

1989

# Harold Edwin (Hal) Rhodes v. John M. Fry and Judith L. Fry v. William C. Petersen : Brief of Appellee

Utah Court of Appeals

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**BRIEF**

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IN THE COURT OF APPEALS

DOCKET NO. 89-473 OF THE STATE OF UTAH

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HAROLD EDWIN (HAL) RHODES,	:	
Plaintiff/Appellee,	:	Case No. 89-0473-CA
vs.	:	
	:	Category 14b
JOHN M. FRY and	:	
JUDITH L. FRY,	:	
Defendants/Third-party	:	
Plaintiffs/Appellants.	:	
vs.	:	
WILLIAM C. PETERSEN,	:	
Third-party Defendant.	:	

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BRIEF OF APPELLEE

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APPEAL FROM A FINAL JUDGMENT  
OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,  
STATE OF UTAH, HON. BOYD L. PARK

---

FRED D. HOWARD and  
LESLIE W. SLAUGH, for:  
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ATTORNEYS FOR APPELLANT

**FILED**

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COURT OF APPEALS

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Third-party Defendant.	:	

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JURISDICTION

This is an appeal from a final judgment in a civil case. The Utah Supreme Court had jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (Supp. 1989). The case was transferred to this Court pursuant to Utah Code Ann. § 78-2-2(4) (Supp. 1989), and this Court has jurisdiction pursuant to § 78-2a-3(2)(j) (Supp. 1989).

ISSUES PRESENTED

1. Did the trial court err in directing a verdict for the plaintiff passenger, where the defendant had stipulated that the plaintiff was not negligent, the trial court had previously directed a verdict in favor of plaintiff's driver based on the uncontroverted evidence, and the accident was not one which would happen in the absence of negligence?

2. If this Court determines that the trial court did err, should this case be remanded for a new trial on negligence only where the trial court determined that there was no substantial competent evidence to support the jury's verdict, the overwhelming weight of the evidence established that Fry was negligent, and the jury was confused?

#### DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 41-6-73 (1981), amended by Utah Code Ann. § 41-6-73 (1988), as in effect at the time of the accident, provided as follows:

The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close to the turning vehicle as to constitute an immediate hazard.

The provisions of Rule 50 of the Utah Rules of Civil Procedure are set forth in the Appendix.

#### STATEMENT OF THE CASE

A. Nature of the Case. This is a civil action to recover for personal injuries incurred in an automobile accident alleged to have been caused by defendants' negligence.

B. Course of Proceedings and Disposition Below. The accident in question occurred on December 11, 1982. (Tr.<sup>1</sup> 11-28-

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<sup>1</sup>Citations to those portions of the record which were repaginated by the trial court clerk in accordance with Rule 11(b) of the Rules of the Utah Court of Appeals will be to "R. [page number]."



88 p. 47.) Plaintiff filed his complaint on August 12, 1983, initially naming as defendants John M. Fry and his mother, Judith L. Fry. The complaint alleged that John M. Fry (hereinafter "Fry") negligently drove the pick-up he was driving into the path of the automobile in which plaintiff was a passenger. The complaint further alleged that Judith L. Fry signed the driver's license application of John M. Fry, who was a minor at the time of the accident, and was accordingly liable for his negligence pursuant to Utah Code Ann. § 41-2-10 (1981), amended by Utah Code Ann. § 41-2-115 (1988).

Defendants Fry subsequently filed a third-party complaint naming William C. Petersen (hereinafter "Petersen"), the driver of the automobile in which plaintiff was a passenger, as a third-party defendant. (R. 90-95.) Plaintiff thereafter amended his complaint to also state a claim against Petersen for negligence. (R. 142-45.)

The case was tried before a jury commencing November 28, 1988. (R. 374-86.) Petersen reserved the right to make motions at the close of plaintiff's case (Tr. 11-29-88 p. 102), and at the end of Fry's case, (R. 500), and at an appropriate time made a motion for directed verdict as against both plaintiff and Fry. (Tr. 11-29-88

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Only one portion of the transcript was so paginated, that of the testimony of Dr. Rudolph Limpert on the second day of trial, November 29, 1988. The balance of the transcript will be cited by date and page number, e.g., "Tr. 11-29-88 p. \_\_\_\_\_."

p. 190.) After considering arguments of counsel, Petersen's motion was granted. (Id. p. 197.)

Plaintiff moved for a directed verdict that plaintiff had no comparative negligence. All parties stipulated to the motion, and it was granted. (Id. p. 197.)

Plaintiff also made an oral motion for a directed verdict that Fry was negligent. (Id.) The motion was preliminarily denied (Id. p. 198), and renewed the following morning in writing. (R. 292; Tr. 11-30-88 p. 3.) After arguments, the trial court took the motion under advisement. (Tr. 11-30-88 p. 9.)

Fry requested, and the court rejected, a jury instruction on "unavoidable accident." (R. 324; Tr. 11-30-88 p. 46.) The case was submitted to the jury on a special verdict, but the jury was instructed to answer questions relating to the amount of plaintiff's damages regardless of its verdict on negligence. (Tr. 11-30-88 p. 49.)

The jury found that Fry was not negligent. (R. 303-04.) The trial court thereafter granted plaintiff's motion for a directed verdict, which had been taken under advisement during the trial. (R. 424-30.) The trial court subsequently entered formal Findings of Fact and Conclusions of Law (R. 448-54), and a Judgment (R. 455-56). Fry filed his appeal on May 15, 1989. (R. 457-58.)

C. Statement of Facts. The accident giving rise to this action occurred shortly after 8:00 p.m. on December 11, 1982, at the intersection of 1300 South and Main Street in Orem, Utah. (Tr.

11-28-88 p. 47; Tr. 11-29-88 p. 8.) The road on which both vehicles were traveling, 1300 South, is the main arterial road leading from the I-15 freeway to the University Mall in Orem, Utah. (A diagram of the intersection appears in the Appendix.) Plaintiff was a passenger in a Volkswagen "bug" driven by William Petersen. Petersen and plaintiff were on a double date; plaintiff and his date were seated in the back seat, and Petersen and his date in the front seat. (Tr. 11-29-88 p. 6.) The Volkswagen was proceeding east along 1300 South at a speed less than the speed limit.<sup>2</sup> There was no evidence of any lane changes by the Volkswagen. (Tr. 11-29-88 pp. 125, 133. See also Tr. 11-28-88 p. 64, Tr. 11-29-88 p. 29.) The Volkswagen was travelling in the right-hand (South) lane of the road. (Tr. 11-28-88 p. 58; tr. 11-29-88 p. 122.) The road at that point had two east-bound lanes plus a left-turn lane. (Exs. 1 & 10, copies in appendix; Tr. 11-30-88 pp. 16-17.) The roads were clear and dry, and although it was dark, the street lights were on and visibility was clear. (Tr. 11-29-88 pp. 7, 32-33; Tr. 11-28-88 pp. 48-49.) The headlights on the Volkswagen were on. (Tr. 11-29-88 pp. 24, 132, 140.)

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<sup>2</sup>Rudolph Limpert, who testified for Fry, estimated the speed of the Volkswagen at 44 to 48 miles per hour prior to application of the brakes, and 30 to 35 miles per hour at the point of impact. (R. 487-88, 493.) Greg DuVal, who testified for plaintiff, estimated the speed of the Volkswagen at 38 miles per hour prior to braking, and 25 miles per hour on impact. (Tr. 11-30-88 p. 26.) Petersen did not recall what speed he was going. (Id. p. 36.) The speed limit was 55 mph. (Tr. 11-28-88 p. 55.)

John M. Fry, 16 years old at the time of the accident, was also on a date. (Tr. 11-29-88 pp. 31-32.) He thought he was on the road to the Orem Recreation Center, but was about 17 blocks off course. (Tr. 11-28-88 p. 56.) His vehicle was proceeding west on 1300 South and turned left through the intersection and into the path of the Volkswagen. (Tr. 11-29-88 p. 123.) The Volkswagen left 35' 11" of skid marks in the right-hand travel lane (Tr. 11-28-88 p. 55; Ex. 2), but still collided with sufficient force to cause the Volkswagen to spin around and to knock all four occupants of the Volkswagen unconscious. (Tr. 11-29-88 pp. 9, 56, 132.) Only one of the four occupants in the Volkswagen had any memory of the accident itself, and that was Becky Jones, Petersen's date. Her only recollection was that she was turned around talking to plaintiff and his date when she felt Petersen slam on his brakes. She turned forward and saw the pick-up in front of the Volkswagen just as the collision occurred. (Tr. 11-29-88 pp. 131-32.)

Fry and his date similarly had little memory of the accident. Fry testified (plaintiff disputed this testimony) that he had been stopped at a red light prior to entering the intersection, and when the light turned green, he looked for on-coming traffic, saw none, and proceeded to make his turn. (Tr. 11-29-88 p. 105.) He further testified that his vision was obstructed by a brown station wagon which was in the eastbound left turn lane and proceeding to turn left. (Id.) He also testified, however, that after making his initial visual check for on-coming vehicles and starting to make

his turn, he did not again look for traffic in the eastbound lanes. Fry further acknowledged that his pickup sat "considerably higher off the road" than the station wagon. (Tr. 11-29-88 P. 44.)

The impact occurred in the southern most lane when Fry was nearly through the intersection (Tr. 11-29-88 p. 111), a distance of over 50 feet from where he began his turn (Tr. 11-30-88 p. 26).<sup>3</sup> It would have taken Fry approximately five to six seconds to travel through the intersection. (Tr. 11-29-88 p. 169.) Fry nonetheless unequivocally testified that he only looked for on-coming traffic prior to starting his turn and did not look again at any point during the turn. (Tr. 11-29-88 pp. 41, 46, 105.)

Plaintiff suffered severe and permanent injuries in the accident, and has a 15% permanent partial disability as a result of the injuries. (Tr. 11-28-88 p. 161.) He has and continues to experience considerable low back pain, with the result that he cannot participate in sporting and other activities as he used to, and is limited in his abilities to work and lift objects.

#### SUMMARY OF ARGUMENT

Accidents don't just happen. They are either caused by circumstances beyond control of the individuals involved, i.e., they are unavoidable accidents, or they are caused by the negligence of

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<sup>3</sup>This is not different from the testimony of Rudolph Limpert. Dr. Limpert testified that the pick-up traveled approximately 28.5 feet from the moment that Petersen would have perceived the pick-up. (R. 495.) Limpert gave no testimony concerning the total distance that Fry traveled across the intersection.

one or more persons. The accident in this case does not fit within the definition of "unavoidable accident" established by prior decisions of the Utah Supreme Court. It follows that the accident was the result of the negligence of some person. The trial court held, based on the undisputed evidence, that neither plaintiff nor Petersen, the driver of the automobile in which plaintiff was a passenger, were negligent. The only other potential cause of the accident was the negligence of defendant Fry. Having previously held as a matter of law that neither plaintiff nor Petersen was negligent, and where the accident was not unavoidable, the court was required to direct a verdict of negligence against Fry.

The trial court was further, based on the evidence presented at trial, required to direct a verdict of negligence against Fry. Even viewed in the light most favorable to Fry, the evidence established that Fry commenced a left turn in a very large intersection when he knew his vision of on-coming traffic was blocked, and did not look for on-coming traffic except when he first commenced his turn. It was obvious that Peterson, who had the right of way, had seen Fry, because he slammed on his brakes in an attempt to avoid the accident. Reasonable minds could not differ in finding that Fry could have seen Peterson if he had looked, and that Fry did not exercise the due care required by statute of an individual making a left turn.

As an alternative, if this Court determines that the trial court erred in granting a directed verdict, this case should be

remanded for a new trial on the issue of negligence only. The findings made by the trial court in granting plaintiff's Motion for Directed Verdict establish that there was no substantial competent evidence to support the verdict, it was contrary to the overwhelming weight of the evidence, and the jury was confused.

## ARGUMENT

### POINT I

#### THE ACCIDENT WAS NOT "UNAVOIDABLE," AND HENCE WAS THE RESULT OF THE NEGLIGENCE OF SOME PERSON.

Utah decisions have recognized a class of accidents which are "unavoidable":

It is obvious that there are some accidents, i.e., unusual and unexpected occurrences, which result in injury and which happen without any one failing to exercise reasonable care; and when this is so the accident is properly classified as unavoidable insofar as legal causation or the imposition of liability is concerned.

Woodhouse v. Johnson, 20 Utah 2d 210, 436 P.2d 442, 445 (1968) (footnotes omitted). The same concept has also been expressed as follows:

If either party can avoid an accident by the exercise of proper care, it cannot be said to be unavoidable. The issue of unavoidable accident arises only where the evidence shows that the accident happened from an unknown or unforeseen cause or in an unexplainable manner which circumstances rebut the defendant's alleged negligence.

Stringham v. Broderick, 529 P.2d 425, 426 (Utah 1974).

The converse of this concept is that other accidents (those which are not unavoidable) are the result of the negligence of some person.<sup>4</sup> Application of this concept was illustrated in the Florida case of Davis v. Sobik's Sandwich Shops, Inc., 351 So. 2d 17 (Fla. 1977). The plaintiff in that case, as in the instant one, "was an innocent passenger, free of any contributory negligence." 351 So. 2d at 18. The court held that where there was no evidence to indicate that the injury was the result of an unavoidable accident, and where there was no evidence that the accident was caused by anyone not joined in the action, the only possible conclusion was that one or more of the defendants was at fault. The court held that "the state of the evidence would require a new trial if petitioner failed to recover against at least one of the

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<sup>4</sup>This assertion is not contrary to King v. Fereday, 739 P.2d 618 (Utah 1987), nor to McCloud v. Baum, 569 P.2d 1125 (Utah 1977), both of which are cited on page 15 of Fry's brief for the proposition that "a collision alone does not create an inference of negligence." The plaintiff in King was injured when her car was rear-ended by the defendant in heavy traffic. The plaintiff in McCloud was injured as he was traveling straight through an intersection on his motorcycle and was struck by the defendant's car, which came from the opposite direction and was turning left. In each case, the plaintiff was found to be 100% at fault. The cases stand only for the proposition that an inference of negligence may not be based solely upon the position or role of the drivers in the accident (i.e., the following car in a rear-end collision is not always at fault, nor is the left-turning car in an intersection collision always at fault). The plaintiff in each case was clearly negligent, so the cases did not address, and did not decide, the question of whether the mere occurrence of a collision creates an inference that some person was negligent, in absence of evidence that the collision was "unavoidable."



defendants. A verdict for all the defendants was legally precluded by the evidence." 351 So. 2d at 18-19.

Each of these factors is present in the instant case. The accident was not unavoidable. Fry's expert, Rudolph Limpert, did characterize the accident as "unfortunate" (R. 497), and did opine that Fry had not done anything unreasonable, but that does not establish that the accident was "unavoidable." The "unfortunate" circumstance identified by Dr. Limpert was that of the alleged station wagon in the left hand turn lane opposite from Fry, and which Fry claimed blocked his view of the Volkswagen. Having one's view blocked by another vehicle when wanting to make a left hand turn is certainly not a rare or uncommon occurrence. The accident could have been avoided by Fry waiting until the station wagon completed its turn before starting his turn, or by Fry continuing to look for on-coming vehicles during the course of his turn. The accident was not unavoidable as that term has been defined by the Utah Supreme Court.

The instant case, therefore, presents a set of circumstances different from the cases relied upon by Fry. The accident was not unavoidable. Fry stipulated that plaintiff was not negligent. The trial court held, and Fry has not appealed that determination, that Petersen was not negligent. There was no claim that the accident was caused by any other person. The only possible remaining conclusion is that the accident was caused by Fry. The trial court properly directed a verdict against Fry.

## POINT II

### THERE WAS NO SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT A FINDING THAT FRY WAS NOT NEGLIGENT.

The standard to be applied by this court in reviewing the trial court's directed verdict is whether there was "substantial competent evidence" which would have supported a jury verdict that Fry was not negligent. Canyon Country Store v. Bracey, 781 P.2d 414, 418 (Utah 1989) (quoting In re Estate of Kesler, 701 P.2d 86, 95 (Utah 1985)). See also First Security Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253, 1255 (Utah 1989). "Substantial evidence" has been defined as follows:

Substantial evidence is more than a mere scintilla of evidence though something less than the weight of the evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah Ct. App. 1989) (citations and quotation marks omitted).

No "substantial competent evidence" was presented in the instant case which would support a jury finding that Fry was not negligent. Although the evidence was conflicting in many particulars, certain facts were not disputed. The night was clear, the roads were dry, and, although it was night, the street lights were on and visibility was clear. The Volkswagen in which plaintiff was a passenger was in good operating condition, and its headlights were on. The Volkswagen had the right of way and was

traveling at a speed well below the posted speed limit. The Volkswagen was traveling in the center lane of the three eastbound lanes and did not make any sudden lane changes immediately prior to the collision. In summary, there was absolutely no evidence, and the trial court properly so held, of any negligence or improper driving by Petersen, the driver of the car in which plaintiff was a passenger. Petersen had a right to be where he was and driving in the manner he was at the time of the accident.

The evidence further established, without dispute, that Fry did not have the right of way. Fry intended to turn left across three lanes of traffic in an area where the posted speed limit was 55 miles per hour. According to Fry's testimony, he looked for on-coming traffic while his own pickup was stopped for a red light, but his view of on-coming traffic was at least partially obstructed by a station wagon in the eastbound left-turn lane. When the light turned green, Fry looked once, did not see any on-coming traffic, and proceeded to turn. He traveled approximately 56 feet, taking approximately five to six seconds, before reaching the point of impact. After his initial visual check prior to starting his turn, he did not again even glance to see if there was any oncoming traffic from the eastbound lanes.

Utah Code Ann. § 41-6-73 (1981), amended by Utah Code Ann. § 41-6-73 (1988), as in effect at the time of the accident, provided as follows:

The driver of a vehicle intending to turn to the left within an intersection or into an

alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close to the turning vehicle as to constitute an immediate hazard.

Fry violated this section, and was therefore negligent. Fry acknowledges that there are prior Utah decisions where a plaintiff has lost at trial against a left-turning driver, and has attempted on appeal to establish that the left-turning driver was negligent as a matter of law, and that the jury decisions have been affirmed. In each of these cases, however, there was evidence that the plaintiff was also negligent. For example, in Smith v. Gallegos, 16 Utah 2d 344, 400 P.2d 570 (1965), Smith was a passenger in a vehicle driven by Jones which turned left at an intersection into the path of Gallegos, who was traveling straight through the intersection. Smith prevailed at trial, and Gallegos appealed, claiming that Jones was contributorily negligent as a matter of law because he had failed to yield the right of way. The Supreme Court affirmed, holding that Jones was entitled to assume, in determining whether an on-coming vehicle constituted an immediate hazard, that other drivers were not negligent. The evidence showed that Gallegos was exceeding the speed limit, had accelerated just before or while going through the intersection, and may have suddenly switched lanes just before the intersection. The court, therefore, held that there was some evidence to support the jury's verdict that Jones was not negligent in failing to yield to Gallegos.

Of similar effect is Gibbons v. Orem City Corp., 27 Utah 2d 184, 493 P.2d 1280 (1972), which also involved the question of whether a left-turning plaintiff was contributorily negligence as a matter of law. The defendant in Gibbons was exceeding the speed limit, and the court accordingly affirmed the jury verdict of no contributory negligence.

Another example is McCloud v. Baum, 569 P.2d 1125 (Utah 1977). The plaintiff was traveling straight through the intersection and was struck by a car turning left. The jury found the plaintiff 100% at fault. The evidence showed, however, that the plaintiff was exceeding the speed limit and had swerved around a camper and into the opposing traffic lane just before entering the intersection.

In each of the foregoing cases, the court has allowed the jury to excuse the left-turning driver's failure to yield where the driver with the right of way was guilty of some negligent or improper conduct. No such circumstance existed in the instant case. Where Petersen was not negligent, reasonable minds could not differ on whether Fry negligently failed to yield the right of way. To hold otherwise would be to hold that left-turning drivers whose view of on-coming traffic is obscured may nonetheless forge boldly ahead without regard to what perils may await.

Such a concept has been previously criticized and rejected by the Utah Supreme Court under circumstances where the victim and the victim's driver were not negligent. In French v. Utah Oil Refining

Co., 117 Utah 406, 216 P.2d 1002 (1950), for example, the plaintiff turned left in an intersection in front of the defendant's truck. The trial court directed a verdict that the plaintiff was contributorily negligent for having failed to yield the right of way. The Utah Supreme Court affirmed and stated as follows:

Regardless of his exact position, plaintiff saw the truck some 120 feet away from him prior to the time he entered the west lane of traffic and never again noticed it until just prior to the crash or until it was 6 feet from the point of impact.

216 P.2d at 1003.

Several other decision have also considered and rejected the contention that a driver may ignore hazards obscured by other vehicles. E.g., Richards v. Anderson, 9 Utah 2d 17, 337 P.2d 59 (1959); Hughes v. Hooper, 19 Utah 2d 389, 431 P.3d 983 (1967).

When faced with the situation of a non-negligent victim and a defendant who has violated the statute, the courts have not hesitated to direct a verdict of negligence. Henderson v. Meyer, 533 P.2d 290 (Utah 1975); Solt v. Godfrey, 25 Utah 2d 210, 479 P.2d 474 (1971).

By holding that Petersen was not negligent, the trial court thereby held that he was doing what he had a right to do and was where he had a right to be. It follows that Fry had a duty to yield to him, and was negligent, as a matter of law, for failing to do so. There was no substantial competent evidence to the contrary. This Court must affirm the directed verdict.

### POINT III

#### AS AN ALTERNATIVE, PLAINTIFF IS ENTITLED TO A REMAND FOR A NEW TRIAL ON NEGLIGENCE ONLY.

Plaintiff has established above that the judgment of the trial court should be affirmed in all respects. In the event, however, that this Court determines to reverse the trial court's directed verdict, this Court should remand for a new trial on negligence only, or alternatively, remand it to allow the plaintiff to file a motion for new trial to be considered by the trial court.

In connection with its granting of plaintiff's Motion for a Directed Verdict, the trial court entered specific Findings of Fact and Conclusions of Law. It is evident from those Findings that the trial court concluded that the overwhelming weight of the evidence showed that Fry was negligent, and that there was insufficient evidence to justify a verdict for Fry. Insufficiency of the evidence to justify the verdict is grounds for a new trial. Utah R. Civ. P. 59(a)(6). The trial court in essence concluded, as did the Utah Supreme Court in Solt v. Godfrey, 25 Utah 2d 210, 479 P.2d 474 (1971), 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." 479 P.2d at 476.

In the event that this Court determines to reverse the trial court's directed verdict, therefore, this Court should remand this case for a new trial on the negligence issues.

A retrial on liability only is proper where, as in this case, there is no claim of any error in the damage phase of the trial and the issues of liability and damages were not intermingled. Groen v. Tri-O-Inc., 667 P.2d 598, 607 n.11 (Utah 1983). See also Annot. Grant of new trial on issue of liability alone without retrial of issue of damages, 34 A.L.R. 2d 988 (1954).

It would follow, if retrial is on negligence only, that interest on the judgment should continue to accrue, because the amount of plaintiff's loss has now been fixed with mathematical accuracy. Jorgensen v. John Clay & Co., 660 P.2d 229, 233 (Utah 1983).

As an alterative, if this Court determines not to remand for a new trial, the Court should nonetheless specifically state that the trial court, on remand, may consider any motion for new trial filed by plaintiff within ten days of entry of a judgment on the original jury verdict. Such a clarification is necessary because of the unique procedural context in which the trial court granted plaintiff's Motion for a Directed Verdict.

Plaintiff's Motion for a Directed Verdict was made pursuant to Utah R. Civ. P. 50(a). (The full text of Rule 50 is reproduced in the Appendix.) Plaintiff made his motion at the close of Fry's evidence, and the court took the motion under advisement. Subdivision (b) of Rule 50 contemplates that where a motion for a directed verdict is made and not granted, and the jury thereafter renders a verdict adverse to the moving party, the moving party may



then file a motion for judgment notwithstanding the verdict, and may include an alternative motion for new trial. The rule further provides that the trial court may grant the judgment notwithstanding the verdict and also make a conditional ruling on the motion for new trial, which ruling becomes operative if the judgment notwithstanding the verdict is reversed on appeal. Utah R. Civ. P. 50(c).

Plaintiff did not follow this procedure in the instant case, however, because no judgment on the verdict was ever entered. A motion for judgment notwithstanding the verdict must be made within "ten days after entry of judgment." Utah R. Civ. P. 50(b). No judgment adverse to plaintiff was entered in this case, and there was, therefore, no point at which plaintiff could properly have made a motion for judgment notwithstanding the verdict and an alternative motion for new trial.


In the event this Court reverses the trial court's judgment and does not remand for a new trial, this Court should at least specifically state that the plaintiff may make a motion for new trial within ten days after entry of the judgment on the verdict.

#### CONCLUSION

There was no substantial competent evidence to support the jury verdict in favor of Fry, and the trial court properly directed a verdict and entered a judgment for plaintiff. The judgment should be affirmed in all respects.

If this Court does not affirm the judgment, the case should be remanded for a new trial on negligence only, with interest to accrue on the judgment pending retrial. Alternatively, this Court should remand with directions that the plaintiff may file a motion for new trial within ten days after entry of the judgment on the jury verdict.

DATED this 16th day of February, 1990.

  
FRED D. HOWARD and  
LESLIE W. SLAUGH, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Plaintiff

**MAILING CERTIFICATE**

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 16th day of February, 1990.

Scott W. Christensen, Esq.  
HANSON, EPPERSON & SMITH  
4 Triad Center, Suite 500  
Salt Lake City, Utah 84180



## **APPENDIX "A"**

### **Findings of Fact and Conclusions of Law**

1989 MAY -1 PM 1:46  
S

FRED D. HOWARD (1547), for:  
**HOWARD, LEWIS & PETERSEN**  
ATTORNEYS AND COUNSELORS AT LAW

120 East 300 North Street  
P.O. Box 778  
Provo, Utah 84603  
Telephone: (801) 373-6345  
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Q:Rhod-FOF.lo  
Our File No. 14,608

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

---

HAROLD EDWIN (HAL) RHODES,	:	
Plaintiff,	:	FINDINGS OF FACT AND
vs.	:	CONCLUSIONS OF LAW
JOHN M. FRY and JUDITH L. FRY,	:	
Defendants and	:	
Third-Party Plaintiffs,	:	
vs.	:	Civil No. 64,555
WILLIAM C. PETERSEN,	:	
Third-Party Defendant.	:	Judge Boyd L. Park

---

This matter having come on regularly for hearing before the Court sitting with a jury on November 28-30, 1988, and after a good faith presentation of the available evidence by both the plaintiff and the defendants; and the Court having heard the Motion of plaintiff's counsel for a directed verdict and having thereafter received memoranda of points and authorities by the respective attorneys in support of and in

opposition to said Motion, and the jury having heretofore resolved the question of damages regarding plaintiff's injuries herein, and the Court having taken said Motion under advisement, and thereafter having heard oral arguments regarding said Motion, and being fully advised in the premises, the Court concludes that all the evidence showed defendant William C. Peterson was not negligent and that John M. Fry was negligent; and does, therefore, grant Plaintiff's Motion for Directed Verdict; and it does now make and enter the following:

#### FINDINGS OF FACT

1. On or about December 11, 1982, the defendant John M. Fry was driving a 1979 Chevrolet C10 pickup truck which was involved in a collision with a 1966 two-door Volkswagen driven by third-party defendant William C. Petersen. The accident occurred at the intersection of State Road 265 and Main Street in Orem, Utah at approximately 6:22 p.m. The intersection was regulated by traffic lights.

2. The plaintiff Harold Edwin Rhodes was a passenger in the vehicle driven by third-party defendant William C. Petersen. Upon impact, the occupants of the Petersen vehicle were all rendered unconscious from the accident and have limited memory of the circumstances occurring at the time of the accident.

3. Prior to the collision, the Fry vehicle was traveling westbound on State Road 265, and the Petersen vehicle was travelling eastbound. Defendant Fry testified that he brought his vehicle to a stop at the intersection while he faced a red light. When the light turned green, he perceived a station wagon approaching that was going to make a left turn. Defendant Fry stated he did not see the Petersen vehicle and, therefore, proceeded to turn to the left across the eastbound lane of travel of the

Petersen vehicle. In an attempt to avoid defendant Fry's vehicle as it turned in front of Petersen's vehicle, Petersen applied the brakes and his vehicle laid down 35 feet 11 inches of tire skid marks before the point of impact between the two vehicles. (See Exhibits 2 and 10.)

4. The Court finds from the testimonies of the investigating officer, Fran Fillmore, and accident reconstructionists, Newell Knight and Greg DuVal, that defendant Fry was negligent.

5. John M. Fry's expert accident reconstructionist, Rudolph Limpert, stated on direct examination when asked: "Based on your experience in accident investigation and reconstruction, what caused this accident?":

A set of unfortunate circumstances, a vehicle driving behind a station wagon, a large domestic or American station wagon that's some distance behind. One could calculate how small that Volkswagen is in relationship to the perspective of that big car, the station wagon obstructing its view. And then the unfortunate accident occurred. So I don't see anything unreasonable in terms of the left turn by Mr. Fry when he made the left turn.

(Reporter's Transcript of Proceedings, Testimony of Rudolph Limpert, November 29, 1988, 2:10 p.m. transcribed p. 30.)

6. The Court notes that the jury by Special Verdict found defendant John M. Fry not negligent. The jury finding, together with the Court's instruction to the jury, that the plaintiff was not negligent as stipulated by the parties and further, that the Court had found as a matter of law defendant Petersen was not negligent, resulted in what would have to be termed an unavoidable accident. The Court had refused to

give an unavoidable accident instruction. The jury further found plaintiff Harold E. Rhodes incurred \$21,000.00 in special damages and \$29,000.00 in general damages.

7. Utah Code Ann., § 41-6-73, which was submitted as Jury Instruction No. 23, states:

The operator of a vehicle intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close to the turning vehicle as to constitute an immediate hazard.

8. This Court finds that Utah Code Ann., § 41-6-73, is applicable to the case at bar and creates a statutory duty on all operators of motor vehicles who make left hand turns to ". . . yield the right-of-way to any vehicle approaching from the opposite direction which is so close to the turning vehicle as to constitute an immediate hazard."

9. This Court also follows the ruling in French v. Utah Oil Ref. Co., 117 Utah 406, 216 P.2d 1002, 1004 (1950) wherein the Utah Supreme Court held:

. . . a burden is placed on the driving making the turn as he has control of the situation, and if there is a reasonable probability that the movement cannot be made in safety then the disfavored driver should yield. The driver proceeding straight ahead has little opportunity to know a vehicle is to be turned across his path until the movement is commenced and in many instances, the warning is too late for the latter driver to take effective action.

10. The Court also adheres to the rationale of Yeates v. Budge, 122 Utah 518, 252 P.2d 220 (1953) wherein the Utah Supreme Court held that where a defendant attempted to turn across the path of the plaintiff, when he was only 40 feet away, the trial court could reasonably conclude that the plaintiff was so close as to constitute an

immediate hazard and that the defendant should have yielded the right-of-way to him.

11. This Court is reluctant to take from the jury its fact finding responsibility regarding negligence of the parties and whether the negligence was a proximate cause of plaintiff's injuries. The Court is mindful of those cases in which the Supreme Court has concluded that juries should be fact finders. (Mel Hardman Productions, Inc. v. Robinson, 604 P.2d 913, 917 (Utah 1979).)

12. The Court, however, given all the testimony of the witnesses, finds that the matter is one in which reasonable minds could not differ, and in fairness and equity, cannot find that this accident was an unavoidable accident. The Utah Supreme Court has defined an unavoidable accident as ". . . an unusual and unexpected occurrence 'which result[s] in injury and which happen[s] without anyone failing to exercise reasonable care . . .'" (Kusy v. K-Mart Apparel Fashion Corporation, 681 P.2d 1232, 1237 (Utah 1984); and Stringham v. Broderick, 529 P.2d 425, 426 (Utah 1974).

13. Even should this Court ignore the testimony of those witnesses who testified that defendant Fry was negligent and look only to the testimony of Fry's witness, Rudy Limpert, (according to his calculations this was an unfortunate accident), this Court is of the opinion that the accident was not an unavoidable accident as defined by the Supreme Court of this state.

14. The Court finds that given all the evidence reasonable men could not differ in finding that the defendant John M. Fry made a left hand turn across on-coming traffic heading eastbound along State Road 265 and did not keep a proper lookout for eastbound on-coming traffic which resulted in his colliding with third-party



defendant William C. Petersen's vehicle, thus violating his statutory duty pursuant to Utah Code Ann., § 41-6-73.

15. The Court also finds that the jury was confused in its application of the jury instructions to the facts of the case by essentially concluding the collision to be an unavoidable accident.

16. The Court further finds that plaintiff Harold Edwin Rhodes is entitled to his directed verdict against defendants holding that defendant John M. Fry negligently operated his vehicle which was the proximate cause of the plaintiff's injuries.

17. The Court finds that at the time of the accident, December 11, 1982, John M. Fry was the operator of a vehicle as a minor under 18 years of age; and this his mother, Judith L. Fry, signed John M. Fry's driver's license application.

From the foregoing Findings of Fact, the Court now makes and enters the following:

#### **CONCLUSIONS OF LAW**

1. The Court concludes that the plaintiff Harold Edwin (Hal) Rhodes was not negligent.

2. The Court concludes that the third-party defendant William C. Petersen was not negligent.

3. The Court concludes that reasonable minds could not differ regarding the liability of the defendant and third-party plaintiff John M. Fry and concludes the same to be negligent and that said negligence was the proximate cause of the accident in question and of plaintiff's injuries.

4. The Court concludes that by law, liability of John M. Fry is imputed to defendant and third-party plaintiff Judith L. Fry under Utah Code Ann. § 41-2-115(2).

5. The Court concludes that plaintiff is entitled to a judgment against defendants John M. Fry and Judith L. Fry in the amount of \$21,000.00 for special damages, together with accrued interest on said special damages from the date of the subject accident, December 11, 1982, until the date of judgment, at the rate of eight percent (8%), and for general damages in the amount of \$29,000.00, with interest to accrue on the total judgment at the rate of twelve percent per annum (12%), plus court costs thereafter.

DATED this 1<sup>st</sup> day of May ~~April~~, 1989.

BY THE COURT



BOYD L. PARK  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 4<sup>th</sup> day of April, 1989.

Scott W. Christensen, Esq.  
Hanson, Epperson & Smith  
P. O. Box 2970  
Salt Lake City, UT 84110-2970

R. Phil Ivie, Esq.  
Ivie & Young  
P. O. Box 672  
Provo, UT 84603

  
SECRETARY

## **APPENDIX "B"**

### **Judgment**

1989 MAY -1 PM 1:46

FRED D. HOWARD (1547), for:  
HOWARD, LEWIS & PETERSEN  
ATTORNEYS AND COUNSELORS AT LAW

120 East 300 North Street  
P.O. Box 778  
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Telephone: (801) 373-6345  
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Q:Rhod-Jud.10  
Our File No. 14,608

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

---

HAROLD EDWIN (HAL) RHODES,

:

Plaintiff,

:

JUDGMENT

vs.

:

JOHN M. FRY and JUDITH L. FRY,

:

Defendants and  
Third-Party Plaintiffs,

:

---

vs.

:

Civil No. 64,555

WILLIAM C. PETERSEN,

:

Third-Party Defendant.

:

Judge Boyd L. Park

---

This matter having come on regularly for hearing before the Court sitting with a jury on November 28-30, 1988, and the Court having heard the Motion of plaintiff's counsel for a directed verdict and having granted the same by reason of the evidence presented, and the jury having heretofore resolved the question of damages regarding plaintiff's injuries herein, and after good faith presentation of the evidence by both plaintiff and defendant, being fully advised in the premises, and having heretofore

entered its Findings of Fact and Conclusions of Law; the Court does now make and enter the following Judgment against defendants John M. Fry and Judith L. Fry:

### JUDGMENT

The Court concludes that plaintiff is entitled to a judgment against defendants John M. Fry and Judith L. Fry in the amount of \$21,000.00 for special damages, together with accrued interest on said special damages from the date of the subject accident, December 11, 1982, until the date of judgment, at the rate of eight percent (8%), and for general damages in the amount of \$29,000.00, with interest to accrue on the total judgment at the rate of twelve percent per annum (12%), plus court costs thereafter.

DATED this 13<sup>th</sup> day of May, 1989.

BY THE COURT



BOYD L. PARK  
DISTRICT COURT JUDGE

### MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 4<sup>th</sup> day of April, 1989.

Scott W. Christensen, Esq.  
Hanson, Epperson & Smith  
P. O. Box 2970  
Salt Lake City, UT 84110-2970

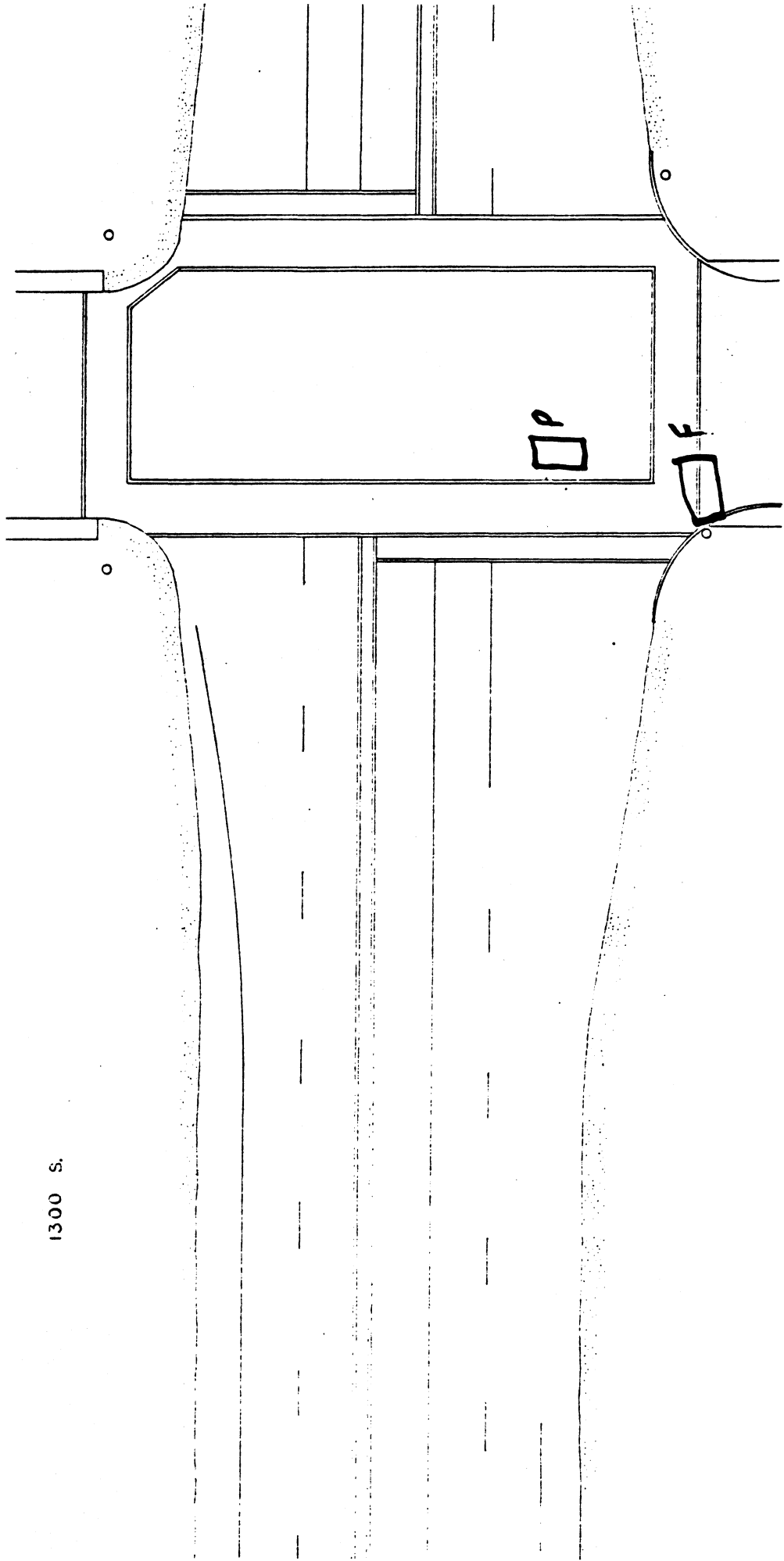
R. Phil Ivie, Esq.  
Ivie & Young  
P. O. Box 672  
Provo, UT 84603

Shauntel Christensen  
SECRETARY

## APPENDIX "C"

Diagrams of accident scene

1300 S.



1300 S.

**MAIN**

51



96 POI

**K-9 Party**



6 DUVAL  
SCALE BIO  
ORFM 10 GR



## EXPLANATION OF ACCIDENT SCENE DIAGRAMS

The scale on the initial drawings was 1" = 10'. The scale on these reductions is approximately 1" = 33'.

Exhibit 1 shows the resting place of the vehicles after the accident. "F" indicates Fry's pickup and "P" indicates the Petersen Volkswagen. (Tr. 11-28-88 p. 50.)

Exhibit 10 shows the probable path of travel of the vehicles leading to the collision. "POI" indicates the point of impact. (Tr. 11-29-88 p. 165.) The heavy black line from the cross-walk to the point of impact indicates the approximate length of the skid marks. (Id. p. 165.) The ".96" reflects the testimony of Newell Knight of the travel time of the Volkswagen while laying down the skid marks. (Id.) The remainder of the heavy black line (next to "1.5") reflects Mr. Knight's testimony of the distance the Volkswagen traveled from the point of perception of the Fry vehicle to the application of the brakes (i.e., the reaction time). (Id. at 177.)

The wavy line is an error. (Id. at 177-78.)

APPENDIX "D"

Utah R. Civ. P. 50.

**Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.**

(a) **Motion for directed verdict; when made; effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) **Motion for judgment notwithstanding the verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) **Same: Conditional rulings on grant of motion.**

(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) **Same: Denial of motion.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.