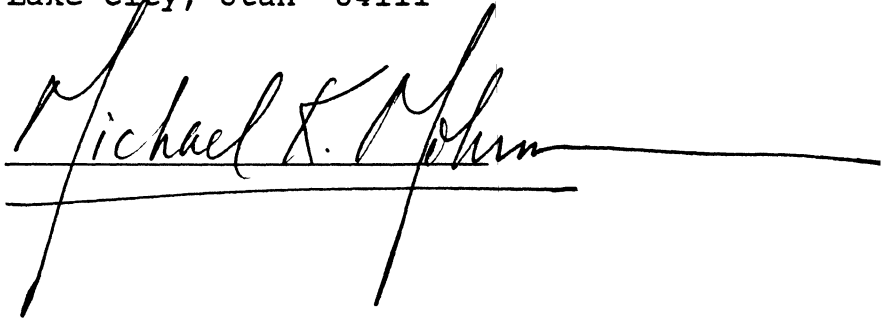
  
MICHAEL K. MOHRMAN  
Attorney for Defendant-  
Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing instrument was ~~mailed, first class, postage~~ *hand delivered* prepaid on this 13 day of October, 1987, to the following counsel of record:

Stephen G. Morgan  
Mark L. Anderson  
261 East 240 South, 2nd Floor  
Salt Lake City, Utah 84111

HILLIER2/MMW  
jbpm10107



## APPENDIX "A"



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.

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 221, 137 P.2d 347 (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.

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 (Utah 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 instructions 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

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. Doebling, 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. Diamani, 226 A.2d 914, 918 (Del. 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.<sup>1</sup>

## III

The third issue raised on appeal is whether the trial court erred in failing to grant a new trial due to the juror's<sup>2</sup> 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."<sup>3</sup> The bailiff complied.

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.

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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.

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 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. 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.

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

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); Uintah 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).

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.

\_\_\_\_\_  
Pamela T. Greenwood, Judge

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WE CONCUR:

\_\_\_\_\_  
Russell W. Bench, Judge

\_\_\_\_\_  
Gregory K. Orme, Judge

## APPENDIX "B"

RECEIVED  
JUL 26 1987  
RICHMOND & Z

**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

MICHAEL K. MOHRMAN  
RICHARDS, BRANDT, MILLER  
& NELSON  
Attorneys for Defendant/Appellant  
CSB Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Telephone: (801) 531-1777

---

IN THE UTAH SUPREME COURT

---

KAREN HILLIER,	)	
	)	
Plaintiff/Respondent,	)	APPELLANT'S EX PARTE
	)	MOTION FOR EXTENSION OF
vs.	)	TIME TO FILE PETITION FOR
	)	WRIT OF CERTIORARI
	)	
WILLIAM J. LAMBORN,	)	
	)	
Defendant/Appellant.	)	Case No. 860030-CA

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Appellant, William J. Lamborn, by and through his counsel of record, Michael K. Mohrman, hereby moves this Court pursuant to Rule 45(e), Rules of the Utah Supreme Court, to extend appellant's time for filing a Petition for Writ of Certiorari from September 25, 1987 up to and including October 9, 1987.

As good cause for this Motion, appellant alleges as follows:

1. The Order denying appellant's Petition for Rehearing was entered by the Utah Court of Appeals on August 26, 1987. Therefore, time for filing appellant's Petition for Writ of Certiorari has not yet expired.

2. Counsel for appellant, Michael K. Mohrman, was preparing for and participated in a two-week trial beginning September 8, 1987. This trial, before Third District Judge Scott Daniels, is entitled Pickhover v. Smith's Management Inc., et al., Civil No. C85-4307.

3. Due to this trial, with its necessary preparation, appellant's counsel was unable to file his Petition for Writ of Certiorari with this Court.

4. Appellant seeks fourteen (14) day extension, and no prior Request for Extension Time has been filed.

DATED this 25 day of September, 1987.

RICHARDS, BRANDT, MILLER  
& NELSON

  
MICHAEL K. MOHRMAN  
Attorney for Appellant

CERTIFICATE OF HAND-DELIVERY

I hereby certify that a true and correct copy of the foregoing instrument was hand-delivered on this 25 day of September, 1987 to the following counsel of record:

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

HILLIER1/TAMI

MICHAEL K. MOHRMAN  
RICHARDS, BRANDT, MILLER  
& NELSON  
Attorneys for Defendant/Appellant  
CSB Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Telephone: (801) 531-1777

---

IN THE UTAH SUPREME COURT

---

KAREN HILLIER,	)	
	)	
Plaintiff/Respondent,	)	ORDER GRANTING APPELLANT'S
	)	MOTION FOR EXTENSION OF TIME
vs.	)	TO FILE WRIT OF CERTIORARI
	)	
WILLIAM J. LAMBORN,	)	
	)	
Defendant/Appellant.	)	Case No. 860030-CA

---

This matter having come before the Court upon  
defendant's/appellant's Motion for Extension of Time to File a  
Petition for Writ of Certiorari in the above-captioned  
matter, and the Court having duly considered said Motion,

IT IS HEREBY ORDERED that defendant's/appellant's  
Motion for Extension of Time to File a Petition for a Writ of  
Certiorari be granted and that the time for filing said  
Petition be extended up to and including October 9, 1987.

DATED this \_\_\_\_\_ day of September, 1987.

BY THE COURT:

---

Supreme Court Justice

CERTIFICATE OF HAND-DELIVERY

I hereby certify that a true and correct copy of the foregoing instrument was hand-delivered on this 25 day of September, 1987 to the following counsel of record:

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

A handwritten signature in black ink, appearing to read "Michael K. Johnson", is written over a horizontal line. A second horizontal line is drawn below the signature.

HILLIER2/TAMI

## APPENDIX "C"

**ACCULOG, INC., a Colorado corporation,  
Robert Pfister and Kenton Shaw, co-  
partners d/b/a Acculog Field Services,  
Plaintiffs and Appellants,**

**v.**

**Keith PETERSON, d/b/a Peterson  
Ford, Defendant and Respondent.**

**No. 18133.**

**Supreme Court of Utah.**

**May 1, 1984.**

In a suit for destruction of plaintiff's van and logging equipment by fire, allegedly caused by defendant's negligence, plaintiff appealed from judgment of the Seventh District Court, Grand County, George E. Ballif, J. The Supreme Court, Howe, J., held that: (1) 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 the question of plaintiffs' comparative negligence, and (2) plaintiff's loss of profits calculated at \$33,122.40 was meticulously supported by exhibits documenting gross profits, deducting expenses not incurred when contracts were lost, and deriving net loss of profits from difference between the two, and there was sufficient evidentiary basis for jury to have determined the issue.

Judgment on special verdict vacated, and case remanded for new trial.

Oaks, J., filed concurring opinion.

#### **1. Negligence ⇐97**

Ultimate facts in comparative negligence case embrace only negligence, causation and percentages of negligence attributed to plaintiff and defendant, and a plaintiff cannot be held to be contributorily negligent unless his negligence is causally connected to the plaintiff's injury. U.C.A. 1953, 78-27-37.

#### **2. Negligence ⇐97**

Only where plaintiff's negligent conduct was contributing factor in causing injury does comparative negligence become defense for defendant. U.C.A.1953, 78-27-37.

#### **3. Automobiles ⇐368**

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 the question of plaintiffs' comparative negligence. U.C.A.1953, 78-27-37.

#### **4. Damages ⇐5, 184**

Generally, all damages, special or general, causally connected to party's tortious actions are recoverable, and although evidence must not be so indefinite as to allow jury to speculate as to their amount, some degree of uncertainty is tolerable.

#### **5. Damages ⇐190**

In suit for negligence causing plaintiffs' van and logging unit to be destroyed by fire, plaintiff's loss of profits calculated at \$33,122.40 was meticulously supported by exhibits documenting gross profits, deducting expenses not incurred when contracts were lost, and deriving net loss of profits from difference between the two, and there was sufficient evidentiary basis for jury to have determined the issue.

Paul W. Mortensen, Harry E. Snow, Moab, for plaintiffs and appellants.

Nelson E. Hayes, Salt Lake City, for defendant and respondent.

**HOWE, Justice:**

Plaintiffs Acculog appeal from a judgment of "no cause of action" which was entered after a jury returned a special verdict. Acculog's 1977 four-wheel-drive Ford E250 QuadraVan, estimated at a value of \$7,000, caught fire and was destroyed later in the same day that defendant Peterson Ford had installed a new fuel filter to cor-

rect overheating in the engine. Also destroyed in the fire was Acculog's geological equipment consisting of a Mount Sopris bore-hole logging unit mounted on the vehicle and stipulated to have a value of \$41,687.95. Acculog claimed that the destruction of the van and equipment resulted in a loss of profits estimated by it at over \$33,000. On the day of the fire Acculog did not carry a fire extinguisher in its van.

At trial, Peterson Ford moved for a directed verdict in its favor at the end of Acculog's case on the issue of lost profits. The motion was based on the ground that plaintiffs had failed to prove the loss of any profits under binding contracts. The motion was granted on that ground and on the further ground added by the court that there was no evidence before the jury what the amount of the profits would have been.

At the end of the trial Acculog excepted to a special verdict form on the ground that there was no evidence to support submitting the question of comparative and contributory negligence to the jury. Acculog also asked the trial court to instruct Peterson Ford not to argue to the jury that the absence of a fire extinguisher constituted negligence on its part as any such negligence was not relevant to causation of the fire. The court noted that it had difficulty with that issue as it seemed to be a question of mitigation of damages. However, the amount of damages had been stipulated to by the parties and the court determined that it could not therefore instruct on mitigation. Plaintiffs' request was denied by the court with a comment that the jury "would be looking at [the absence of a fire extinguisher] from the standpoint of it being maybe just another one of the elements that ended up in causing the fire." That argument was made by the defense to the jury.

The special verdict contained five interrogatories:

1. Was the defendant negligent in the manner of servicing plaintiffs' van on June 28, 1979?

1. These percentages seem to closely parallel the estimated value of the truck of \$7,000 and the

2. If your answer to Question No. 1 is "yes," then answer the following question: Was such negligence a proximate cause of the fire and damage sustained by plaintiffs on said date?

3. Was [sic] the plaintiffs negligent at the time of the fire in question on June 28, 1979?

If your answer to Question No. 3 is "yes," then answer the following question:

4. Was such negligence a proximate cause of the fire and damage sustained by plaintiffs on said date?

5. If you have answered all the previous questions "yes," then and only then, are you to answer this question:

Taking the combined negligence that caused the damage as one hundred percent (100%), what percentage of that negligence was attributable [sic] to the plaintiffs and what percentage was attributable to the defendant?

(a) Percentage attributable to defendant?

(b) Percentage attributable to plaintiffs?  
TOTAL 100%

During deliberation the jury delivered a note to the trial court that they could not answer questions 2 and 4 as "they appear to be two-part questions that we cannot answer with a singular answer." The trial court responded "you must answer either yes or no to each of the questions referred to above. Consult the instructions. I cannot help you further." Questions Nos. 1 through 4 were answered in the affirmative. Question No. 5 attributed 14 percent negligence to the defendant and 86 percent negligence to the plaintiffs.<sup>1</sup>

Acculog's points on appeal can be reduced to two major issues: (1) Was it error for the trial court to refuse to direct a verdict in favor of Acculog on the issue of plaintiffs' comparative negligence? (2) Was it error for the trial court to direct a verdict in favor of Peterson Ford on the issue of loss of profits?

stipulated damages to the equipment of \$41,687.95

## COMPARATIVE NEGLIGENCE

Utah's comparative negligence statute, U.C.A., 1953, § 78-27-37, provides that the contributory negligence of a person shall not bar the recovery of damages "for negligence . . . resulting in death or injury to person or property, if such negligence was not as great as the negligence . . . of the person against whom recovery is sought . . . ." The question posed therefore is whether plaintiffs' alleged negligence, their failure to carry a fire extinguisher in the van, caused "injury" to their own property, and whether a jury instruction on plaintiffs' negligence was proper under the circumstances of this case.

[1,2] The ultimate facts in a comparative negligence case embrace only negligence, causation and the percentages of negligence attributed to plaintiff and defendant. *Marcus v. Cortese*, 98 N.M. 414, 649 P.2d 482 (App.1982). A plaintiff cannot be held to be contributorily negligent unless his negligence is causally connected to the plaintiff's injury. *Boeke v. International Paint Co. (Cal.), Inc.*, 27 Wash.App. 611, 620 P.2d 103 (1980); *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980). From its inception comparative negligence law has been so construed that once the combined negligence of plaintiff and defendant in causing the injury to the plaintiff is established, it is within the province of the trier of fact to apportion fault or causation. *Brown v. Haertel*, 210 Wis. 345, 244 N.W. 630 (1932). In other words, where plaintiff's negligent conduct was a contributing factor in causing the injury, comparative negligence becomes a defense for the defendant.

[3] Here there was no evidence presented at trial that Acculog in any way caused the fire. The jury found that Peterson Ford had negligently serviced the van and that its negligence was a proximate cause of the fire and damage sustained by Acculog. (Interrogatories 1 and 2.) The jury also found Acculog to have been negligent in causing the fire and damage. (Interrogatories 3 and 4.) When faced with apportioning negligence, the jury was asked

to take the combined negligence that caused the damage and apportion it between the two parties. (Interrogatory 5.) Testimony at the trial made it clear that Acculog could have prevented the spread of the fire from the engine of the van to the logging equipment had a fire extinguisher been available, but that should not have been the question presented to the jury. We are not concerned in comparative negligence law with the cause of the damage, but with the cause of the injury instead.

The term "injury" is sometimes used in the sense of "damage," as including the harm or loss for 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).

The special verdict form in the case under review combined in interrogatories 2 and 4 injury and damage as one element of the tort. The jury was confused and requested clarification. The confusion was compounded when in interrogatory 5 an apportionment was requested on cause of damage. In *Kelley v. Capital Motors*, 204 S.C. 304, 28 S.E.2d 836 (1944), a case inversely apposite here, plaintiff sued defendant for loss of his car in a fire originating outside defendant's premises. Defendant moved for a directed verdict on the ground that his failure to have a sprinkler system and fire extinguishers on the premises bore no causal connection to the destruction of plaintiff's car. The trial court denied the motion and defendant appealed. Finding no causal connection between defendant's negligence and plaintiff's loss, the appeals court stated:

On the issue of proximate cause, we are of the opinion that the only reasonable inference warranted by the record is that

the proximate, direct and immediate cause of the loss of [plaintiff's] automobile was a fire which broke out and commenced on premises over which [defendant] had no control, and which . . . spread to [defendant's] sales room and repair garage.

Likewise in the case under review, the proximate, direct and immediate cause of the loss of Acculog's van and equipment was a fire which broke out in the engine through no fault of Acculog's and spread to the logging unit. Peterson Ford did not have the defense of plaintiffs' comparative negligence. 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.

We hold that the trial court committed prejudicial error in submitting to the jury the question of plaintiffs' comparative negligence.

#### LOSS OF PROFITS

On motion of the defendant, the trial court directed a verdict against plaintiffs on the issue of lost profits because they did not produce evidence that they had entered into any binding contracts which they were unable to perform when they lost their van and equipment. The court also based its ruling on the ground that on the evidence then before the court, the jury could not have concluded what the profit on any job would have been. Defendant's motion for a directed verdict was supported by its argument that lost profits could not be based upon an understanding between Acculog and Amoco (one of its customers) that did not rise to the level of a legally binding contract. Defendant misperceives the test. Acculog was not seeking lost profits resulting from the breach of contract by a contracting party. Damages were claimed in an action sounding in tort against a noncontracting party.

[4] The general rule that all damages, whether special or general, which are causally connected to a party's tortious actions are recoverable was restated in *ERA Helicopters, Inc. v. Digicon Alaska, Inc.*, Alas-

ka, 518 P.2d 1057 (1974). In that case a survey company suffered losses when a helicopter company damaged a gravity meter which it used to conduct gravity and seismic surveys in the Norton Sound region of Alaska, not dissimilar to the type of work engaged in by Acculog in the instant case. The survey company based its claim for damages to property and for business disruption on the helicopter company's negligence. Survey work was halted for 25 days until a new gravity meter could be obtained. The trial court gave the following jury instruction:

If you find that the loss of the gravity meter was proximately caused by the negligence of the [helicopter company] you may award as damages to the plaintiff such amount as will compensate for the business interruption, including but not limited to the standby time of the crew aboard the vessel and the costs related to the delay in completion of the seismographic work for the client of plaintiff.

Two complementary instructions dealt with a party's duty to avoid loss and minimize damages, and with damages proximately resulting from the wrongful act. The reviewing court upheld those instructions and damages awarded thereunder as proper. Again, the measure of damages for loss of use of property was set out in *State v. Stanley*, Alaska, 506 P.2d 1284 (1973). Stanley had lost his crab fishing boat as a result of the state's negligence. Damages were awarded for loss of use for 18 months, the period required to replace the vessel. After recognizing the general objective of tort law to place an injured person in a position as nearly as possible to the position he would have occupied but for the defendant's tort, the court applied that objective to the loss of a vessel: "[T]he damages would be the vessel's share of gross earnings reasonably anticipated for the period involved, . . . less the expenditures which would have been chargeable to the owner." *Id.* at 1293.

We have recognized that lost profits may be recovered when the evidence submitted

provides a basis for estimating them with reasonable certainty. While the evidence must not be so indefinite as to allow the jury to speculate as to their amount, some degree of uncertainty is tolerable. *Cook Associates, Inc. v. Warnick*, Utah, 664 P.2d 1161 (1983); *Penelko, Inc. v. John Price Assocs., Inc.*, Utah, 642 P.2d 1229 (1982); *Winsness v. M.J. Conoco Distributors, Inc.*, Utah, 593 P.2d 1303 (1979); dictum in *Howarth v. Ostergaard*, 30 Utah 2d 183, 515 P.2d 442 (1973); *Security Development Company v. Fedco, Inc.*, 23 Utah 2d 306, 462 P.2d 706 (1969). Cf. *Jenkins v. Morgan*, 123 Utah 480, 260 P.2d 532 (1953).

[5] Under the above authorities, the trial court erred in directing a verdict against Acculog on the issue of lost profits. Acculog produced as a witness Amoco's geologist who was in charge of all bidding and who had accepted Acculog's bid on two jobs. He testified that during his employment with Amoco, no bid accepted by him had ever been rejected by the officer authorized to contractually bind Amoco. Acculog had to withdraw those bids when it could not timely replace its logging unit. Plaintiffs calculated their loss of profits at \$33,122.40. That amount was meticulously supported by exhibits documenting gross profits, deducting expenses not incurred when the contracts were lost, and deriving the net loss of profits from the difference between the two. Thus there was laid an evidentiary basis for the jury to have determined the issue. In this instance, we examine the evidence in the light most favorable to the losing party, and when there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party the directed verdict cannot be sustained. *Management Committee v. Graystone Pines*, Utah, 652 P.2d 896 (1982).

The judgment on the special verdict is vacated and the case remanded for a new trial. Costs are awarded to the plaintiffs.

HALL, C.J., and DURHAM, J., concur.  
STEWART, J., concurs in the result.

OAKS, Justice (concurring):

I concur in the Court's opinion, but believe that instead of reserving judgment on the effect of plaintiff's "failure to mitigate damages," this Court should give guidance on how the district court should handle the issue of apportionment of damages on the new trial.

Our comparative negligence statute, U.C.A., 1953, § 78-27-37, only applies to negligence "resulting in death or in injury to person or property . . ." The "resulting . . . injury" referred to in this section is the accident, in this case the fire. Consequently, as the main opinion holds, only negligence that caused the fire is properly compared under the statute.

Negligence that only contributed to the harm, detriment, or loss sustained by reason of the accident is also relevant and should be given effect before money damages are finally apportioned. *Restatement (Second) of Torts*, § 465 comment c (1965). In the context of our comparative negligence statute, this requires a two-step process, as follows:

First, the negligence of plaintiff and defendant that resulted in the accident are compared, in the manner and with the effect specified in § 78-27-37. That is, the trier of fact determines the amount of damages the plaintiff would be allowed to recover (independent of damages caused by his failure to mitigate or avoid damages), and that amount is then "diminished in the proportion to the amount of negligence [in causing the accident] attributable to the [plaintiff]." This step exhausts the effect of the comparative negligence statute.

Second, the amount of damages the plaintiff would be allowed to recover under the first step is subjected to a further reduction dictated by the common-law rule of mitigation of damages or what the *Restatement* calls "the damages rule as to avoidable consequences . . ." *Restatement (Second) of Torts*, § 465 comment c (1965). This reduction, on which the defendant has the burden of proof, applies

where the plaintiff is found to have been negligent in failing to mitigate or avoid damages and where this negligence is found to have increased his total damages beyond what he would have suffered if he had not been negligent in this manner. The reduction under this step is the percentage of the total damages that is attributable to plaintiff's negligence in failing to mitigate or avoid damages.

The two-step process specified here is the one described and applied by the North Dakota Supreme Court in *Halvorson v. Voeller*, N.D., 336 N.W.2d 118 (1983), a well-reasoned opinion to which reference is made for further discussion. The process is illustrated in that court's example, quoted in the footnote.<sup>1</sup>



**Douglas BOTTOMS, Plaintiff, Appellant  
and Cross-Respondent,**

**v.**

**Scott O. HUNSAKER, Defendant,  
Respondent and Cross-Appellant.**

**No. 17775.**

Supreme Court of Utah.

May 1, 1984.

Appeal from Third District Court, Salt Lake County; James S. Sawaya, Judge.

John L. Black, Salt Lake City, for plaintiff, appellant and cross-respondent.

Roger H. Bullock, Salt Lake City, for defendant, respondent and cross-appellant.

1. Assume: X driving a car, and Y, driving a motorcycle, get in an accident. Y is not wearing a helmet. The jury finds X is 60 percent liable for causing the accident [the "injury" under § 78-27-37], making Y, the motorcyclist, 40 percent liable for causing the accident. The jury also finds Y would have avoided 60 percent of his injuries [damages] if he had worn a helmet; X is 40 percent liable for causing Y's [damages]. Y proves \$100,000 in damages.

HALL, Chief Justice:

Plaintiff brought this action to recover for injuries sustained while a guest passenger in a jeep operated by defendant that rolled over while attempting an off-road hill climb.

The trial court granted summary judgment in favor of defendant in reliance upon the Guest Statute, U.C.A., 1953, § 41-9-1. Plaintiff appeals, and defendant cross-appeals the court's denial of his motion to dismiss a second cause of action based on intoxication and willful misconduct.

*Malan v. Lewis*, Utah, -693- P.2d - 661 (1984), determines the Guest Statute to be unconstitutional. We therefore vacate the judgment of the trial court and remand this case for trial. No costs awarded.

STEWART, HOWE, OAKS and DURHAM, JJ., concur.



**Melissa BUNKER, By and Through her  
general guardian, Karen MECHAM,  
Plaintiff-Appellant,**

**v.**

**Ted MOHLMAN, Defendant-Respondent.**

**No. 17286.**

Supreme Court of Utah.

May 1, 1984.

Appeal from Fourth District Court, Utah County; David Sam, Judge.

On the basis of these findings, the \$100,000 award should be reduced by 40 percent, which accounts for Y's contributing to the cause of the accident. Hence, the award is diminished to \$60,000.

The \$60,000 should now be reduced to the extent that Y's [damages] would have been [avoided] had he worn a helmet, i.e., 60 percent. This adjustment leaves a total award of \$24,000.

*Id.* at 121-22 n. 2.